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IMPEACHMENT INQUIRY: WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES

PRESENTATION ON BEHALF OF THE PRESIDENT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

IMPEACHMENT INQUIRY PURSUANT TO H. RES. 581:
PRESENTATION ON BEHALF OF THE PRESIDENT

DECEMBER 8 AND 9, 1998

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IMPEACHMENT INQUIRY: WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES PRESENTATION ON BEHALF OF THE PRESIDENT

Hearing on Impeachment Inquiry Pursuant to H. Res. 581

TUESDAY, DECEMBER 8, 1998

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to call, at 10 a.m., in room 2141, Rayburn House Office Building, Hon. Henry J. Hyde [chairman of the committee] presiding.

Present: Representatives Henry J. Hyde, F. James Sensenbrenner, Jr., Bill McCollum, George W. Gekas, Howard Coble, Lamar S. Smith, Elton Gallegly, Charles T. Canady, Bob Inglis, Bob Goodlatte, Stephen E. Buyer, Ed Bryant, Steve Chabot, Bob Barr, William L. Jenkins, Asa Hutchinson, Edward A. Pease, Christopher B. Cannon, James E. Rogan, Lindsey O. Graham, Mary Bono, John Conyers, Jr., Barney Frank, Charles E. Schumer, Howard L. Berman, Rick Boucher, Jerrold Nadler, Robert C. Scott, Melvin L. Watt, Zoe Lofgren, Sheila Jackson Lee, Maxine Waters, Martin T. Meehan, William D. Delahunt, Robert Wexler, Steven R. Rothman, and Thomas M. Barrett.

Majority Staff Present: Thomas E. Mooney, Sr., general counsel-chief of staff; Jon W. Dudas, deputy general counsel-staff director; Diana L. Schacht, deputy staff director-chief counsel; Daniel M. Freeman, parliamentarian-counsel; Joseph H. Gibson, chief counsel; Rick Filkins, counsel; Sharee M. Freeman, counsel; John F. Mautz, IV, counsel; William Moschella, counsel; Stephen Pinkos, counsel; Sheila F. Klein, executive assistant to general counsel-chief of staff; Annelie Weber, executive assistant to deputy general counsel-staff director; Samuel F. Stratman, press secretary; Rebecca S. Ward, officer manager; James B. Farr, financial clerk; Elizabeth Singleton, legislative correspondent; Sharon L. Hammersla, computer systems coordinator; Michele Manon, administrative assistant; Joseph McDonald, publications clerk; Shawn Friesen, staff assistant/clerk; Robert Jones, staff assistant; Ann Jemison, receptionist; Michael Connolly, communications assistant; Michelle Morgan, press secretary; and Patricia Katyoka, research assistant.

Subcommittee on Commercial and Administrative Law Staff Present: Ray Smietanka, chief counsel; and Jim Harper, counsel.

Subcommittee on the Constitution Staff Present: John H. Ladd, chief counsel; and Cathleen A. Cleaver, counsel.

Subcommittee on Courts and Intellectual Property Staff Present: Mitch Glazier, chief counsel; Blaine S. Merritt, counsel; Vince Garlock, counsel; and Debra K. Laman.

Subcommittee on Crime Staff Present: Paul J. McNulty, director of communications-chief counsel; Glenn R. Schmitt, counsel; Daniel J. Bryant, counsel; and Nicole R. Nason, counsel.

Subcommittee on Immigration and Claims Staff Present: George M. Fishman, chief counsel; Laura Ann Baxter, counsel; and Jim Y. Wilon, counsel.

Majority Investigative Staff Present: David P. Schippers, chief investigative counsel; Susan Bogart, investigative counsel; Thomas M. Schippers, investigative counsel; Jeffrey Pavletic, investigative counsel; Charles F. Marino, counsel; John C. Kocoras, counsel; Diana L. Woznicki, investigator; Peter J. Wacks, investigator; Albert F. Tracy, investigator; Berle S. Littmann, investigator; Stephen P. Lynch, professional staff member; Nancy Ruggero-Tracy, office manager/coordinator; and Patrick O'Sullivan, staff assistant.

Minority Staff Present: Julian Epstein, minority chief counsel-staff director; Perry Apelbaum, minority general counsel; Samara T. Ryder counsel; Brian P. Woolfolk, counsel; Henry Moniz, counsel; Robert Raben, minority counsel; Stephanie Peters, counsel; David Lachmann, counsel; Anita Johnson, executive assistant to minority chief counsel-staff director, and Dawn Burton, minority clerk.

Minority Investigative Staff Present: Abbe D. Lowell, minority chief investigative counsel; Lis W. Wiehl, investigative counsel; Deborah L. Rhodes, investigative counsel; Kevin M. Simpson, investigative counsel; Stephen F. Reich, investigative counsel; Sampak P. Garg, investigative counsel; and Maria Reddick, minority clerk.

Chairman HYDE. The committee will come to order. A quorum being present, and pursuant to notice, the committee will come to order for the purpose of conducting an impeachment inquiry pursuant to House Resolution 581. Ranking member John Conyers and I will make brief opening statements. Without objection, all members' and witnesses' written statements will be included in the record.

Now, members should know that while in the past I have been liberal with the gavel, because we have many witnesses, I intend to adhere strictly to the 5-minute rule. That means questions and answers will end after 5 minutes. Members who make 4-minute speeches and ask five questions in the final minute will not get their questions answered.

I now recognize myself for purposes of an opening statement.

I have made a commitment to members of this committee, to Members of the House, to the President and to the people that I will do all I can to ensure that this impeachment inquiry will be concluded by the end of the year. I plan on honoring that commitment, and today's hearing moves us in that direction.

Yesterday afternoon, the White House provided us with a list of 14 witnesses that it requested this committee to hear. I am pleased to accommodate the White House's request. We will hear the testimony of all 14 witnesses as well as Special Counsel Greg Craig and White House Counsel Charles Ruff.

Therefore, I would like to set the schedule for the remaining Judiciary Committee proceedings. At the request of the White House counsel, we have begun today at 10 a.m. and we will hear from three panels of witnesses today, one panel tomorrow morning, and the testimony of White House Counsel Charles Ruff tomorrow afternoon.

The first panel will be Special Counsel Greg Craig and five witnesses who wish to speak about constitutional standards for impeachment. Mr. Craig will be recognized for 15 minutes. All other panel witnesses will each have 10 minutes to make a statement. After the testimony of the witnesses, members will be allowed to ask questions for 5 minutes and that will not be a liberal gavel, but a strict gavel.

I ask that the members pay attention to their time and be aware that their questions should be asked and answered within their 5 minutes. The White House has proposed many witnesses, and we want to make sure that everyone has an opportunity to be heard. In the interest of time, there will not be questioning by committee counsel for these four panels.

After the hearing of Panel I, we will move immediately to Panel II, and then to Panel III. We will observe the same procedures as Panel I, 10-minute witness presentations followed by questions by members under the 5-minute rule.

Tomorrow we will hear the fourth panel of witnesses. I hope to start at 8 a.m. tomorrow morning to ensure ample time for the White House presentation. Tomorrow afternoon, the committee will receive the testimony of White House Counsel Charles Ruff. After his presentation, members will question Mr. Ruff under the 5–minute rule. He will also be available for questioning by committee counsel.

Thursday morning, we will have a presentation by Minority Chief Investigative Counsel Abbe Lowell at 9 a.m. and a presentation by Chief Investigative Counsel David Schippers at 1 p.m. Beginning at 4 p.m., we will begin consideration of a resolution containing articles of impeachment for our debate and deliberation. We will hear opening statements from all members Thursday evening. Friday, we will begin consideration and debate of articles of impeachment.

I now recognize the distinguished gentleman from Michigan and ranking member of the committee, John Conyers, for his opening remarks. Immediately following the gentleman's remarks, we will hear from Special Counsel Greg Craig and the other witnesses of Panel I.

Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman, for providing the White House the opportunity to present their witnesses. The Independent Counsel had 4 years to investigate the President. This committee has had 4 months. The White House is now getting 2 days.

There is no question that the President's conduct was wrong, that he misled the country and the Nation. But I believe that the legal case against the President is not strong. Republicans have said that Democrats do not contest the charges. Well, we do. There is no question that the President misled the country in his January 21 press conference. But that does not amount to perjury. The President already admitted before the grand jury to an improper sexual relationship. Now the Republicans insist that he must admit to sexual relations under the contorted definition provided by the Paula Jones attorneys. That is really at the heart of the perjury charge. That is the strength of its foundation.

