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CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT: MODERN PRECEDENTS

REPORT BY THE STAFF OF THE IMPEACHMENT INQUIRY

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

HENRY J. HYDE, *Chairman*

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INTRODUCTION

The United States Constitution provides that "[t]he 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." [1]

In 1974, the House of Representatives directed the Judiciary Committee to investigate whether sufficient grounds existed for the House to impeach President Richard Nixon. The impeachment inquiry staff prepared a memorandum on the constitutional grounds for presidential impeachment. The staff memorandum, entitled *Constitutional Grounds for Presidential Impeachment,* reported on "the history, purpose and meaning of the constitutional phrase, 'Treason, Bribery, or other high Crimes and Misdemeanors.'" [2] Then Judiciary Committee Chairman Peter Rodino, Jr., stated in a foreword 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." [3] In any event, over the ensuing years the memorandum has become one of the leading and most cited sources as to the grounds for impeachment.

In 1998, the Committee has again been directed to investigate whether sufficient grounds exist for the House to impeach a president. On September 11, the House of Representatives passed H.Res. 525, which provided that the Committee review the communication received on September 9 from Independent Counsel Kenneth Starr in which he transmitted his determination that substantial and credible information received by his office might constitute grounds for an impeachment of President Clinton, and determine whether sufficient grounds did in fact exist to recommend to the House that an impeachment inquiry be commenced. [4] After reviewing the evidence submitted, the Committee voted to recommend that an impeachment inquiry be commenced and reported a resolution to the House authorizing an inquiry. On October 8, the House passed H.Res. 581, which directed the Committee to conduct such an inquiry to investigate fully and completely whether sufficient grounds exist for the House to exercise its constitutional power to impeach President Clinton.

The Chairman of the Committee has asked the impeachment inquiry staff to update the 1974 report for the benefit of the Committee's members. The present memorandum was written for that purpose and is designed to be read in conjunction with the 1974 report (which is attached as an appendix).

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[1] U.S. Const. art. II, § 4. "The House of Representatives . . . shall have the sole Power of Impeachment." *Id.* at art. I, § 2, cl. 5. "The Senate shall have the sole Power to try all Impeachments." *Id.* at art. I, § 3, cl. 6. "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." *Id.* at art. I, § 3, cl. 7.

[2] Staff of House Comm. on the Judiciary, 93rd Cong., 2d Sess., *Constitutional Grounds for Presidential Impeachment* 3 (Comm. Print 1974)(hereinafter cited as "1974 Staff Report").

[3] *Id.* at iii.

[4] The Ethics in Government Act of 1978, Pub. L. No. 95–521, 92 Stat. 1824 (codified as amended at 28 U.S.C. §§ 591–99 (1994 & Supp. 1996)) provides that an independent counsel "shall advise the House of Representatives of any substantial and credible information which such independent counsel receives, in carrying out the independent counsel's responsibilities under this chapter, that may constitute grounds for an impeachment." 28 U.S.C. § 595(c) (1994). *See Referral from Independent Counsel Kenneth W. Starr in Conformity with the Requirements of Title 28, United States Code, Section 595(c),* H.R. Doc. No. 105–310, 105th Cong., 2d Sess. (1998).

This memorandum takes into account the four impeachment inquiries and three convictions that have taken place since the 1974 report was written. The 1974 report stated that the "American experience with impeachment [is among 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."[5] The present memorandum relies on this insight and will utilize the impeachment proceedings of the last quarter century to provide guidance to the members of this Committee in the difficult duties they must perform.

As with the 1974 report, this memorandum's views and conclusions are those of the staff and do not necessarily reflect those of the Committee or any of its members.

IMPEACHMENT "STANDARDS"

The goal of this memorandum is not to define which offenses in the abstract render a federal official impeachable. The 1974 report recognized why such an effort would be ill-conceived:

> 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.
>
> . . . . [This memorandum] 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.[6]

A commentator, Michael Gerhardt, writes in his recent book *The Federal Impeachment Process: A Constitutional and Historical Analysis,*[7] that both Alexander Hamilton and Supreme Court Justice Joseph Story, the document's greatest nineteenth century interpreter, share this view. He finds that: "[t]he implicit understanding shared by Hamilton and Justice Story was that subsequent generations would have to define on a *case-by-case basis* the political crimes comprising impeachable offenses to replace the federal common law of crimes that never developed."[8] He quotes Hamilton as stating that "the impeachment court could not be 'tied down' by strict rules 'either in the delineation of the offense by the

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[5] *1974 Staff Report, supra* note 2, at 4.

[6] *Id.* at 2.

[7] Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* (1996).

[8] *Id.* at 106 (emphasis added).

prosecutors [the House of Representatives] or in the construction of it by the judges [the Senate].'"[9] He quotes Story as stating that "'political offenses are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it.'"[10]

The impeachment clause is not the only example of a constitutional provision that must be interpreted in the context of the facts of particular cases. The due process clauses of the fifth and fourteenth amendments are others.[11] The Supreme Court has stated that "[i]t is by now well established that ''due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' . . . '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.'"[12] The Fifth Circuit adds that "''due process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts.'"[13]

These principles should be kept in mind when interpreting the impeachment proceedings that follow. Different fact patterns might lead to different results.

IMPEACHMENTS OF THE 1980'S

Three sitting federal judges were impeached in the 1980's. It is to be hoped that their misdeeds were isolated instances and not indications of a broader problem in our federal judicial system. In any event, they were extremely troubling.

The judicial impeachments of the 1980's provide insights for members of the Committee as they consider possible articles of impeachment against President Clinton. The offenses committed by the three judges that led to their impeachments have some similarities to the offenses President Clinton is charged with committing.

It has been argued, however, that offenses that can lead to impeachment when committed by federal judges do not necessarily rise to this level when committed by a president, because a different constitutional standard applies. The basis for this argument is said to be that Article III judges under the Constitution "shall hold their Offices during good Behavior"[14] and thus that judges are impeachable for "misbehavior" while other federal officials are only impeachable for treason, bribery, and other high crimes and misdemeanors.

The 1974 Staff Report rejected this argument. The report asked whether the good behavior clause "limit[s] the relevance of the . . .

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[9] *Id.* at 105 (footnote omitted), *quoting The Federalist* No. 65, at 396 (Alexander Hamilton)(Clinton Rossiter ed., 1961).

[10] Gerhardt, *supra* note 7, at 105–06 (footnote omitted), *quoting* J. Story, *Commentaries on the Constitution* (R. Rotunda & J. Nowak eds., 1987).

[11] "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

[12] *Gilbert* v. *Homar*, 138 L. Ed.2d 121, 127 (1997), *quoting Cafeteria & Restaurant Workers* v. *McElroy*, 367 U.S. 886, 895 (1961) & *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). The Supreme Court has developed a three factor balancing test to help determine the specific dictates of due process. *See Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

[13] *Hernandez* v. *Cremer*, 913 F.2d 230, 237 (5th Cir. 1990), *quoting Continental Air Lines, Inc.* v. *Dole*, 784 F.2d 1245, 1248 (5th Cir. 1986) (*quoting Woodbury* v. *McKinnon*, 447 F.2d 839, 843 (5th Cir. 1971))(*quoting Hannah* v. *Larche*, 363 U.S. 420, 442 (1960)).

[14] U.S. Const. art. III, § 1.

impeachments of judges with respect to presidential impeachment standards as has been argued by some[.]" [15] The report answered: "It does not. . . . [T]he only impeachment provision . . . included in the Constitution . . . applies to all civil officers, including judges, and defines impeachment offenses as 'Treason, Bribery, and other high Crimes and Misdemeanors.'" [16]

The conclusion of the staff report is bolstered by the findings of the National Commission on Judicial Discipline and Removal, chaired by Robert Kastenmeier, former Chairman of the Committee's then Subcommittee on Courts, Civil Liberties and the Administration of Justice and one of the House managers during the Senate trial of Judge Claiborne. The Commission concluded that "the most plausible reading of the phrase 'during good Behavior' is that it means tenure for life, subject to the impeachment power. . . . The ratification debates about the federal judiciary seem to have proceeded on the assumption that good-behavior tenure meant removal only through impeachment and conviction." [17]

The record of the judicial impeachments which follows also argues against different standards for impeachable offenses when committed by federal judges as when committed by presidents.

A. THE IMPEACHMENT OF JUDGE CLAIBORNE [18]

U.S. District Court Judge Harry E. Claiborne was impeached in 1986. At the time of his impeachment, he was serving a sentence in federal prison for filing false federal income tax returns. Judge Claiborne had signed written declarations that the returns were made under penalty of perjury. The crimes of violating the Internal Revenue Code for which he was convicted formed the basis for the three articles of impeachment on which he was also convicted.

The judgement by Congress regarding Judge Claiborne was harsh. Hamilton Fish, ranking member of the Judiciary Committee and one of the House managers in the Senate trial, stated that:

> Judge Claiborne's actions raise fundamental questions about public confidence in, and the public's perception of, the Federal court system. They serve to undermine the confidence of the American people in our judicial system. . . . Judge Claiborne is more than a mere embarrassment. He is a disgrace—an affront—to the judicial office and the judicial branch he was appointed to serve. [19]

Committee Chairman and House manager Peter Rodino, Jr., said on the Senate floor that:

> Judge Harry E. Claiborne is, and will forever remain, a convicted felon—a man who cannot legitimately preside over judicial proceedings, who cannot with any respect for decency pass judgement on other persons, and who cannot hope to maintain the trust and the respect of the American people.

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[15] *1974 Staff Report, supra* note 2, at 17.

[16] *Id.*

[17] National Commission on Judicial Discipline and Removal, *Report of the National Commission on Judicial Discipline and Removal* 17–18 (1993)(footnote omitted).

[18] *See* Appendix 1 for sources and a description of the articles of impeachment and the proceedings against Judge Claiborne.

[19] 132 Cong. Rec. H4713 (daily ed. July 22, 1986).

. . . . He has earned a mark of shame, which the evidence proves is sadly but unequivocally deserved.[20]

The record of Judge Claiborne's impeachment proceedings says much about what offenses might justify impeachment. The proceedings make it clear that an individual can be impeached for conduct not related to his or her official duties. Hamilton Fish stated that "[i]mpeachable conduct does not have to occur in the course of the performance of an officer's official duties. Evidence of misconduct, misbehavior, high crimes, and misdemeanors can be justified upon one's private dealings as well as one's exercise of public office. That, of course, is the situation in this case."[21]

Representative Fish's views were reinforced by now chairman of the Judiciary Committee and then House manager Henry Hyde, who stated that "the decision to impeach and convict . . . stands as an admonition to others in public life. It is an opportunity for Congress to restate and reemphasize the standards of both personal and professional conduct expected of those holding high Federal office."[22] House manager Romano Mazzoli stated that impeachment reached "corruption, maladministration, gross neglect of duties and other public and private improprieties committed by judges and high Government officials which rendered them unfit to continue in office."[23]

Additional evidence that personal misconduct can lead to impeachment is provided by the fact that Judge Claiborne's motion that the Senate dismiss the articles of impeachment for failure to state impeachable offenses was unsuccessful. One of the arguments his attorney made for the motion was that "there is no allegation . . . that the behavior of Judge Claiborne in any way was related to misbehavior in his official function as a judge; it was private misbehavior."[24]

Representative Kastenmeier responded by stating that "it would be absurd to conclude that a judge who had committed murder, mayhem, rape, or perhaps espionage in his private life, could not be removed from office by the U.S. Senate."[25] Kastenmeier's response was repeated by the House of Representatives in its pleading opposing Claiborne's motion to dismiss.[26]

The House went on to state that:

> [Claiborne's] narrow view of impeachable offenses expressly was offered and *rejected* by the Framers of the Constitution.
>
> . . . . As originally drafted, the impeachment clause provided that the President should be "removable on impeachment and conviction of malpractice or neglect of duty." . . . The provision was subsequently revised to make the President impeachable for "treason, bribery or corruption." . . . Colonel

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[20] 132 Cong. Rec. S15,495–96 (daily ed. Oct. 7, 1986).
[21] 132 Cong. Rec. H4713 (daily ed. July 22, 1986).
[22] 132 Cong. Rec. H4716 (daily ed. July 22, 1986).
[23] 132 Cong. Rec. H4717 (daily ed. July 22, 1986).
[24] *Hearings Before the Senate Impeachment Trial Committee*, 99th Cong., 2d Sess. 77 (1986)(hereinafter cited as "*Senate Claiborne Hearings*")(statement of Judge Claiborne's counsel, Oscar Goodman). *See also Memorandum in Support of Motion to Dismiss the Articles of Impeachment on the Grounds They Do Not State Impeachable Offenses* 3 (hereinafter cited as "*Claiborne Motion*"), *reprinted in Senate Claiborne Hearings* at 245, 246.
[25] *Senate Claiborne Hearings, supra* note 24, at 81.
[26] U.S. House of Representatives, *Opposition to Motion to Dismiss Articles of Impeachment for Failure to State Impeachable Offenses* 2 (hereinafter cited as "*Opposition to Claiborne Motion*"), *reprinted in Senate Claiborne Hearings, supra* note 24, at 441, 442.

Mason moved to add the phrase "or maladministration" after "bribery." . . . In response, James Madison objected that "maladministration" was too narrow a standard. Mason soon withdrew his amendment and substituted the phrase "or other high crimes and misdemeanors." This formulation was accepted, along with an amendment to extend the impeachment sanction to the Vice President and all other civil officers. . . . The Framers thus rejected . . . the concepts of professional "malpractice" or "maladministration" as the sole basis for the impeachment of federal officials.

The contrary position urged by Judge Claiborne is incompatible with common sense and the orderly conduct of government. Little can be added to the succinct argument of Representative Clayton in 1913 on this identical point, during the impeachment proceedings involving Judge Charles Swayne:

> . . . . [The contention is that] however serious the crime, the misdemeanor, or misbehavior of the judge may be, if it can be said to be extrajudicial, he can not be impeached. To illustrate this contention, the judge may have committed murder or burglary and be confined under a sentence in a penitentiary for any period of time, however long, but because he has not committed the murder or burglary in his capacity as judge he can not be impeached. That contention, carried out logically, might lead to the very defeat of the performance of the function confided to the judicial branch of the government.
>
> . . . . As also noted in one commentary:
>
> An act or a course of misbehavior which renders scandalous the personal life of a public officer, shakes the confidence of the people in his administration of the public affairs, and thus impairs his official usefulness, although it may not directly affect his official integrity or otherwise incapacitate him properly to perform his ascribed functions.
>
> Thus, Judge Claiborne's argument is both inaccurate and illogical in its extraordinary premise that a federal judge may intentionally commit a felonious act outside his judicial functions and automatically find protection from the impeachment sanction.[27]

Senator Charles Mathias, Jr., chairman of the impeachment trial committee, referred Judge Claiborne's motion to the full Senate, it having jurisdiction over the articles of impeachment.[28] He did state, however, that:

> [I]t is my opinion . . . that the impeachment power is not as narrow as Judge Claiborne suggests. There is neither historical nor logical reason to believe that the Framers of the Constitution sought to prohibit the House from impeaching . . . an officer of the United States who had committed treason or bribery or any other high crime or misdemeanor which is a serious offense against the government of the United States and which indicates that the official is unfit to exercise public responsibil-

[27] *Opposition to Claiborne Motion, supra* note 26, at 3–5 (citations omitted)(emphasis in original).