The effort to find Monica Lewinsky a job started well before there was any Paula Jones witness list. The President never offered Lewinsky a job. That charge is frivolous.

Betty Currie was not on the witness list, and thus the President's conversations with her could not possibly have been the basis for obstruction. It is perfectly legal for the President, or anyone else, to tell a civil witness—in this case, Miss Lewinsky—that an affidavit may satisfy the requirement of the court. That is not obstruction.

It was Monica Lewinsky's idea to return the gifts. The President was never concerned about the gifts and kept giving them. And Monica Lewinsky, in the most significant, clarion statement before the grand jury, said that no one asked her to lie and no one promised her a job.

The legal case against the President is, in my judgment, a house of cards. The Judiciary Committee has heard from no factual witnesses to validate any of the charges. Instead, it is relying on uncross-examined, often contradictory grand jury hearsay to support an already weak case.

That would not satisfy any court of law, and it cannot possibly serve as the evidentiary foundation for an impeachment. And even if these shaky allegations were proven true, they would not rise to the standard of impeachment which requires the abuse of official power.

So we are at a critical crossroads today. We can either impeach the President, along a largely party line vote, and send this resolution to the Senate where there will be a 6–month or more, full-blown, intensified investigation; or we can find a meaningful way of censuring the President. The public, you may know, is overwhelmingly against impeachment and is for censure.

But our new Republican leadership, led by Speaker-Elect Livingston and Whip Tom DeLay, are thumbing their noses at the American people and telling them that the solution the American people want most cannot even come to the floor for a vote.

Well, if the American people ever wanted strong evidence that the extremists are still in control of this process, then that is it. It is time to give the American people a holiday gift, to end this sordid tale. But the gift that the extremists on the other side offer is 6 more months of this investigation by changing the venue to the Senate.

This, Mr. Chairman and colleagues, is not the way to bring this important issue to a speedy conclusion.

Thank you.

Chairman HYDE. Thank you, Mr. Conyers. Mr. Craig, Attorney General Katzenbach, Professor Ackerman, Professor Wilentz and Professor Beer, would you mind standing to receive the oath. Would you raise your right hand.

[Witnesses sworn.]

Chairman HYDE. Thank you.

Mr. SCOTT. Mr. Chairman?

Chairman HYDE. Mr. Scott?

Mr. SCOTT. Mr. Chairman, parliamentary inquiry. I understood that we would have a committee meeting prior to the receipt of testimony. Are motions at this point out of order?

Chairman HYDE. I think we are going to do that tomorrow morning, Mr. Scott.

Mr. SCOTT. Well, I would like the record to reflect that I had a motion that would be timely now, that might not be timely tomorrow morning.

Chairman HYDE. What is your motion?

Mr. SCOTT. To ask for a specific scope of inquiry prior to the White House rebuttal of the undefined allegations. If we are asking them to rebut, we ought to have them notified of what the allegations and what the scope is.

We only have 5 minutes to ask questions. We have had various different lists of what the allegations are. We would like to use our 5 minutes effectively and not ask questions about allegations that we are not actually pursuing.

Chairman HYDE. Well, this is a hearing, so it is not appropriate that you be recognized for the purposes of that motion. We will proceed with the hearing.

Mr. SCOTT. Thank you, Mr. Chairman.

Chairman HYDE. Let the record show that the witnesses answered the question posed by the oath in the affirmative. And I will give a very brief introduction. Mr. Craig may want to make a more fulsome introduction, and I don't want to foreclose you from doing that.

Mr. Gregory Craig is Assistant to the President and Special Counsel. The Honorable Nicholas Katzenbach is a former Attorney General of the United States under President Johnson and Under Secretary of State. He is also retired as Senior Vice President and Chief Legal Officer of IBM.

Professor Bruce Ackerman is the Sterling Professor of Law and Political Science at Yale University and author of "Volume II: We the People," which includes an historical and legal analysis of the impeachment of Andrew Johnson. Professor Sean Wilentz is the Dayton Stockton Professor of History and Director of Program in American Studies at Princeton University. Professor Wilentz is an expert and teacher of American history from the American Revolution through Reconstruction. He is the author of six books and numerous articles.

Professor Samuel H. Beer is the Eaton Professor of the Science of Government Emeritus at Harvard University. He has written and lectured and taught about the American system of government for over 65 years.

TESTIMONY OF GREGORY B. CRAIG, ESQ., ASSISTANT TO THE PRESIDENT AND SPECIAL COUNSEL; HON. NICHOLAS KATZENBACH, FORMER ATTORNEY GENERAL OF THE UNITED STATES; SEAN WILENTZ, THE DAYTON STOCKTON PROFESSOR OF HISTORY; SAMUEL H. BEER, EATON PROFESSOR OF THE SCIENCE OF GOVERNMENT EMERITUS, HARVARD UNIVERSITY; AND BRUCE ACKERMAN, STERLING PROFESSOR OF LAW AND POLITICAL SCIENCE, YALE UNIVERSITY

Chairman HYDE. Mr. Craig, you are recognized for a 15-minute statement.

TESTIMONY OF GREGORY B. CRAIG, ESQ.

Mr. CRAIG. Mr. Chairman, Congressman Conyers, members of the committee, good morning. My name is Greg Craig, and I am Special Counsel to the President. Let me first say that it is my honor, as well as an obligation, to appear before this committee in defense of the President.

The purpose of my appearance is to describe briefly and in general terms how we plan to proceed with the presentation of the President's defense over the next 2 days.

The time has finally come for the President to make his case and to give his side of the story. Over the next 2 days we will present to this committee, to the Congress, and to the country as a whole, a powerful case—based on the facts already in the record and on the law—a powerful case against the impeachment of this President.

During our presentation today and tomorrow we will show from our history and our heritage, from any fair reading of the Constitution, and from any fair sounding of our countrymen and women, that nothing in this case justifies this Congress overturning a national election and removing our President from office.

As we begin this undertaking, I make only one plea to you, and I hope it is not a futile one coming this late in the process. Open your mind, open your heart, and focus on the record. As you sit there listening to me at this moment, you may already be determined to vote to approve some articles of impeachment against this President. That is your right and your duty if you believe the facts and the law justify such a vote.

But there is a lot of conventional wisdom about this case that is just plain wrong, and if you are in fact disposed to vote for impeachment in the name of a justice that is fair and blind and impartial, please do so only on the basis of the real record and on the real testimony, not on the basis of what someone else tells you is in the record.

By the close of tomorrow, all the world will see one simple and undeniable fact: Whatever there is in the record that shows that what the President did was wrong and blameworthy, there is nothing in the record—in either the law or the facts—that would justify his impeachment and removal from office.

In truth, I would not be fairly representing President Clinton if I did not convey to you his profound and powerful regret for what he has done. He has insisted and personally instructed his lawyers that no technicalities or legalities should be allowed to obscure the simple moral truth that his behavior in this matter was wrong. He

misled his wife and family, his friends and colleagues, and our Nation about the nature of his relationship with Ms. Lewinsky.

The President wants everyone to know—the committee, the Congress, and the country—that he is genuinely sorry for the pain and the damage that he has caused and for the wrongs that he has committed.

But as an attorney, I must caution this committee to draw a sharp distinction between immoral conduct and illegal acts. Just as no fancy language can obscure the simple fact that what the President did was morally wrong, no amount of rhetoric can change the legal reality that there are no grounds for impeachment. As surely as we all know that what he did is sinful, we also know it is not impeachable.

Let me assure the members of this committee, the Members of the House of Representatives, and the American public of one thing: In the course of our presentation today and tomorrow, we will address the factual and evidentiary issues directly. We will draw this committee's attention to evidence that tends to clear the President with respect to each of the various charges—evidence that was left out of the Independent Counsel's referral, evidence that has not been widely reported in the press, but evidence that reveals the weakness of the charges being brought against the President. We are confident that at the end of this presentation, you will agree that impeachment is neither right nor wise nor warranted.

When it comes to constitutional standards for impeachment as conceived by the Founding Fathers, we will show that the Constitution requires proof of official misconduct and abuse of high public office for the drastic remedy of impeachment to be appropriate.

When it comes to standards of proof that should apply to the evidence that is brought before this committee, we will argue that this President should be considered innocent until proven guilty, and that he should be informed with particularity as to the facts and specifics of the misconduct that he is accused of, especially when it comes to the allegations of perjury.