[28] *Senate Claiborne Hearings, supra* note 24, at 113.

ities, but which is an offense which is technically unrelated to the officer's particular job responsibilities.[29]

The Senate never voted on Judge Claiborne's motion. However, the Senate was clearly not swayed by the arguments contained therein because the body later voted to convict Judge Claiborne. The Senate thus agreed with the House that private improprieties could be, and were in this instance, impeachable offenses.

The rejection of Judge Claiborne's motion also provides evidence that the offenses that can lead to impeachment are similar for both judges and presidents. The motion argued that "[t]he standard for impeachment of a judge is different than that for other officers" and that the Constitution limited "removal of the judiciary to acts involving misconduct related to discharge of office."[30]

Judge Claiborne's attorney stated to the Senate trial committee that:

> [B]ecause of the separation of powers contemplated by the framers . . . . the standard for impeachment of a Federal judge is distinct from the standard of impeachment for the President, Vice President, or other civil officers of the United States because as we know, under article II, section 4, the President, Vice President, and civil officers may be removed on impeachment for conviction of treason, bribery, or other high crimes and misdemeanors.
>
> It is our contention that the Federal judiciary, in order to remain an independent branch, has a different standard, a separate and distinct standard, as far as the ability or the disability to be impeached, and that is that the impeachment process would take place if in fact the judge, who is the sole . . . lifetime appointment of all the officers which are referred to in the Constitution, is not on good behavior, a separate and distinct standard than that which is applicable to the elected officials and the officials who are appointed for a specific term.[31]

Judge Claiborne's attorney was arguing that federal judges are not "civil officers" and thus that the impeachment standard in article II, section 4, does not apply; instead, "misbehavior" would be the grounds for impeaching a federal judge.[32] He admitted his theory would fall if the Senate concluded that a federal judge was a civil officer.[33]

Representative Kastenmeier responded that "reliance on the term 'good behavior' as stating a sanction for judges is totally misplaced and virtually all commentators agree that that is directed to affirming the life tenure of judges during good behavior. It is not to set them down, differently, as judicial officers from civil officers."[34] He further stated that "[n]or . . . is there any support for the notion that . . . Federal judges are not civil officers of the United States, subject to the impeachment clause of article II of the Constitution."[35]

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[29] *Id.* at 113–14.
[30] *Claiborne Motion, supra* note 24, at 4.
[31] *Senate Claiborne Hearings, supra* note 24, at 76–77 (statement of Oscar Goodman).
[32] *Id.* at 78–79. *See also Claiborne Motion, supra* note 24, at 3–4.
[33] *Senate Claiborne Hearings, supra* note 24, at 79.
[34] *Id.* at 81–82.
[35] *Id.* at 81.

Kastenmeier's argument was repeated by the House of Representatives.[36] The House stated that:

> If lack of good behavior were the sole standard for impeaching federal judges, then a different standard would apply to civil officers other than judges. Nowhere in the proceedings of the Constitutional Convention was such a distinction made. On the contrary, the proceedings of the Convention show an intention to limit the grounds of impeachment for all civil officers, including federal judges, to those contained in Article II.
>
> On August 20, 1787, a committee was directed to report on "a mode of trying the supreme Judges in cases of impeachment." The committee reported back on August 22 that "the Judges should be triable by the Senate." . . . Several days later, a judicial removal provision was added to the impeachment clause. On September 8, 1787, the judicial removal clause was deleted and the impeachment clause was expanded to include the Vice President and all civil officers. . . . In so doing, the Constitutional Convention rejected a dual test of "misbehavior" for judges and "high crimes and misdemeanors" for all other federal officials.
>
> In Federalist No. 79, Alexander Hamilton confirmed this reading of the Convention's actions with respect to the impeachment standard:
>
> > The precautions for [judges'] responsibility, are comprised in the article respecting impeachments. . . . This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our Constitution with respect to our own judges.[37]

Again, while the Senate never voted on Claiborne's motion, it did vote to convict the judge. The Senate was not convinced by Claiborne's argument that the standard of impeachable offenses was different for judges than for presidents.

In addition to the two articles charging him with filing false tax returns, Judge Claiborne was found guilty on an article of impeachment that found that by willfully and knowingly falsifying his income on his tax returns, he had "betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts."

B. THE IMPEACHMENT OF JUDGE NIXON[38]

U.S. District Court Judge Walter L. Nixon, Jr. was impeached in 1989. At the time of his impeachment, he was serving a sentence in federal prison for making false statements to a federal grand jury. He made the false statements in an attempt to conceal his involvement with an aborted state prosecution for drug smuggling against the son of a man who had benefitted Judge Nixon financially with a "sweetheart" oil and gas investment. Judge Nixon lied about whether he had discussed the case with the state prosecutor

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[36] *Opposition to Claiborne Motion, supra* note 26.

[37] *Id.* at 6–7 (citations omitted).

[38] *See* Appendix 1 for sources and a description of the articles of impeachment and the proceedings against Judge Nixon.

and had influenced the state prosecutor to essentially drop the case. Judge Nixon was acquitted of the charge of accepting an illegal gratuity. The perjury convictions alone formed the basis of the two articles of impeachment on which he was found guilty.

As with Judge Hastings, Congress was harsh in its judgement of Judge Nixon. Representative Don Edwards, chairman of the Judiciary Committee's subcommittee that held hearings on Judge Nixon and a House manager in the Senate trial, stated before the Senate trial committee that the judge had "disobeyed the law, soiled his own reputation, and undermined the integrity of the judiciary."[39] As to why the crime was so heinous, Edwards further stated that "[t]he crime for which he was convicted, lying to a grand jury in testimony under oath, is particularly serious because a judge must bear the awesome responsibility of swearing witnesses, judging credibility, and finding the truth in cases that come before him."[40] There was only one answer—impeachment: "The pattern of lies, concealment and deceit on the part of Judge Nixon led the committee, by clear and convincing evidence, to the unavoidable conclusion that he must be impeached."[41] On the Senate floor, Edwards asked "[i]s a man who repeatedly lied fit to hold the high office of Federal judge? I hope you agree that the answer is obvious."[42]

James Sensenbrenner, ranking member of the Judiciary Committee's subcommittee that held hearings on Judge Nixon, and a House manager, also emphasized the damage done by Nixon's perjury:

> Our hearings have produced clear and convincing evidence that Judge Nixon lied to the law enforcement authorities during the investigation of the criminal case as well as to the Federal grand jury. . . . Judge Nixon thwarted the entire fact finding process by defining the "truth, the whole truth, and nothing but the truth" as only that which was convenient for Judge Nixon to disclose at that particular time.[43]

Representative Charles Schumer, a member of the Judiciary Committee, reiterated that perjury was worthy of impeachment:

> [This] is a case where some of the charges were dropped and the only conviction was for perjury.
>
> Perjury, of course, is a very difficult, difficult thing to decide; but as we looked and examined all of the records and in fact found many things that were not in the record it became very clear to us that this impeachment was meritorious.
>
> My colleagues, in conclusion, impeachment is a grave issue. In this case it is deserved.[44]

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[39] *Hearings Before the Senate Impeachment Trial Committee on the Articles of Impeachment Against Judge Walter L. Nixon, Jr., a Judge of the United States District Court for the Southern District of Mississippi, for High Crimes and Misdemeanors,* 101st Cong., 1st Sess. 304 (1989)(hereinafter cited as "*Senate Nixon Hearings*").

[40] 135 Cong. Rec. 8816 (1989).

[41] 135 Cong. Rec. 8817 (1989).

[42] *Proceedings of the United States Senate in the Impeachment Trial of Walter L. Nixon, Jr., a Judge of the United States District Court for the Southern District of Mississippi,* S. Doc. No. 101–22, 101st Cong., 1st Sess. 367 (1989)(hereinafter cited as "*Proceedings of the United States Senate*"). Senator Herbert Kohl asked whether concealing information from a grand jury is the same as perjury. Representative Edwards responded that "the managers firmly believe that if you make an affirmative statement to a grand jury and purposely leave material facts out, that would constitute perjury." *Id.* at 418.

[43] 135 Cong. Rec. 8820 (1989).

[44] 135 Cong. Rec. 8822 (1989).

Judge Nixon argued that the third article of impeachment should be dismissed. This article stated that "Judge Nixon has raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States . . . and brought disrepute on the Federal courts and the administration of justice by the federal courts . . . ." It charged that he did this by making a total of 14 false statements to officials from the Department of Justice and the Federal Bureau of Investigation and to a federal grand jury, all regarding the events surrounding the drug smuggling prosecution.

One of Judge Nixon's arguments against article III was that "[t]hese allegations do not make out an impeachable offense . . . ."[45] Judge Nixon's contention was that "an impeachable offense may be only (i) a judge's abuse of office or (ii) grave criminal acts."[46] Nixon stated that this was the intent of the framers of the Constitution, who only intended impeachment to "protect the community from abuse of the public trust and misconduct in office"[47] and who believed that "'[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution.'"[48]

Nixon argued that article III of the impeachment resolution did not allege either crimes or abuses of office, but instead focused on his "general reputation and character."[49] The framers' goal would be thwarted by article III, which "alleges vague and subjective offenses," and "encompasses almost any act that the political majority may fine offensive or distasteful, thereby exposing a judge to impeachment for controversial acts or conduct."[50] Under the standard of article III, a judge could be impeached for "issuing unpopular judicial decisions," "smoking marijuana" as a youth, "driving while intoxicated," associating with "disreputable members of the community," "openly engaging in an extramarital affair," or "attending a meeting of the Communist Party."[51] Finally, "[w]hat evidence or facts will a Senator examine to determine whether the courts have been brought into disrepute . . . [o]r whether public confidence has been undermined?"[52]

Judge Nixon complained that:

> In recent impeachments . . . the House has become enamored of the tactical device of charging the respondent with being a generally bad person who has brought discredit on the judiciary. . . . Judge Claiborne . . . [was] convicted on such [a] "catch-all" article[]. . . . Both Judges Hastings and Nixon

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[45] *Judge Nixon's Motion to Dismiss Impeachment Article III* 1 (June 23, 1989), *reprinted in Senate Nixon Hearings, supra* note 39, at 121. The other arguments were that article III contained allegations that were "redundant and multiplicitous" of allegations in other articles of impeachment and that the article was so "complex and confusing" that it was both "unfair and completely unworkable." *Judge Nixon's Motion to Dismiss Impeachment Article III* at 1–2.

[46] *Memorandum in Support of Judge Nixon's Motion to Dismiss Impeachment Article III* 3 (hereinafter cited as "*Memorandum in Support of Nixon Motion*"), *reprinted in Senate Nixon Hearings, supra* note 39, at 123, 127. Judge Nixon thus disagrees with Judge Claiborne, stating that "[I] do not argue that impeachment is . . . limited [to acts performed in an official capacity] and agree that private criminal offenses of a grave nature are also impeachable offenses." *Memorandum in Support of Nixon Motion* at 7 n.3.

[47] *Id.* at 7 (footnote omitted).

[48] *Id.* at 11–12, *quoting The Federalist* No. 78, at 466 (Alexander Hamilton).

[49] *Memorandum in Support of Nixon Motion, supra* note 46, at 15.

[50] *Id.* at 3–4.

[51] *Id.* at 16.

[52] *Id.* at 17.

now face similar catch-all articles. The Senate should no longer allow such a blatantly unfair prosecutorial device. . . .[53]

The House of Representatives responded by arguing that article III was "modeled on articles of impeachment from prior cases that focus on the impact of a judge's misconduct on the integrity of the judiciary."[54] Article III was "modeled upon 'omnibus' or 'catch-all' articles of impeachment presented by the House and voted on by the Senate in *every impeachment trial* this century that resulted in conviction. . . . Past 'omnibus' impeachment articles contain phraseology virtually identical to that alleged in Article III. . . ."[55]

The House then pointed out that Judge Nixon had conceded that criminal conduct constituted an impeachable offense and therefore must agree that "the alleged concealment of information by committing perjury before a federal grand jury, a federal crime . . . state[s] an impeachable offense."[56]

The House argued that it was not charging Judge Nixon with just being a "bad person," but with committing specific acts which raised doubts about his integrity and that of the judicial system.[57] Specifically:

> Giving false testimony under oath to a grand jury is a crime. . . . Because truth is such an indispensable element of our judicial system, with federal judges entrusted with the important task of assessing credibility and finding the truth in cases that come before them, the notion of permitting a proven liar to sit on the bench strikes at the heart of the integrity of the judicial process.
>
> It is difficult to imagine an act more subversive to the legal process [than] lying from the witness stand. . . . If a judge's truthfulness cannot be guaranteed, if he sets less than the highest standard for candor, how can ordinary citizens who appear in court be expected to abide by their testimonial oath?[58]

The House asserted that "[t]he Framers would applaud both Judge Nixon's criminal prosecution and his removal from office."[59]

The Senate voted to deny Judge Nixon's motion to dismiss the third article of impeachment by a vote of 34 to 63.[60] It had done the same when Judge Hastings made a similar motion as to an omnibus article.[61]

The Senate did vote in the end to find Judge Nixon not guilty as charged in article III.[62] A possible explanation for this vote is provided by Senator Herbert Kohl, who found Judge Nixon guilty as charged in articles I and II but found him not guilty on article III:

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[53] *Id.* at 14.
[54] United States House of Representatives, *The House of Representatives' Response to Judge Nixon's Motion to Dismiss Impeachment Article III* 5 (hereinafter cited as "*Response to Nixon Motion*"), *reprinted in Senate Nixon Hearings*, *supra* note 39, at 261, 265.
[55] *Response to Nixon Motion*, *supra* note 54, at 8 (emphasis in original).
[56] *Id.* at 5–6.
[57] *Id.* at 6–7.
[58] United States House of Representatives, *The House of Representatives' Brief in Support of the Articles of Impeachment* 58–59, *reprinted in Proceedings of the United States Senate*, *supra* note 42, at 28, 88–89.
[59] *Response to Nixon Motion*, *supra* note 54, at 8.
[60] *Proceedings of the United States Senate*, *supra* note 42, at 431.
[61] 135 Cong. Rec. 4533 (1989). *See* footnotes 124–25 and accompanying text.
[62] *Proceedings of the United States Senate*, *supra* note 42, at 436.

> Article III is phrased in the disjunctive. It says that Judge Nixon concealed his conversations through "one or more" of 14 false statements. This wording presents a variety of problems. First of all, it means that Judge Nixon can be convicted even if two thirds of the Senate does not agree on which of his particular statements were false. . . .
>
> The House is telling us that it's OK to convict Judge Nixon on article III even if we have different visions of what he did wrong. But that's not fair to Judge Nixon, to the Senate, or to the American people. . . .
>
> Article III reminds me of the kind [of] menu that some Chinese restaurants use. We are asked to choose a combination of selections from column "A" and from column "B." This complicates our deliberations and puts a tremendous burden on the accused.
>
> I realize that we have used omnibus articles before. But they did not contain the word "OR," and they did not allege 14 crimes. In the Claiborne case, for example, the omnibus article accused him of just two crimes—falsifying tax returns in 1979 and 1980.
>
> But my basic objection is more fundamental: the prosecution should not be allowed to use a shotgun or blunderbuss. We should send a message to the House: "Please do not bunch up your allegations. From here on out, charge each act of wrongdoing in a separate count. Follow the example of prosecutors in court." . . . [E]ven if article III is technically permissible under the Constitution, Congress can do better.[63]

In any event, the Senate voted to convict Judge Nixon on two articles of impeachment, both founded upon his making false statements to a grand jury. The body seems to have agreed with the House of Representatives as to the seriousness of such perjury.