On those allegations, we will show that neither the law of perjury nor the facts of this case could sustain a criminal prosecution, much less impeachment.

Mr. Chairman, I am willing to concede that in the Jones deposition the President's testimony was evasive, incomplete, misleading, even maddening, but it was not perjury.

On the allegation of perjury before the grand jury, which we all agree is the more serious offense, please look at the real record, not the referral's report of that record. Millions of Americans watched that testimony. They concluded, as I believe you too will find, that in fact the President admitted to an improper, inappropriate, and intimate relationship with Ms. Lewinsky. He did not deny it; he admitted it. Fair-minded Americans heard what the President said, and they knew what the President meant.

When it comes to allegations that the President, with Ms. Lewinsky and Ms. Currie and Mr. Jordan, obstructed justice, we will show that the evidence presented in the referral is misleading, incomplete, and frequently inaccurate. We will show that the President did not obstruct justice with respect to gifts, the job search,

or the affidavit. And we will show that the President did not seek wrongfully to influence Ms. Currie's testimony.

Again, we will ask you to look at the real record, not the referral's version of the record. And the real record shows that the sworn testimony of Ms. Lewinsky, Ms. Currie and Mr. Jordan, far from incriminating the President, actually exonerates him. And yet their testimony, although crystal clear before the grand jury, is edited, modified, qualified, or ignored in the referral.

When it comes to allegations that the President abused his office, we will show that the President's assertions of executive privilege were perfectly proper and that the claims of attorney-client privilege were justified under the circumstances.

And when it comes to allegations that the President used the power of his office to mislead his aides, not, as one might think, for the purpose of protecting himself and his family, but, as alleged, to mislead the grand jury, we will show that false denials about an improper private relationship, whether those denials are made in private or before the entire world, simply do not constitute an abuse of office that justifies impeachment.

Finally, Mr. Chairman, before introducing the distinguished members of this panel, let me just point out that in the course of this impeachment inquiry the members of this committee have learned nothing new either about the Lewinsky matter or about any other matter warranting consideration in these proceedings except that the President has finally, if belatedly, been cleared on the charges concerning Whitewater, the file matter, and the travel office. There has been no new evidence and there are no new charges.

So I say to the members of the committee, if back in September when you received this referral, if back in October when you voted to conduct this inquiry, if back then you did not think that the referral justified impeaching President Clinton, there is no reason for you to think so today.

There can be no more solemn or awesome moment in the history of this Republic than when the Members of the House of Representatives contemplate returning an article of impeachment against the President of the United States. There can be no more soul-searching vote in the career of a Member of the House of Representatives than when he or she considers impeachment of the President of the United States. These are weighty issues and great moments of conscience and consequence. Please do not let the passion of partisan politics on either side blind your eyes to the truth of the law, the evidence, and above all, the national interest.

This first panel of witnesses is composed of a distinguished public servant and a group of eminent scholars who will testify about the history of impeachment and the constitutional standards that should govern impeachment.

The second panel of witnesses will bring the wisdom of hard-won experience—experience, Mr. Chairman, earned in this very room serving on this very committee under the leadership of that distinguished Chairman, Peter Rodino, whose portrait hangs on the wall before me. They will bring that wisdom to bear on the vital issue of what was abuse of power by a President in 1974 compared with

the allegations and the evidence of abuse of power by this President in 1998.

The third panel of witnesses will discuss how we should examine and evaluate the evidence that is before us with respect to the abuse of power and the fact-finding process. And then tomorrow, we will hear the testimony of a fourth group of witnesses, experienced lawyers in the criminal justice system who will shed light on the prosecutorial standards of bringing criminal cases of alleging perjury and obstruction of justice.

To close, tomorrow afternoon, Charles Ruff, Counsel to the President, will present the President's final defense to the committee and respond to questions.

On behalf of the President, I thank the committee for its time and its attention, and I now turn the microphone over to Mr. Katzenbach, the former Attorney General of the United States.

[The statement of Mr. Craig follows:]

STATEMENT OF GREGORY B. CRAIG
SPECIAL COUNSEL TO THE PRESIDENT
HOUSE COMMITTEE ON THE JUDICIARY
DECEMBER 8, 1998

Mr. Chairman, Congressman Conyers, Members of the Committee:

My name is Greg Craig, and I am Special Counsel to the President. First let me say that it is an honor as well as an obligation to appear before this Committee in defense of the President.

The purpose of my appearance is to describe --briefly and in general terms --how we plan to proceed with the presentation of the President's defense over the next two days.

The time has finally come for the President to make his case and to give his side of the story. Over the next two days, we will present to this Committee, to the Congress and to the country as a whole, a powerful case -- based on the facts already in the record and on the law -- a powerful case against the impeachment of this President.

During our presentation today and tomorrow, we will show -- from our history and our heritage, from any fair reading of the Constitution and from any fair sounding of our countrymen and women -- that nothing in this case justifies this Congress overturning a national election and removing our President from office.

As we begin this undertaking, I make only one plea to you -- and I hope it is not a futile one coming this late in the process. Open your mind. Open your heart. And focus on the record. As you sit there listening to me at this moment, you may already be determined to vote to approve some articles of impeachment against this President. That is your right and your duty if you believe the facts and the law justify such a vote. But there is a lot of conventional wisdom about this case that is just plain wrong, and if you are in fact disposed to vote for impeachment -- in the name of a justice that is fair and blind and impartial -- please do so only on the basis of the real record and on the real testimony, not on the basis of what someone else tells you is in the record.

By the close of tomorrow, all the world will see one simple and undeniable fact: Whatever there is in the record that shows that what the President did was wrong and blameworthy, there is nothing in the record -- in either the law or the facts -- that would justify his impeachment and removal from office.

In truth, I would not be fairly representing President Clinton if I did not convey to you his profound and powerful regret for what he has done. He has insisted and personally instructed his lawyers that no legalities or technicalities should be allowed to obscure the simple moral truth that his behavior in this matter was wrong. He misled his wife and family, his friends and

colleagues, and our Nation about the nature of his relationship with Ms. Lewinsky. The President wants everyone to know -- the Committee, the Congress and the country -- that he is genuinely sorry for the pain and the damage that he has caused, and for the wrongs he has committed.

But as an attorney I must caution this Committee to draw a sharpdistinction between immoral conduct and illegal acts. Just as no fancy language can obscure the simple fact that what the President did was morally wrong, no amount of rhetoric can change the legal reality that there are no grounds for impeachment. As surely as we all know that what he did is sinful, we also know it is not impeachable.

Let me assure the members of this Committee, the members of the House of Representatives and the American public of one thing: In the course of our presentation today and tomorrow, we will address the factual and evidentiary issues directly. We will draw this Committee's attention to evidence that tends to clear the President with respect to each of the various charges -- evidence that was left out of the Independent Counsel's Referral; evidence that has not been widely reported in the press; but evidence that reveals the weakness of the charges being brought against the President. And we are confident that, at the end of this presentation, you will agree that impeachment is neither right nor wise nor warranted.

When it comes to constitutional standards for impeachment as conceived by the Founding Fathers, we will show that the Constitution requires proof of official misconduct and abuse of high public office for the drastic remedy of impeachment to be appropriate.

When it comes to standards of proof that should apply to the evidence that is brought before this Committee, we will argue that this President should be considered innocent until proven guilty, and that he should be informed with particularity as to the facts and specifics of the misconduct that he is accused of -- especially when it comes to the allegations of perjury.

On those allegations, we will show that neither the law of perjury nor the facts of this case could sustain a criminal prosecution, much less impeachment.

Mr. Chairman, I am willing to concede that in the Jones deposition, the President's testimony was evasive, incomplete, misleading -- even maddening. But it was not perjury.

On the allegation of perjury before the grand jury -- which we all agree is the more serious offense -- please look at the real record, not the Referral's report of that record. Millions of Americans watched that testimony. They concluded, as I believe you too will find, that in fact the President admitted to an improper, inappropriate and intimate relationship with Ms. Lewinsky. He did not deny it -- he admitted it. Fair-minded Americans heard what the President said and knew what the President meant.

When it comes to allegations that the President -- with Ms. Lewinsky, Ms. Currie and Mr. Jordan -- obstructed justice, we will show that the evidence presented in the Referral is misleading, incomplete and frequently inaccurate. We will show that the President did not obstruct justice with respect to the gifts, the job search or the affidavit, and we will show the

President did not seek wrongfully to influence Ms. Currie's testimony. Again, we will ask you to look at the real record, not the Referral's version of the record. The real record shows that the sworn testimony of Ms. Lewinsky, Ms. Currie and Mr. Jordan -- far from incriminating the President --actually exonerates him. And yet their testimony, although crystal clear before the grand jury, is edited, modified, qualified, or ignored in the Referral.