C. THE IMPEACHMENT OF JUDGE HASTINGS[64]

U.S. District Court Judge Alcee L. Hastings was impeached in 1989. He had been acquitted of charges that he and a friend had conspired to solicit a $150,000 bribe from defendants in a racketeering and embezzlement case heard by Judge Hastings in exchange for lenient sentencing. However, in a separate trial, a jury convicted his alleged co-conspirator on these charges, and it was alleged that Judge Hastings won acquittal by committing perjury on the witness stand. Judge Hastings' involvement in the bribery scheme and his perjury in his criminal trial formed the basis of the eight articles of impeachment on which he was convicted.

As with the other judges, the reaction of Congress was harsh. John Conyers, who was chairman of the Subcommittee on Criminal Justice (which held the investigatory hearings into Judge Hastings' conduct) and a House manager, stated that the judge was "the architect of his own undoing" and that "[w]e did not wage th[e] civil rights struggle merely to replace one form of judicial corruption for another."[65] George Gekas, ranking member of the Subcommittee

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[63] *Id.* at 449–50.

[64] *See* Appendix 1 for sources and a description of the articles of impeachment and the proceedings against Judge Hastings.

[65] 134 Cong. Rec. 20,214 (1988).

and a House manager, said that "this look that we have just given into the conduct of Alcee Hastings makes one sick in the stomach."[66]

Hamilton Fish, ranking member of the Judiciary Committee and a House manager, stated that "Judge Hastings . . . sought to sell his judicial office for private gain—and later perverted the legal process by testifying falsely. Such conduct cannot be tolerated in a public official responsible for dispensing equal justice under the law."[67]

The House of Representatives' position before the Senate was that "[e]ach and every one of the fourteen instances of false testimony charged in the Articles of Impeachment justifies Judge Hastings' removal from the Federal bench."[68] Further, "[f]ew actions are more subversive of the legal process than lying on the stand. A judge who has sought to mislead persons engaged in any aspect of the legal process is unfit to remain on the bench."[69]

Judge Hastings was found guilty by the Senate on seven of the 12 articles involving false testimony and on the article stating that he was a participant in the bribery conspiracy. It is clear from his impeachment that perjury is an impeachable offense.

The Senate found Judge Hastings not guilty on the last article of impeachment, which charged that through his actions, he undermined "confidence in the integrity and impartiality of the judiciary and betray[ed] the trust of the people of the United States, thereby bringing disrepute on the Federal courts and the administration of justice by the Federal courts." The Senate had earlier, though, refused to dismiss this article.

IMPEACHMENT PROCEEDINGS AGAINST PRESIDENT NIXON[70]

President Richard Nixon resigned in 1974 after the Judiciary Committee had approved three articles of impeachment against him. The articles generally revolved around the 1972 burglary at the Washington, D.C., headquarters of the Democratic National Committee and the president's role in the ensuing coverup of the break-in.

The Committee characterized the first article as charging that:

> President Nixon, using the power of his high office, engaged, personally and through his subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of the unlawful entry into the headquarters of the Democratic National Committee in Washington, D.C., for the purpose of securing political intelligence; to cover

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[66] 134 Cong. Rec. 20,215 (1988).

[67] 134 Cong. Rec. 20,217 (1988).

[68] United States House of Representatives, *Revised Pretrial Statement of the House of Representatives* 3 (July 7, 1989), *reprinted in Hearings Before the Senate Impeachment Trial Committee on the Articles of Impeachment Against Judge Alcee L. Hastings, a Judge of the United States District Court for the Southern District of Florida, for High Crimes and Misdemeanors*, 101st Cong., 1st Sess. 941, 943 (1989). This might be considered hyperbole in that it only takes conviction on one article of impeachment to remove a federal official from office.

[69] *Revised Pretrial Statement of the House of Representatives, supra* note 68, at 17.

[70] *See* Appendix 1 for sources and a description of the articles of impeachment articles and the proceedings against President Nixon.

up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities.[71]

The Committee believed that this course of conduct by President Nixon required "perjury, destruction of evidence, obstruction of justice, all crimes. But, most important, it required deliberate, contrived, and continuing deception of the American people."[72] The Committee went on to say that:

> [His] actions resulted in manifest injury to the confidence of the nation and great prejudice to the cause of law and justice, and was subversive of constitutional government. His actions were contrary to his trust as President and unmindful of the solemn duties of his high office. It was this serious violation of Richard M. Nixon's constitutional obligations as President, and not the fact that violations of Federal criminal statutes occurred, that lies at the heart of Article I.[73]

The Committee characterized the second article as charging that:

> President Nixon, using the power of the office of President of the United States, repeatedly engaged in conduct which violated the constitutional rights of citizens; which impaired the due and proper administration of justice and the conduct of lawful inquiries, or which contravened the laws governing agencies of the executive branch and the purposes of these agencies.[74]

As to this article, the Committee believed that:

> [I]t is the duty of the President not merely to live by the law but to see that law faithfully applied. Richard M. Nixon has repeatedly and willfully failed to perform that duty. He has failed to perform it by authorizing and directing actions that violated or disregarded the rights of citizens and that corrupted and attempted to corrupt the lawful functioning of executive agencies. He has failed to perform it by condoning and ratifying, rather than acting to stop, actions by his subordinates that interfered with lawful investigations and impeded the enforcement of the laws.
>
> The conduct of Richard M. Nixon has constituted a repeated and continuing abuse of the powers of the Presidency. . . . This abuse of the powers of the President was carried out by Richard M. Nixon . . . for his own political advantage, not for any legitimate governmental purpose and without due consideration for the national good.[75]

The Committee characterized the third article as charging that President Nixon failed "without lawful cause or excuse and in willful disobedience of the subpoenas of the House, to produce papers and things that the Committee had subpoenaed in the course of its impeachment inquiry . . . ."[76]

The Committee believed that:

> [I]n refusing to comply with limited, narrowly drawn subpoenas . . . the President interfered with the exercise of the

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[71] *Impeachment of Richard M. Nixon, President of the United States*, H.R. Rep. No. 93–1305, 93rd Cong., 2d Sess. 10 (1974)(hereinafter cited as "*Impeachment of Richard M. Nixon*").
[72] *Id.* at 136.
[73] *Id.*
[74] *Id.* at 10.
[75] *Id.* at 180.
[76] *Id.* at 10–11.

House's function as the "Grant Inquest of the Nation." Unless the defiance of the Committee's subpoenas under these circumstances is considered grounds for impeachment, it is difficult to conceive of any President acknowledging that he is obliged to supply the relevant evidence necessary for Congress to exercise its constitutional responsibility in an impeachment proceeding.[77]

The impeachment proceedings against President Nixon have become the most famous, or infamous, in the history of the republic. Unfortunately, it is impossible to know how the House of Representatives and the Senate would have viewed the articles of impeachment.

However, it can be said that the first article emphasized the obstruction of justice by President Nixon and the second article emphasized his abuse of power. The first article charged that President Nixon tried to delay, impede, and obstruct the investigation of the break-in at the Democratic National Committee by engaging in activities such as making false and misleading statements to the public and to governmental investigators, counseling witnesses to give false or misleading statements to such investigators and in judicial and congressional proceedings, withholding evidence and information from such investigators, approving surreptitious payments to witnesses to obtain their silence or influence their testimony, and interfering in the conduct of federal investigations.

The second article charged that President Nixon violated the constitutional rights of citizens, impaired the administration of justice and contravened the laws governing executive agencies by engaging in activities such as trying to obtain data on persons from the Internal Revenue Service and causing the agency to engage in improper audits, using executive branch personnel to conduct improper investigations, keeping a secret investigative unit in his office, failing to act when he knew or had reason to know that subordinates were trying to impede governmental investigations, and interfering with agencies of the executive branch.