When it comes to allegations that the President abused his office, we will show that the President's assertions of executive privilege were perfectly proper, and that the claims of attorney-client privilege were justified under the circumstances.

And when it comes to allegations that the President used the power of his office to mislead his aides, not, as one might think, for the purpose of protecting himself and his family, but allegedly to mislead the grand jury, we will show that false denials about an improper private relationship -- whether those denials are made in private or before the entire world -- do not constitute an abuse of office justifying impeachment.

Finally before introducing the distinguished members of this panel, let me just point out that in the course of this impeachment inquiry the Members of this Committee have learned nothing new either about the Lewinsky matter or about any other matter warranting consideration in these proceedings -- except that the President has finally if belatedly been cleared on the charges concerning Whitewater, the file matter and the travel office. There has been no new evidence, and there are no new charges. So I say to the Members of this Committee: If, back in September, when you received the Referral, or back in October when you voted to conduct this inquiry -- if back then you didn't think that the Referral justified impeaching President Clinton, there is no reason for you to think so today.

There can be no more solemn or awesome moment in the history of this Republic than when the Members of the House of Representatives contemplate returning an article of impeachment against a President of the United States. There can be no more soul-searching vote in the career of a Member of the House of Representatives than when he or she considers the impeachment of the President of the United States. These are weighty issues and great moments of conscience and consequence. Please do not let the passion of partisan politics -- on either side -- blind your eyes to the truth of the law, the evidence and above all the national interest.

The first panel of witnesses is composed of a distinguished public servant and a group of eminent scholars who will testify about the history of impeachment and of the constitutional standards that govern impeachment.

The second panel of witnesses will bring the wisdom of hard-won experience -- experience earned in this very room, serving on this very Committee under the leadership of that distinguished Chairman, Peter Rodino, whose portrait hangs on the wall before me -- they will bring that wisdom to bear on the vital issue of what is abuse of power by a President in 1974, compared with the allegations of abuse of power in 1998.

The third panel of witnesses will discuss how we should examine and evaluate the evidence before us --with respect to abuse of power, and the fact-gathering process.

And then tomorrow, we will hear the testimony of a fourth group of witnesses, experienced lawyers all, who will shed light on the prosecutorial standards for bringing criminal cases alleging perjury and obstruction of justice.

To close, Charles Ruff, Counsel to the President, will present the President's final defense to the Committee and respond to questions.

On behalf of the President, I thank the Committee for its time and attention.

Mr. ROGAN. Mr. Chairman, a parliamentary inquiry.

Chairman HYDE. The gentleman will state his parliamentary inquiry.

Mr. ROGAN. Mr. Chairman, will the written statements of the respective witnesses be provided to the members of the committee?

Chairman HYDE. That is a good question. I am not sure.

Mr. Craig, do you have a written statement?

Mr. CRAIG. This is my only written statement. I will be happy to copy it and distribute it among the members.

Chairman HYDE. Would one of our staff get Mr. Craig's statement—we can do that if you don't mind.

Jim, would you get the copy?

Mr. CRAIG. Pay no attention to my edits.

Chairman HYDE. Will the other witnesses have written statements that we can avail ourselves of? It is helpful for the record and for our edification.

Mr. Katzenbach.

TESTIMONY OF HONORABLE NICHOLAS KATZENBACH

Mr. KATZENBACH. I do, Mr. Chairman, but I would appreciate it if I could have the written statement until I have completed reading it.

Chairman HYDE. Well, that gives you a considerable advantage, but go ahead.

Mr. KATZENBACH. I think, with this committee, I need it, Mr. Chairman.

Chairman HYDE. Touche, touche.

Mr. KATZENBACH. Proceed?

Mr. Chairman and members of the committee, let me first say, Mr. Chairman, that I thought your introduction was very fulsome, and I appreciate it.

Chairman HYDE. Good.

Mr. KATZENBACH. I also appreciate the opportunity to testify before this once-familiar-to-me committee on the important constitutional question of impeachment of the President of the United States which is before this committee.

A great deal has been written and spoken on the subject of impeachment by the media, by Members of Congress, by the witnesses testifying before this committee, by academics and others—so much, in fact, that it seems to me we are in danger of losing sight of and understanding the fundamentals. So in the hope of simplifying a complex issue, I would like to begin with some fundamentals that are not, I believe, controversial.

The process of impeachment is simply to remove from office upon conviction, not to otherwise punish the person involved. The Constitution provides the legislative branch, the Congress, with this means of removing from office the President, the Vice President, and all civil officers upon conviction of treason, bribery, or other high crimes and misdemeanors. The threshold problem for the committee is, of course, to determine what constitutes high crimes and misdemeanors which would justify removal from office of an elected President.

The phrase, "high crimes and misdemeanors," is not a familiar one in modern American jurisprudence. Common law constituted a

category of political crimes against the state and neither "high crime" nor "high misdemeanor" have ever been terms used in the criminal law. In the United States, one of the founders, James Wilson, made essentially that point when he wrote that, quote, "Impeachments are confined to political characters, to political crimes and misdemeanors, to political punishments."

Or, as Justice Story observed, "Impeachment is a proceeding purely of a political nature. It is not so much designed to punish an offender as to secure the state against gross political misdemeanors. It touches neither his person nor his property, but simply divests him of his political capacity," end quote.

The problem which the Founders faced was how to adapt this process from a parliamentary system in which there was no separation of powers to one in which separation of powers was of great importance. In Great Britain, the impeachment process was aimed at officers appointed by the Crown in circumstances historically where the king himself could not be removed from office, except perhaps by revolution, such as Oliver Cromwell's. As the British system has evolved and the prime minister become essentially a legislatively elected official where he or she could be forced to a midterm election by a parliamentary vote of no confidence, impeachment has lost its punch. But in the United States where the President is elected for a fixed term of office different from the legislative terms, the Founders thought it essential to have some means of removing him or her before the expiration of his term if he is guilty of high crimes and misdemeanors.

And whatever that term may be found to mean, it is clear that the Founders intended it to be a limited power. Because in their debates, the Founders dealt virtually exclusively with the President. Civil officers, as you know, were added later in the process. And because for most of the Convention the impeachment clause was confined to treason and bribery, they equated all high crimes and misdemeanors with, in the debates, great offenses when that term was added.

Now, I appreciate this brief history does not resolve in any decisive fashion the threshold problem the committee is facing in determining what conduct by a President justifies impeachment. But I do think it tends to provide some parameters which should be useful and which should not, at least when phrased generally, be very controversial.

It is a serious matter for a Congress to remove a President who has been elected in a democratic process for a term of 4 years, raising fundamental issues about the separation of powers. If that power is not limited, as it clearly is, then any President could be removed if a sufficient number of Members of the House and Senate simply disagreed with his policies, thus converting impeachment into a parliamentary vote of no confidence. Whatever its merits, that is not our constitutional system.

Because impeachment is a political process, it has always had a strong partisan quality element and strong partisan motivation. It still does and in a democratic political system probably always will. But that fact simply increases the risk of subverting the constitutional system.

To appreciate those risks, you need only consider the impeachment of Andrew Johnson, a President who came close to being convicted in a process as unfair as it was partisan, which should be an object lesson for all.

The job of this committee is to weigh the facts of President Clinton's alleged conduct against the limiting provision of the Constitution, "other high crimes and misdemeanors." The job may seemingly be made more difficult because of the application of that term to judges as well as the President and Vice President. But judges are appointed during good behavior, a term which significantly does not apply to limit the 4-year term of the President. By removing one of several hundred Federal judges from office doesn't have the same constitutional significance as removing the President. Even removal of a Supreme Court Justice would raise different considerations from removing the President where the standard is far higher than for judges, as Congressman—as he was then—Gerald Ford recognized when he proposed impeachment of Justice Douglas. To come to the same conclusions on the same facts in such different situations would make a mockery of the Constitution and the intentions of the Founding Fathers.

Only if one takes the view articulated by Senator Fessenden in the Johnson impeachment, that impeachment is a power, quote, "to be exercised with extreme caution in extreme cases," can the same standards apply to Presidents and judges. One simply needs to take into consideration the different roles and responsibilities of the officers involved.