CONCLUSION

Our nation's recent experience with impeachments under the United States Constitution provides a number of clear guiding principles for those who must conduct future impeachment inquiries, draft future articles of impeachment, and vote on those articles:

- First, in most instances of impeachment since 1974, making false and misleading statements under oath has been the most common compelling basis for impeachment—whether it is before a jury, a grand jury, or on a tax return.
- Second, the constitutional standard for impeachable offenses is the same for federal judges as it is for presidents and all other civil officers.
- Third, impeachable offenses can involve both personal and professional misconduct.

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[77] *Id.* at 213.

- Fourth, impeachable offenses do not have to be federal or state crimes.[78]

The research conducted by the staff in 1974, and this update, are meant to provide guidance and background to members as they prepare to undertake this constitutional responsibility of determining whether or not any acts allegedly committed by the president rise to the level of an impeachable offense. Impeachment is a unique and distinct procedure established by the Constitution. Each Member must decide for himself or herself, after the conclusion of the fact-finding process and in the light of historical precedents based on his or her own judgment and conscience, whether the proven acts constitute a High Crime or Misdemeanor.

[78] This was also the conclusion of the 1974 Staff Report. *See 1974 Staff Report, supra* note 2, at 22–25.

APPENDIXES

APPENDIX 1

RECENT AMERICAN IMPEACHMENT PROCEEDINGS

1. PRESIDENT RICHARD NIXON

A. PROCEEDINGS IN THE HOUSE

Various resolutions to impeach President Nixon were introduced and referred to the Judiciary Committee.[79] The House adopted H.Res. 702 on November 15, 1973, which provided additional funds for the Committee for purposes of considering the resolutions.[80] On February 6, 1974, the House adopted H.Res. 803, a resolution that authorized the Committee to investigate whether grounds existed to impeach President Nixon.[81] From May 9, 1974, until July 17, 1974, the impeachment inquiry staff made presentations to the Committee of the results of their investigation and the Committee heard witnesses.[82]

Beginning on July 24, 1974, the Committee considered a resolution containing two articles of impeachment, and on July 27, 1974, the Committee agreed to an amended version of the first article by a vote of 27 to 11.[83] On July 29, 1974, the Committee approved an amended version of the second article by a vote of 28 to 10.[84] On July 30, 1974, an additional article (regarding the president's failure to produce items demanded by congressional subpoenas) was offered and was adopted by a vote of 21 to 17.[85]

Also on July 30, the Committee considered and rejected (by votes of 12–26) two additional articles. The first charged that President Nixon authorized and concealed from Congress the bombing of Cambodia in derogation of the powers of Congress. The second charged the president with filing false income tax returns for the years 1969–72 and having received unlawful emoluments in the form of government expenditures at properties at San Clemente, California, and Key Biscayne, Florida.[86]

President Nixon resigned on August 9, 1974.[87] The Judiciary Committee report, which recommended that the House impeach President Nixon and which adopted articles of impeachment, was

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[79] *Impeachment of Richard M. Nixon, supra* note 71, at 6.
[80] *Id.*
[81] *Id.*
[82] *Id.* at 9.
[83] *Id.* at 10.
[84] *Id.*
[85] *Id.*
[86] *Id.* at 11.
[87] 3 *Deschler's Precedents of the United States House of Representatives*, H. Doc. No. 94–661, 94th Cong., 2d Sess., Ch. 14, § 15.13, 638 (1974).

accepted by the House through the passage of H.Res. 1333 on August 20, 1974.[88] No further proceedings occurred.

B. ARTICLES OF IMPEACHMENT[89]

Article I charged that President Nixon had violated his constitutional duty to faithfully execute his office, preserve, protect, and defend the Constitution, and take care that the laws be faithfully executed by interfering with the investigation of events relating to the June 17, 1972, unlawful entry at the Washington, D.C., headquarters of the Democratic National Committee for the purpose of securing political intelligence. Using the powers of his office, the president "engaged personally and through his subordinates and agents, in a course of conduct or plan designed to delay, impede, and obstruct the investigation of such unlawful entry; to cover up, conceal and protect those responsible; and to conceal the existence and scope of other unlawful covert activities."

Implementation of the course of conduct included (1) making or causing to be made false or misleading statements to investigative officers and employees of the United States, (2) withholding relevant and material evidence or information from such persons, (3) approving, condoning, acquiescing in, and counseling witnesses with respect to the giving of false or misleading statements to such persons as well as in judicial and congressional proceedings, (4) interfering or endeavoring to interfere with the conduct of investigations by the Department of Justice, the Federal Bureau of Investigation, the Office of Watergate Special Prosecution Force and congressional committees, (5) approving, condoning, and acquiescing in surreptitious payments for the purpose of obtaining the silence of or influencing the testimony of witnesses, potential witnesses or participants in the unlawful entry or other illegal activities, (6) endeavoring to misuse the Central Intelligence Agency, (7) disseminating information received from the Department of Justice to subjects of investigations, (8) making false or misleading public statements for the purpose of deceiving the people of the United States into believing that a thorough investigation of "Watergate" had taken place, and (9) endeavoring to cause prospective defendants and persons convicted to expect favored treatment or rewards in return for silence or false testimony. President Nixon "acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States."

Article II charged that the President had violated his constitutional duty to faithfully execute his office, preserve, protect, and defend the Constitution, and take care that the laws be faithfully executed by "repeatedly engag[ing] in conduct violating the constitutional rights of citizens, impairing the due and proper administration of justice and the conduct of lawful inquiries, or contravening the laws governing agencies of the executive branch and the purposes of these agencies."

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[88] *Id.* at 642.

[89] *Impeachment of Richard M. Nixon, supra* note 71, at 1–4.

The president did such by (1) personally and through subordinates trying to obtain for purposes not authorized by law confidential information maintained by the Internal Revenue Service and causing the IRS to engage in improper tax audits and investigations, (2) misusing the FBI, the Secret Service and other executive personnel by directing them to conduct improper electronic surveillance and other investigations and permitting the improper use of information so obtained, (3) authorizing the maintenance of a secret investigative unit within the office of the president, partially financed with campaign contributions, which unlawfully utilized resources of the CIA and engaged in covert and unlawful activities and attempted to prejudice the constitutional right of an accused individual to a fair trial, (4) failing to act when he knew or had reason to know that subordinates were trying to impede and frustrate inquiries by governmental entities into the break-in at the Democratic National Committee and the cover-up and other matters, and (5) knowingly misusing the executive power by interfering with agencies of the executive branch, including the FBI, the Department of Justice, and the CIA, in violation of his duty to take care that the laws be faithfully executed. He acted "in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice and to the manifest injury of the people of the United States."

Article III charged that the president had violated his constitutional duty to faithfully execute his office, preserve, protect, and defend the Constitution, and take care that the laws be faithfully executed by, without lawful cause or excuse, failing to produce items relating to "Watergate" as directed by subpoenas issued by the Judiciary Committee and willfully disobeying such subpoenas. President Nixon had thus interposed the powers of the presidency against the lawful subpoenas of the House of Representatives, "assuming to himself functions and judgments necessary to the exercise of the sole power of impeachment vested by the Constitution in the House. . . ." He acted "in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice, and to the manifest injury of the people of the United States."

C. PROCEEDINGS IN THE SENATE

None.

2. DISTRICT JUDGE HARRY CLAIBORNE

A. PROCEEDINGS IN THE HOUSE

Harry E. Claiborne was a judge of the United States District Court for the District of Nevada. A resolution to impeach him, H.Res. 461, was introduced June 3, 1986, and referred to the Judiciary Committee.[90] An investigatory hearing into the conduct of Judge Claiborne was held on June 19, 1986, by the Subcommittee on Courts, Civil Liberties and the Administration of Justice.[91] On June 24, 1986, the Subcommittee amended H.Res. 461 and passed it by a 15 to 0 vote; on June 26, 1986, the full Committee amended

[90] *Impeachment of Judge Harry E. Claiborne,* H.R. Rep. 99–688, 99th Cong., 2d Sess. 1 (1986).
[91] *Id.* at 4.

the resolution and ordered it favorably reported to the House by a vote of 35 to 0.[92] On June 30, 1986, the Judicial Conference of the United States notified the House that it had made its own determination that Judge Claiborne's conduct in violating section 7206(1) of the Internal Revenue Code could constitute grounds for impeachment under Article I of the Constitution.[93] On July 22, 1986, the House agreed to H.Res. 461 by a vote of 406 to 0.[94]

B. ARTICLES OF IMPEACHMENT[95]

Article I charged that, while serving as a federal judge, Judge Claiborne had filed an income tax return for 1979, knowing that it substantially understated his income. The return, filed with the Internal Revenue Service, was verified by a written declaration that it was made under penalty of perjury. A jury found beyond a reasonable doubt that Judge Claiborne had failed to report substantial income in violation of federal law.

Article II charged that, while serving as a federal judge, Judge Claiborne had filed an income tax return for 1980, knowing that it substantially understated his income. The return, filed with the Internal Revenue Service, was verified by a written declaration that it was made under penalty of perjury. A jury found beyond a reasonable doubt that Judge Claiborne had failed to report substantial income in violation of federal law.

Article III charged that, while serving as a federal judge, Judge Claiborne had been found guilty of making and subscribing false income tax returns for 1979 and 1980 in violation of federal law and was sentenced to two years imprisonment (with the terms of imprisonment to be served concurrently) and a fine of $5000 for each violation.

Article IV charged that Judge Claiborne was "required to discharge and perform all the duties incumbent on him and to uphold and obey the Constitution and laws of the United States" and was "required to uphold the integrity of the judiciary and to perform the duties of his office impartially." The article concluded that by willfully and knowingly falsifying his income on his tax returns, he had "betrayed the trust of the people of the United States and reduced confidence in the integrity and impartiality of the judiciary, thereby bringing disrepute on the Federal courts and the administration of justice by the courts."

C. PROCEEDINGS IN THE SENATE

Pursuant to S.Res. 481 and rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, a committee of twelve Senators received evidence and heard testimony relating to the articles of impeachment and then provided the transcripts of the proceedings to the Senate.[96] Rule XI does not allow the trial committee to make recommendations to the Senate as to

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[92] *Id.* at 6–7.

[93] 132 Cong. Rec. H4712 (daily ed. July 22, 1986). Forwarding a determination that a judge's impeachment may be warranted is the severest disciplinary action against a judge that the Judicial Conference can take under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. *See* 28 U.S.C. §372(c)(8)(a) (1994).

[94] 132 Cong. Rec. H4721 (daily ed. July 22, 1986).

[95] 132 Cong. Rec. S15,760–61 (daily ed. Oct. 9, 1986).

[96] 132 Cong. Rec. S11,673 (daily ed. Aug. 14, 1986).

how Senators should vote on articles of impeachment.[97] The Senate found Judge Claiborne guilty as charged in article I by a vote of 87 to 10 (with one "present") and guilty as charged in article II by a vote of 90 to 7 (with one "present").[98] He was found not guilty on article III by vote of 46 (guilty) to 17 (not guilty) with 35 "present"—a two-thirds majority of Senators present being required for conviction on an article of impeachment.[99] Judge Claiborne was convicted of the charge in article IV by vote of 89 to 8 (with one "present").[100]

3. DISTRICT JUDGE WALTER NIXON

A. PROCEEDINGS IN THE HOUSE

Walter L. Nixon, Jr., was a judge of the United States District Court for the Southern District of Mississippi. A federal jury convicted Judge Nixon of two counts of perjury on February 9, 1986 (acquitting him of an illegal gratuity count), and he was sentenced to five years imprisonment on each count, the terms to run concurrently.[101] Subsequent to the exhaustion of his appellate rights, on March 15, 1988, the Judicial Conference transmitted to the House of Representatives a determination that Judge Nixon's impeachment may be warranted.[102] On March 17, 1988, H.Res. 407, a bill impeaching Judge Nixon, was introduced and referred to the Judiciary Committee, which in turn referred it to the Subcommittee on Civil and Constitutional Rights.[103] The Subcommittee's investigation, including hearings, proceeded to the end of the 100th Congress.[104] H.Res. 87, impeaching Judge Nixon, was introduced on February 22, 1989, and also referred to the Subcommittee on Civil and Constitutional Rights.[105] On March 21, 1989, the Subcommittee amended the resolution and voted 8 to 0 to favorably report it to the full Judiciary Committee, which, on April 25, 1989, voted 34 to 0 to report the resolution favorably to the House floor.[106] On May 10, 1989, the House passed H.Res. 87 by vote of 417 to 0.[107]

B. ARTICLES OF IMPEACHMENT[108]

Article I charged that in testimony before a grand jury investigating his business relationship with an individual and a state prosecutor's handling of a drug smuggling prosecution of that individual's son, Judge Nixon knowingly made a false or misleading state-

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[97] *On the Impeachment of Harry E. Claiborne,* S. Rep. No. 99–511, 99th Cong., 2d Sess. 1 (1986).

[98] 132 Cong. Rec. S15,760–61 (daily ed. Oct. 9, 1986).

[99] 132 Cong. Rec. S15,761 (daily ed. Oct. 9, 1986). *See* U.S. Const. art. I, §3, cl. 6.
The reason for the Senate's vote on this article might have been that many Senators were concerned that in voting in favor of the article, they wouldn't be making their own finding of guilt, but would be accepting as dispositive the jury verdict. *See* 132 Cong. Rec. S15,763 (daily ed. Oct. 9, 1986)(statement of Senator Bingaman) & 132 Cong. Rec. S15,767 (daily ed. Oct. 9, 1986)(statement of Senator Specter).

[100] 132 Cong. Rec. S15,762 (daily ed. Oct. 9, 1986).

[101] *Impeachment of Walter L. Nixon, Jr.,* H.R. Rep. No. 101–36, 101st Cong., 1st Sess. 12 (1989).

[102] *Id.* at 13.

[103] *Id.*

[104] *Id.* at 14–15.

[105] *Id.* at 15.

[106] *Id.* at 15–16.

[107] 135 Cong. Rec. 8823 (1989).

[108] *Proceedings of the United States Senate, supra* note 42, at 432–35.

ment in violation of his oath to tell the truth to the effect that he never discussed the prosecution with the state prosecutor.

Article II charged that in testimony before the same grand jury, Judge Nixon knowingly made a false or misleading statement in violation of his oath to tell the truth to the effect that he never influenced anyone with respect to the drug smuggling case.

Article III charged that by virtue of his office, Judge Nixon had "raised substantial doubt as to his judicial integrity, undermined confidence in the integrity and impartiality of the judiciary, betrayed the trust of the people of the United States, disobeyed the laws of the United States and brought disrepute on the Federal courts and the administration of justice by the Federal courts. . . ." It was charged that after entering into an oil and gas investment with an individual, Judge Nixon had conversations with a state prosecutor and others relative to a pending criminal proceedings in state court in which the individual's son was facing drug conspiracy charges. Judge Nixon was charged with concealing those conversations through a series of false or misleading statements knowingly made to an attorney from the Department of Justice and a special agent of the FBI. He was also charged with concealing those conversations by knowingly making a series of false or misleading statements to a federal grand jury during testimony under oath.