The proper way to resolve these problems which are made more difficult by unfamiliar language than they are by clear purpose, is simply to return to the reasons for the provision. If we think of it in political, not partisan, but political terms impeachment is designed to provide the legislative branch with a method of removing a person from office whose conduct is so egregious as to justify reversing the process by which he was appointed or elected.

It seems to me clear that in our system of separation of powers, this cannot mean simply disagreement, however sincere, however strongly felt, with either the decisions of judges or the policies of the President. It must be some conduct, some acts which are so serious as to bring into question the capacity of the person involved to carry out his role with the confidence of the public.

If I am correct—and this seems to me the fundamental question—it is simply whether the President has done something which has destroyed public confidence in his ability to continue in that office. If the public does not believe that what he has done seriously affects his ability to perform his public duties as President, should the committee conclude that his acts have destroyed public confidence essential to that office? The only question, after all, is removal from office of an elected official. Is it proper? Is it the proper role of a partisan majority in Congress to conclude that the offenses are so serious as to warrant removal, even if the public believes otherwise? I don't find the arguments for this position persuasive.

First, there is the argument that perjury—and for the purposes of this analysis, I take it to be correct—is always so serious, irrespective of circumstance, as to warrant removal of a President. I

suggest that some perjury is more serious than others—if, for example, the President were to swear falsely that he had no knowledge of a CIA plot to assassinate the Speaker.

Chairman HYDE. Mr. Katzenbach, could you wind up? Because your 10 minutes has expired.

Mr. KATZENBACH. Are you sure, Mr. Chairman?

Chairman HYDE. Yes, that big red light——

Mr. KATZENBACH. Could I have 1 more minute?

Chairman HYDE. Surely, but I just wanted you to know.

Mr. KATZENBACH. Okay. The point is simply that all perjury may be reprehensible, but it is still not of similar import when the ultimate issue is public confidence to perform the duties of office.

If the argument is made that the public's view as to what does or does not constitute a cause for impeachment is irrelevant because of the duty of the House to determine whether or not the President has committed a high crime or misdemeanor, I would agree if it were a criminal case. I would agree if the President was extremely unpopular, because I could not then separate that popularity from the acts causing the impeachment. In those circumstances, the Congress would have a particularly difficult job.

But this Congress and this committee are faced with a totally new impeachment problem. Due to the existence of the Independent Counsel, the facts are publicly known, the areas of factual dispute relatively minor. Members of Congress have expressed concern over the evils of perjury and other alleged offenses and their serious nature. For whatever reason, the public remains unpersuaded.

Finally, I cannot see any constitutional basis for impeachment. To remove a popularly elected President requires, in my judgment, showing a great offense against the public sufficient to bring into question of reasonable people whether or not he should be removed.

The threshold constitutional question, Mr. Chairman, for each Member of Congress is that he—which he must decide, or her—can be simply stated: Is the conduct of the President such that he should be removed from office because, as a consequence of that conduct, the public no longer has confidence that he can perform the duties of that high office.

Remember, impeachment is a political process, a political remedy to preserve confidence in that political process, not to punish a perpetrator.

Thank you.

Chairman HYDE. Thank you very much, Mr. Katzenbach.

[The statement of Mr. Katzenbach follows:]

PREPARED STATEMENT OF HON. NICHOLAS KATZENBACH

Mr. Chairman and Members of the Committee: My name is Nicholas Katzenbach. I am a retired Senior Vice-President and Chief Legal Officer of IBM and a former Attorney General of the United States and Under Secretary of State now semi-retired from the practice of law in New Jersey. I appreciate the opportunity to testify before this once-familiar Committee on the important Cosntitutional question of Impeachment of the President of the United States.

A great deal has been written and spoken on the subject of impeachment by the media, by Members of Congress, witnesses testifying before the Committee, academics and others—so much, in fact, that it seems to me we are in danger of losing sight and understanding of the fundamentals. So, in the hope of simplifying a complex issue, I'd like to begin with some fundamentals that are not, I believe, controversial.

The process of impeachment is simply to remove from office upon conviction—not to otherwise punish the person involved. The Constitution provides the legislative branch—the Congress—with this means of removing from office the President, Vice-President and all civil officers upon conviction of treason, bribery, or other high crimes and misdemeanors. The threshold problem for the Committee and the House is, of course, to determine what constitutes the "high crimes and misdemeanors" which would justify removal from office of an elected President. The phrase "high crimes and misdemeanors" is not a familiar one in modern jurisprudence.

At common law it constituted a category of political crimes against the state, and neither "high crime" or "high misdemeanor" were ever terms used in criminal law. In the United States one of the Founders, James Wilson, made essentially the same point when he wrote that "impeachments are confined to political characters, to political crimes and misdemeanors, and to political punishments". Or, as Justice Story observed, impeachment is "a proceeding purely of a political nature. It is not so much designed to punish an offender as to secure the state against gross political misdemeanors. It touches neither his person nor his property, but simply divests him of his political capacity".

The problem which the Founders faced was how to adapt this process from a Parliamentary system in which there was no separation of powers to one in which Separation of Powers was of great importance. In Great Britain the impeachment process was aimed at officers appointed by the Crown in circumstances where the King himself could not be removed from office except by a revolution such as Oliver Cromwell's. As the British system evolved and the Prime Minister became essentially a legislatively elected official where he or she could be forced to a mid-term election by a parliamentary vote of no confidence, impeachment lost its punch.

But in the United States, where the President is elected for a fixed term of office different from the legislative terms, the Founders thought it essential to have some means of removing him or her before the expiration of his term if he was guilty of "high crimes and misdemeanors". And whatever that term may be found to mean, it is clear that the Founders intended it to be a limited power. Because in their debates the Founders dealt virtually exclusively with the President (civil officers were added late in the process), and because for most of the Convention the impeachment clause was confined to treason and bribery, they equated "other high crimes and misdemeanors" with "great offenses" when that term was added.

I appreciate that this brief history does not revolve in any decisive fashion the threshold problem the Committee is facing in determining what conduct by a President justifies impeachment. But I do think it tends to provide some parameters which should be helpful and which should not, when phrased generally, be very controversial. It is a serious matter for the Congress to remove a President who has been elected in a democratic process for a term of four years, raising fundamental issues about the Separation of Powers. If that power is not limited—as it clearly is—then any President could be removed if a sufficient number of Members of the House and Senate simply disagreed with his policies thus converting impeachment into a Parliamentary vote of no confidence. Whatever its merits, that is not our Constitutional system.

Because impeacement is a political process it has always had a strong partisan political element and motivation. It still does and in a democratic political system probably always will. But that fact obviously increases the risk of subverting the Constitutional system. To appreciate those risks one need only review the impeachment of President Andrew Johnson, an unpopular President who came close to being convicted in a process as unfair as it was partisan and an object lesson for all.

The job of this Committee is to weigh the facts of President Clinton's alleged conduct against the limiting provision of the Constitution—"other high crimes and misdemeanors". The job may seemingly be made more difficult because of the application of that term to judges as well as the President and Vice-President: judges are appointed during "good behavior", a term which significantly does not apply to limit the four year term of the President. But removing one of several hundred federal judges from office does not have the same Constitutional significance as removing the President; even removal of a Supreme Court Justice would raise different considerations than removing the President where the standard is far higher than for judges, as Congressman (as he then was) Gerald Ford recognized when he proposed the impeachment of Justice William Douglas.

To come to the same conclusions on the same facts in such different situations would make a mockery of the Constitution and the intention of the Founding Fathers. Only if one takes the view articulated by Senator Fessenden in the Johnson impeachment that impeachment is a power "to be exercised with extreme caution" in "extreme cases" can the same standard apply to both Presidents and judges. One

simply needs to take into consideration the different roles and responsibilities of the offices involved.

The proper way to resolve these problems—which are made more difficult by unfamiliar language than by clear purpose—is simply to return to the reasons for the provision. If we think of it in political—not partisan—terms, impeachment is designed to provide the legislative branch with a method of removing a person from office whose conduct is so egregious as to justify reversing the process by which he was appointed or elected. It seems clear to me that in our system of Separation of Powers this cannot mean simply disagreement—however sincere and however strongly felt—with either the decisions of judges or the policies of Presidents. It must be some conduct—some acts—which are so serious as to bring into question the capacity of the person involved to carry out his role with the confidence of the public.