C. PROCEEDINGS IN THE SENATE

On May 11, 1989, the Senate passed S.Res. 128.[109] The resolution, in conjunction with rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, provided that a committee of twelve Senators would receive evidence and hear testimony relating to the articles of impeachment against Judge Nixon and provide the transcripts of its proceedings to the Senate. The committee carried out its duties and transmitted a record of its proceedings to the Senate on October 16, 1989.[110] On November 3, 1989, the Senate first rejected Judge Nixon's motion for a trial by the full Senate by vote of 7 to 90.[111] It also rejected his motion to dismiss impeachment article III by vote of 34 to 63.[112] He was then found guilty on article I by vote of 89 to 8 and on article II by vote of 78 to 19, and not guilty on article III by a vote of 57 (guilty) to 40.[113]

D. MISCELLANEOUS

Judge Nixon's claim that the Senate had not properly tried him under the impeachment clause of the Constitution was rejected by the Supreme Court in *Nixon* v. *United States*[114] as non-justiciable, involving a political question that should be left to the Senate to decide. He had alleged that Senate rule XI, which allowed a committee of Senators to hear evidence and report to the full Senate regarding articles of impeachment, violated article I, section 3,

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[109] 135 Cong. Rec. 8989 (1989).
[110] *Proceedings of the United States Senate, supra* note 42, at 363.
[111] *Id.* at 430.
[112] *Id.* at 431.
[113] *Id.* at 432–36.
[114] 506 U.S. 224 (1993).

clause 6 of the Constitution, which provides that the "Senate shall have the sole Power to try all Impeachments."

4. DISTRICT JUDGE ALCEE HASTINGS

A. PROCEEDINGS IN THE HOUSE

Alcee L. Hastings was a judge of the United States District Court for the Southern District of Florida. On February 4, 1983, a federal jury acquitted Judge Hastings of charges that he and a friend had conspired to solicit a bribe from defendants in a criminal case heard by Judge Hastings (while in a separate trial, a jury had convicted his alleged co-conspirator on these charges).[115] On March 17, 1987, the Chief Justice of the United States, acting on behalf of the Judicial Conference, transmitted a determination to the House of Representatives stating that Judge Hastings had engaged in conduct that may constitute one or more grounds for impeachment.[116] The Subcommittee on Criminal Justice investigated the matter and held numerous hearings.[117] It was learned that Judge Hastings had allegedly improperly disclosed confidential information that he had received while supervising a wiretap.[118] On July 7, 1988, the Subcommittee unanimously voted to adopt articles of impeachment that were introduced as H.Res. 499; on July 26, 1988, the Committee voted to adopt the resolution, as amended, by a vote of 32 to 1 (two of the 17 articles were adopted by voice vote).[119] On August 3, 1988, the resolution was passed by the House by a vote of 413 to 3 with 4 members answering "present."[120]

B. ARTICLES OF IMPEACHMENT[121]

Article I charged that in 1981, Judge Hastings and a friend engaged in a conspiracy to obtain $150,000 from defendants in a racketeering and embezzlement case tried before Judge Hastings in return for sentences which would not require incarceration.

Article II charged that during the course of his defense while on trial for the conspiracy, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he had entered into an agreement to seek the $150,000 bribe.

Article III charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he had agreed to modify the sentences of the defendants in the racketeering and embezzlement case in return for the bribe.

Article IV charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he had agreed in connection with the bribe to return property of the defendants in the racketeering and embezzlement case that he had previously ordered forfeited.

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[115] *Impeachment of Alcee L. Hastings*, H.R. Rep. No. 100–810, 100th Cong., 2d Sess. at 8 (1988).
[116] *Id.* at 7.
[117] *Id.* at 10.
[118] *Id.* at 9.
[119] *Id.* at 12–13.
[120] 134 Cong. Rec. 20,221 (1988).
[121] 134 Cong. Rec. 20,206–07 (1988).

Article V charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he had appeared at a hotel to demonstrate his participation in the bribery scheme.

Article VI charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he expected his co-conspirator to show up at his hotel room one day.

Article VII charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he instructed his law clerk to prepare an order returning property to the defendants in the racketeering and embezzlement case in furtherance of the bribery scheme.

Article VIII charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether a telephone conversation with his co-conspirator was made in furtherance of the bribery scheme.

Article IX charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether certain letters were fabricated in an effort to hide the bribery scheme.

Article X charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he had actually spoken to a certain individual during a phone call that was being offered as exculpatory evidence.

Article XI charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he had actually spoken to a certain individual during a phone call that was being offered as exculpatory evidence.

Article XII charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he had actually spoken to a certain individual during a phone call that was being offered as exculpatory evidence.

Article XIII charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he could actually reach a certain individual at a certain phone number.

Article XIV charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding whether he had actually made two phone calls that were being offered as exculpatory evidence.

Article XV charged that during the course of his defense, Judge Hastings made a false statement under oath intending to mislead the trier of fact regarding his motive in taking an airline trip after his co-conspirator had been arrested.

Article XVI charged that while acting as supervising judge of a federal wiretap, Judge Hastings revealed to certain individuals highly confidential information disclosed by the wiretap. The disclosure thwarted, and ultimately led to the termination of, an investigation by federal law enforcement agents.

Article XVII charged that through his actions, Judge Hastings undermined "confidence in the integrity and impartiality of the judiciary and betray[ed] the trust of the people of the United States, thereby bringing disrepute on the Federal courts and the administration of justice by the Federal courts."

C. PROCEEDINGS IN THE SENATE

On September 30, 1988, the Senate passed S.Res. 480 to carry the impeachment proceedings against Judge Hastings over to the 101st Congress."[122] On March 16, 1989, the Senate agreed to S.Res. 38.[123] The resolution, in conjunction with rule XI of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, provided that a committee of twelve Senators would receive evidence and hear testimony relating to the articles of impeachment and provide transcripts of its proceedings to the Senate. The same day, the Senate dismissed two motions of Judge Hastings, the first seeking the dismissal of articles of impeachment I–XV based upon his prior acquittal and the ensuing lapse of time, and the second seeking the dismissal of article XVII for its failure to state an impeachable offense.[124] The first motion lost by a vote of 1 to 92 and the second motion lost by a vote of 0 to 93.[125]

The trial committee sent a record of its proceedings to the Senate on October 2, 1989.[126] On October 20, 1989, the Senate found Judge Hastings to be: guilty on article I by a vote of 69 to 26; guilty on article II by a vote of 68 to 27; guilty on article III by a vote of 69 to 26; guilty on article IV by a vote of 67 to 28; guilty on article V by a vote of 67 to 28; not guilty on article VI by a vote of 48 (guilty) to 47; guilty on article VII by a vote of 69 to 26; guilty on article VIII by a vote of 68 to 27; guilty on article IX by a vote of 70 to 25; not guilty on article XVI by a vote of 0 to 95; and not guilty on article XVII by a vote of 60 (guilty) to 35.[127] The Senate did not vote on articles X through XV.

D. MISCELLANEOUS

Judge Hastings (with Judge Walter Nixon as intervening plaintiff) brought suit to stop the impeachment proceedings alleging that the Senate's use of a trial committee violated article I, section 3, clause 6 of the Constitution and thus denied him due process.[128] The court found the complaint to be a non-justiciable political question.[129] Subsequent to his removal from office, Judge Hastings brought suit challenging his impeachment on similar grounds. While Hastings initially prevailed, his victory did not survive the Supreme Court's decision in *Nixon* v. *United States.*[130]

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[122] 134 Cong. Rec. 26,867–68 (1988).
[123] 135 Cong. Rec. 4533 (1989).
[124] 135 Cong. Rec. 4532–33 (1989).
[125] *Id.*
[126] 135 Cong. Rec. 22,639 (1989).
[127] 135 Cong. Rec. 25,330–35 (1989).
[128] *Hastings* v. *United States Senate,* 716 F. Supp. 38 (D.D.C. 1989).
[129] *Id.* at 40. The court also rejected other claims of Judge Hastings, including that his fifth amendment right against double jeopardy was being violated because he was being impeached after having been acquitted in a criminal trial, and that he was being denied the effective assistance of counsel because the Senate would not pay his attorney's fees. *Id.* at 41–42.
[130] *Hastings* v. *United States,* 802 F. Supp. 490 (D.D.C. 1992), *vacated and remanded,* 988 F.2d 1280 (D.C. Cir. 1993), *dismissed* 837 F. Supp. 3 (D.D.C. 1993).