If I am correct, then it seems clear to me that the fundamental question is simply whether the President has done something which has destroyed the public's confidence in his ability to continue in office. If the public does not believe that what he has done seriously affects his ability to perform his or her public duties as President, should the Committee conclude that his acts have destroyed the public confidence essential to that office? The only question, after all, is removal from office of an elected official. Is it the proper role of a partisan majority in Congress to conclude that the offenses are so serious as to warrant removal even if the public believes otherwise?

I do not find the arguments for this position persuasive in the slightest. First, there is the argument that perjury (and for purposes of analysis I take this as correct) is always so serious (irrespective of circumstance) as to warrant removal of a President. I suggest that some perjury is more serious than others: If, for example, the President were to swear falsely that he had no knowledge of a CIA plot to assassinate the Speaker, that would be pretty serious—and I have no doubt the public would regard it as such. Indeed, if he simply told the public, not under oath, that he had no knowledge of such serious misconduct when he did have knowledge, I think that would raise serious questions of impeachability. My point is simply that all perjury may be reprehensible, but it is still not of similar import when the ultimate issue is public confidence to perform the duties of office. Isn't it clear that despite the strongly held views of some, the public does not put perjury about sexual relations in the category of "high crimes or misdemeanors"?

Second, the argument is made that the public's view as to what does or does not constitute a cause for impeachment is irrelevant because of the duty of the House to determine whether or not the President has committed a "high crime or misdemeanor". If this were a criminal trial, I would agree. If the President were extremely unpopular, as was Andrew Johnson, I would agree—simply because I would be unable to separate dislike for the President based on unpopular policies from lack of confidence based on "high crimes or misdemeanors". A public that does not like the President is more likely to find high crimes and misdemeanors whatever the facts. In those circumstances the Congress has a particularly difficult and demanding task of being sure that its partisan feelings and those of the public are not subverting the Constitutional standard; Congress must be sure that there has been a loss of confidence because of the President's personal behavior and not his policies. From the retrospective of history one cannot but admire those Senators in the Johnson impeachment trial who, despite political affiliation or interest, had the courage to see that Constitutional distinction and who voted to acquit because, whatever the political feeling, the Constitutional standard had not been met.

This Committee and this Congress are also faced with a totally new impeachment problem. Due to the existence of the Independent Counsel the facts are publicly known and the areas of factual dispute relatively minor. Members of Congress have expressed concern over the evils of perjury and other alleged offenses and their serious nature. For whatever reason, the public remains unpersuaded. It continues, in the recent election and in the polls, to express confidence in the President's ability to carry out his official responsibilities. In those circumstances it is difficult for me to see any basis for his removal other than the obviously partisan—however sincere—views of a putative majority.

Frankly, I cannot see any Constitutional basis for impeachment. To remove a popularly elected President requires, in my judgment, a showing of "great offenses" against the public weal sufficient to bring into question in the minds of reasonable people the capacity of the incumbent to continue to govern in a democracy with public support. If those "great offenses" are known, I have no doubt the public will appreciate their serious nature and react accordingly. Today the public knows all the facts and does not regard them as of sufficient importance to justify impeachment. In these unprecedented circumstances a contrary finding by the Committee would

appear to be simply an act of political partisanship, not adherence to the Constitution. That would be most unfortunate and most destructive of our Constitutional Separation of Powers.

Thank you.

Chairman HYDE. Professor Bruce Ackerman of Yale.

Mr. ACKERMAN. I think it is Mr. Wilentz.

Chairman HYDE. All right. I think we have had a substitution temporarily. Professor Sean Wilentz of Princeton.

Professor WILENTZ. Turn the switch on.

TESTIMONY OF SEAN WILENTZ

Mr. WILENTZ. There it is, okay. Wilentz in for Ackerman.

Mr. Chairman and members of the Judiciary Committee, it is a high honor to address you today on the grave and momentous matter of presidential impeachment. Although I appear at invitation of the White House, I wish to make it clear from the start that I have no intention of defending the President over his confessed and alleged misdeeds. Lawyers with a far greater familiarity with the evidence than I are far better equipped to do that. Certainly I do not think that the President is blameless in these matters, something that I have noted many times over the years in my writings.

Instead, I wish to defend the institution of the presidency, the Constitution, and the rule of law from what I see as the attacks upon them that have accompanied the continuing inquiry into the President's misconduct. In time, we will learn how much these attacks have been calculated and how much they have been unwitting. Either way, they are extremely dangerous.

It is no exaggeration to say that upon this impeachment inquiry, as upon all presidential impeachment inquiries, hinges the fate of our American political institutions. It is that important. As a historian, it is clear to me that the impeachment of President Clinton would do great damage to those institutions and to the rule of law, much greater damage than the crimes of which President Clinton has been accused.

More important, it is clear to me that any Representative who votes in favor of impeachment, but who is not absolutely convinced that the President may have committed impeachable offenses—not merely crimes or misdemeanors, but high crimes or misdemeanors—will be fairly accused of gross dereliction of duty and earn the condemnation of history.

I would like to address three basic points of historical relevance: the grounds for impeachment as envisaged by the framers of the Constitution and our understanding of them, the dangers of politicizing the impeachment process, and the relation between impeachment and the rule of law.

First, regarding the framers, the scholarly testimony on November 9th before the subcommittee regarding the Constitution showed—alas, at mind-numbing length—that there is disagreement over what constitutes grounds for presidential impeachment as envisaged by the framers. Yet, the testimony also showed that there is substantial common ground. Above all, the scholars agreed that not all criminal acts are necessarily impeachable acts. Only, "treason, bribery and other high crimes and misdemeanors" committed, in George Mason's explicit, original language, "against the state," would seem to qualify, at least if we are to go by what the framers

actually said and wrote. Or, according to James Wilson of Pennsylvania, impeachment is restricted to "political characters, to political crimes and misdemeanors, and to political punishments."

Now, a great deal of the disagreement among historians stems from a small but fateful decision taken by the Constitutional Convention's Committee on Style. Before the Constitution reached that committee, Mason's original wording on impeachment was changed from "against the state" to "high crimes and misdemeanors against the United States." The committee was charged with polishing the document's language, but with instructions that the meaning not be changed at all. Yet by removing in article 1, section 4, the words "against the United States," the committee created a Pandora's box which we have opened 211 years later.

The absence of the wording "against the state" or "against the United States" in the final document has persuaded some historians and constitutional scholars that the Constitution embraces all sorts of private crimes as impeachable. Yet many, if not most American historians, including the nearly 500 who have now endorsed the widely publicized statement imploring the impeachment drive, hold to the view that Mason's wording and Wilson's observation best express the letter and the spirit of what the framers had in mind. By that standard, the current charges against President Clinton do not, we American historians believe, rise to the level of impeachable offenses.

As further historical evidence, I would point to the fact that the only other occasions when presidential impeachment was pursued, against Presidents Andrew Johnson and Richard Nixon, plainly involved allegations of grievous public crimes that directly assaulted our political system.

Another pivotal piece of evidence has to do with the Nixon impeachment. In 1974, the Judiciary Committee declined to approve a bill of impeachment, an article of impeachment connected to serious allegations that President Nixon had defrauded a Federal agency, the Internal Revenue Service.

Now, without question, an occasion could arise when it would be necessary to expand on the framers' language to cover circumstances they may never have contemplated, including truly monstrous private crimes. I would hope, for example, that any President accused of murder, even in the most private circumstances, would be impeached and removed from office. But not even the President's harshest critics, as far as I know, have claimed that the current allegations are on a par with murder.

Various Representatives, scholars, and commentators have offered technically plausible, but I think deeply mistaken and misleading arguments, contending that the allegations against President Clinton rise to an impeachable standard under the definitions of crimes "against the state." There has been talk of a concerted attack on one of the coordinate branches of government, of a calculated presidential abuse of power, namely, that he raised issues of executive privilege and that he lied to his aides. But these assertions rightly sound overwrought, exaggerated, and suspicious to ordinary Americans, let alone to professional historians, when matched against the facts of the case.

Similar magisterial language was used in the impeachment proceedings against President Johnson and had impact in the Congress. Johnson too, after all, had violated a Federal law much more definitively than President Clinton has. Since then, though, historians have looked behind the language at the actual facts of the case, as well as at the political context of the time, and in general they have concluded that the impeachment effort against Johnson was a drastic departure from what the framers intended, one that badly weakened the presidency for decades. That is the reason why very few of us can remember the names of all those presidents between Ulysses S. Grant and Theodore Roosevelt.

So, too, later generations of historians will judge these proceedings. I strongly believe that the weight of the evidence runs counter to impeachment. What each of you on the committee and your fellow Members of the House must decide, each for him or herself, is whether the actual facts alleged against the President, the actual facts and not the sonorous formal charges, truly rise to the level of impeachable offenses. If you believe they do rise to that level, you will vote for impeachment and take your risks at going down in history with the zealots and the fanatics. If you understand that the charges do not rise to the level of impeachment, or if you are at all unsure, and yet you vote in favor of impeachment anyway for some other reason, history will track you down and condemn you for your cravenness. Alternatively, you could muster the courage of your convictions. The choice is yours.

Second, on impeachment and politicization, many commentators—including Attorney General Katzenbach—have noted correctly that presidential impeachment is, strictly speaking, a political and not a judicial matter. Yet there is all the difference in the world between a political procedure and a politicized one. A political proceeding is a deliberative, bipartisan, evenhanded effort to assess possible political offenses under the Constitution. A politicized procedure, however, overlooks constitutional standards and heeds other considerations, be they political favors, anger at the President or pressure from party leaders.

On the basis of recent press reports, I fear that these proceedings are on the brink of becoming irretrievably politicized, more so than even the notorious drive to remove Andrew Johnson from office 130 years ago.

I would like to be able to share with you the story of that impeachment of Johnson and its relevance to our current distempers. The light has, however, turned orange, and I don't have much time, so I will skip over that and perhaps we will be able to do that in questioning.

The point that I wanted to make is that it seems to me that, unlike then, when Members of the House of Representatives were firmly convinced that President Johnson had committed a high misdemeanor, today it seems that other considerations are coming into play, that perhaps something else is going on.

Indeed, compared to 1868, a perverse logic has taken hold. Some have said that we should impeach a President because we do not think the Senate will remove them. This perverted logic turns the impeachment vote into a thoroughly politicized and reckless move.

I see the red light, Mr. Chairman, and I will wrap up.

Some would have us forget about constitutional standards and duties and do the short-term political thing, sailing the ship of state into dangerous waters uncharted in this century. Such willingness to pass the buck on so grave and indelible a matter as impeachment is a feeble evasion of responsibility and a degradation of conscience.

Finally, on the question of rule of law, what I say in my written statement is basically that it is a greater threat to the rule of law to actually go ahead with this impeachment than not to go ahead with this impeachment. The argument that somehow allowing the President to get away with suspected perjury and obstruction of justice will countenance an irreparable tear in the seamless web of American justice, that if we impeach the President the rule of law will be vindicated, if only in a symbolic way, proving firstly that no American is above the law and that the ladder of the law has no top and no bottom—this argument, I believe, is nonsense logically and historically, with all due respect. Rather, I believe—and we can talk about this later on—the impeachment process itself poses a far greater risk to the rule of law.

A final comment. I began by discussing President Clinton's accountability for the current impeachment mess. By equivocating before the American people and before a Federal grand jury, not to mention before his family and friends, he has disgraced the presidency and badly scarred his reputation. He has apologized and asked for forgiveness.

But now, as mandated by the Constitution, the matter rests with you, the Members of the House of Representatives. You may decide as a body to go through with impeachment, disregarding the letter as well as the spirit of the Constitution, defying the deliberate judgment of the people whom you are supposed to represent, and in some cases deciding to do so out of anger and expedience.

But if you decide to do this, you will have done far more to subvert respect for the framers, for representative government, and for the rule of law than any crime that has been alleged against President Clinton, and your reputations will be darkened for as long as there are Americans who can tell the difference between the rule of law and the rule of politics.

Chairman HYDE. Thank you, Professor, very much.

[The statement of Mr. Wilentz follows:]

STATEMENT ON IMPEACHMENT OFFERED IN CONJUNCTION WITH TESTIMONY BEFORE THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES DECEMBER 8, 1998

Sean Wilentz
Dayton-Stockton Professor of History and
Director of the Program in American Studies
Princeton University

Mr. Chairman and Members of the Judiciary Committee:

It is a high honor to address you today on the grave and momentous matter of presidential impeachment.

Although I appear at the invitation of the White House, I wish to make it clear from the start that I have no intention of defending the President over his confessed and alleged misdeeds. Lawyers with a far greater familiarity with the evidence than I are far better equipped to do that. Certainly, I do not think that the President is blameless in these matters, as I have said over the years.

Although I have found a great deal to praise about President Clinton's performance since 1993, I have also found some disturbing things in the record. For example, in an article regarding the Whitewater matter written in May 1996 – a year and a half before Monica Lewinsky became a household name – I criticized the President for his occasional impulsiveness, his "imprudence bordering on recklessness," as well as his tendency to respond to danger by trying "to charm the danger away."[1] It does not take a Ph.D. to see how that pattern of imprudence and deviousness has played itself out in the Lewinsky matter. And for that, the President has no one to blame but himself.

Instead, I wish to defend the institution of the Presidency, the Constitution, and the rule of law from what I see as the attacks upon them that have accompanied the continuing inquiry into the President's misconduct. In time we will learn how much these

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[1] "Flirting With Disaster," *The New Republic*, May 20, 1996. I should note that although this essay criticized the President, it also concluded that the then-available evidence in the Whitewater matter, which was copious, deserved "to be placed not before a jury, or a special investigator, or a Senate committee, but before the citizenry," in the then-forthcoming national election (p. 39). I believe that the recent testimony of the Independent Counsel, which has apparently exonerated the President of impeachable offenses in the Whitewater matter, vindicates that conclusion.

attacks have been calculated and how much they have been unwitting. Either way, they are extremely dangerous.

It is no exaggeration to say that upon this impeachment inquiry, as upon all presidential impeachment inquiries, hinges the fate of our American political institutions. *It is that important.* As a historian, it is clear to me that the impeachment of President Clinton would do great damage to those institutions and to the rule of law -- much greater damage than the crimes of which President Clinton has been accused. More important, it is clear to me that any Representative who votes in favor of impeachment but who is not absolutely convinced that the President may have committed impeachable offenses – not merely crimes or misdemeanors, but high crimes and misdemeanors – will be fairly accused of gross dereliction of duty and earn the condemnation of history.

Let me address three basic points of historical relevance: The grounds for impeachment as envisaged by the Framers of the Constitution and our understanding of them; the dangers of politicizing and thus trivializing the impeachment process; and the relation between impeachment and the rule of law.

Impeachment, the Framers, and Us

The scholarly testimony on November 9 before the sub-committee regarding the Constitution showed, at mind-numbing length, that there is disagreement over what constitutes grounds for presidential impeachment, as envisaged by the Framers. Yet the testimony also showed that there is substantial common ground. Above all, the scholars agreed that not all criminal acts are necessarily impeachable acts. Only "treason, bribery, and other high crimes and misdemeanors," committed, in George Mason's explicit original language "against the state," would seem to qualify, at least if we are to go by what the Framers actually said and wrote. Or, according to James Wilson of Pennsylvania (generally credited as second in importance only the James Madison as the man responsible for the Constitution's framing), impeachment is restricted to "political characters, to political crimes and misdemeanors, and to political punishments."[2]

A great deal of the disagreement stems from a small but fateful decision made by the Constitutional Convention's Committee on Style. Before the Constitution reached that committee, Mason's original wording was changed from "crimes against the state" to "crimes against the United States." The committee was charged with polishing the document's language, but with instructions that the meaning not be changed at all. By removing, in Article I, Section 4, the words "against the United States" the Committee created a Pandora's box, which we have opened two hundred and eleven years later.

There can be little doubt that the Committee did not think it has made a substantial

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[2]Max Farrand, ed., *The Records of the Federal Convention of 1787* (revised edition, 4 volumes, New Haven and London, 1966), II, 550; Robert Green McCloskey, ed., *The Works of James Wilson* (2 volumes, Cambridge, Mass., 1967), I, 426.

change. As Gary McDowell, one of the scholars called by the majority, has testified, the standards for impeachment were "obviously clear and unequivocal to the founders." Discussions in the Convention over the matter had revolved around grave presidential abuses of office that threatened the core of the new political system. Had Mason's original language or the language about "crimes against the United States" been kept, there would be little doubt that impeachable offenses would be limited to, in the words of another scholar called by the majority, Forrest McDonald, "actions taken in the performance of public duties."[3]

The absence of that wording in the final document has persuaded some historians and constitutional scholars that the Constitution's phrase "high crimes and misdemeanors" embraces all sorts of private crimes. Yet many if not most American historians -- including the nearly 500 who have now endorsed the widely-publicized statement deploring this impeachment drive, a statement I helped to draft and circulate – hold to the view that Mason's wording and Wilson's observation best express the letter and the spirit of what the Framers had in mind. By that standard, the current charges against President Clinton do not, we American historians believe, rise to the level of impeachable offenses.

As further historical evidence, I would point to the fact that the only other occasions when presidential impeachment was pursued, against Presidents Andrew Johnson and Richard Nixon, plainly involved allegations of grievous public crimes that directly assaulted our political system. The proceedings against Nixon led to his resignation because there was a broad bipartisan agreement that he had directly undertaken such assaults. The charges against Johnson eventually failed because there was just enough bi-partisan agreement in the Senate that they ought to fail. Today, however, we are faced with, a deeper division, ominously along party lines, about whether the allegations against President Clinton even come close to being impeachable. At least as much in the Johnson case, the current proceedings have evoked fierce and uncompromising partisan responses – precisely what Alexander Hamilton and the other authors of the Federalist Papers most feared would arise from possible abuses of the impeachment power.

Another pivotal piece of evidence, made familiar by numerous commentators, has to do with the Nixon impeachment. In 1974, the Judiciary Committee declined to approve a bill of impeachment connected to serious allegations that President Nixon had defrauded a federal agency, the Internal Revenue Service. The judgment was that, because the allegations did not directly concern Nixon's public duties, they had no relevance to impeachment.

Without question, an occasion could arise when it would be necessary to expand on the Framers' language, to cover circumstances they may have never contemplated, including truly monstrous private crimes. I would hope, for example, that any President accused of murder, even in the most private of circumstances, would be impeached and

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[3] Gary McDowell, "High Crimes and Misdemeanors: Recovering the Intentions of the Founders;- " and Forrest McDonald, "Written Statement," both delivered as testimony to the Sub-Committee on the Constitution, Committee on the Judiciary, House of Representatives, November 9, 1998.

removed from office.[4] But not even the President's harshest critics, as far as I know, have claimed that the current allegations are on a par with murder.

Various Representatives, scholars, and commentators have offered technically plausible (though, I think, deeply mistaken and misleading) arguments, contending that the allegations against President Clinton rise to an impeachable standard under the definition of crimes against the state. There has been talk of a concerted attack on one of the coordinate branches of government, of a calculated presidential abuse of power (because President Clinton raised issues of executive privileges and because he lied to his aides), and of how perjury by a President, regardless of context, is a fundamental breach of trust that must be punished by impeachment and removal from office. But these assertions rightly sound overwrought, exaggerated, and suspicious to most ordinary Americans, let alone professional historians, when matched against the facts of the case.

Similar magisterial language was used in the impeachment proceedings against President Johnson and had considerable impact inside the Congress. (Johnson too, after all, violated a federal law, much more definitively than President Clinton has.) Since then, though, historians have looked behind the language at the actual facts of the case, as well at the political context of the time. And in general they have concluded that the impeachment effort against Johnson was a drastic departure from what the Framers intended, one that badly weakened the presidency for decades. Johnson's impeachment helped pave the way for the Gilded Age, an age of political sordidness and unremarkable chief executives. How many of us can even remember the names of all those Presidents from Ulysses S. Grant to Theodore Roosevelt?

So, too, later generations of historians will judge these proceedings. I strongly believe that the weight of the evidence runs counter to impeachment. What each of you on the Committee, and your fellow Members of the House, must decide, each for him or herself, is whether the actual facts alleged against the President – the actual facts and not the sonorous formal charges – truly rise to the level of impeachable offenses. If you believe they do rise to that level, you will vote in favor of impeachment and take your risks at going down in history with the zealots and the fanatics. If you understand that the charges do not rise to the level of impeachment, or if you are at all unsure, and yet you vote in favor of impeachment anyway, for some other reason, history will track you down and condemn you for your cravenness. Alternatively, you could muster the courage of your convictions. The choice is yours.

2. Impeachment and Politics

Many commentators have noted, correctly, that presidential impeachment is strictly

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[4] Although, incredibly, the most pertinent historical case here, involving Vice-President Aaron Burr's famous duel with Alexander Hamilton, seems to point in the other direction. Burr was not impeached, even though a Bergen County, New Jersey, court indicted him for murder. See my article, "It Depends on How You Define 'Murder,'" *Los Angeles Times*, November 22, 1998, p. M2.

speaking a political and not a judicial matter. Many of the standard judicial protocols and procedures do not apply in a presidential impeachment proceeding. Yet there is all the difference in the world between a political procedure and a politicized one. A political proceeding is a deliberative, bipartisan, even-handed effort to assess possible political offenses under the Constitution. A politicized procedure, however, overlooks Constitutional standards and heeds other considerations, be they political favors, anger at the President, or pressure from party leaders.

On the basis of recent press reports, I fear that these proceedings are on the brink of becoming irretrievably politicized, more so even than the notorious drive to remove Andrew Johnson from office one hundred and thirty years ago. A quick review of the Johnson affair, in fact, makes our forebears look much better than we do.

Recall the situation.[5] After succeeding the assassinated President Abraham Lincoln, President Johnson did his utmost to thwart congressional efforts to resolve the issues of the Civil War. Johnson vetoed every law intended to protect the freedom and rights of the freed slaves. Congress overrode those vetoes, but Johnson impeded their enforcement – actions that encouraged lethal reprisals in the South against white Unionists and ex-slaves.

In the midterm elections of 1866, Republicans routed the President and his supporters, gaining a three-fourths majority in the next House and Senate. Yet Johnson remained defiant, vetoing more bills and firing key administrators.

Many overzealous Republicans believed that Johnson's actions amounted to high crimes and misdemeanors, and in 1867, the House twice considered impeachment resolutions. But moderate Republicans defeated them. Then in February 1868 Johnson deliberately disobeyed the recently-passed Tenure of Office Act, designed to curtail the President's power, in part because he wanted to test the act in the courts. It was too much for congressional Republicans, moderates and Radicals alike, and on February 24, 1868, the House impeached Johnson by a margin of almost three to one.

The impeachment was a profoundly serious step. It had nothing to do with the President's private life, or with possibly perjurious deceptions about his private life, but with the political fate of the nation. Moderates had changed their minds and voted for impeachment because they truly believed that the President had committed a high misdemeanor by defying the Tenure of Office Act – a law that had been approved by a three-fourths majority of in Congress, a majority with a huge mandate from the voters. They fully expected the Senate to convict.

In contrast, it seems that today, some Representatives who do not believe that President Clinton has committed an impeachable offense are nevertheless slouching toward a vote for impeachment, under intense political pressure. We hear that some Members think that Clinton must be punished in some way for his legalistic posture, most recently displayed in his responses to the questionnaire sent him by the Chairman of this Committee. We hear that the Majority Whip, Mr. DeLay, is doing his utmost to thwart

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[5] The following paragraphs owe a great deal to conversations with my Princeton colleague, James M. McPherson, on 1868 and 1998, and with his kind permission I have borrowed from his ideas and phrases.

all efforts to censure the president and to insist upon the President's impeachment. We hear that many Members consider the House's action a free vote, since they believe that Clinton's removal from office by the Senate is highly unlikely.

Compared to 1868, the logic is perverse: Impeach a President because you think he will *not* be removed. And this perverted logic turns the impeachment vote into a thoroughly politicized and reckless move: Forget about Constitutional standards and duties and do the short-term political thing, sailing the ship of state into dangerous waters uncharted in this century. Such willingness to pass the buck on so grave and indelible matter as impeachment is a feeble evasion of responsibility and a degradation of conscience.

One of the "profiles in courage" in John F. Kennedy's book of that title was connected to the Johnson impeachment in 1868. It was the story of Edmund Ross who was one of the seven Republicans who voted against Andrew Johnson's conviction. The President escaped conviction by a single vote. Which of those Members today, vacillating over impeachment because of political considerations or sheer frustration with the President, and more than happy to let the Senate take over, could be the subjects for a profile in courage? Profile in cowardice is more like it. Courage or cowardice: Again, the choice is yours.

Impeachment and the Rule of Law

Amid these proceedings, various Committee Members, most eloquently your chairman, have spoken about the need to preserve, protect and defend the American rule of law. No one who has heard those remarks can fail to be alarmed by the vision of a breakdown of the nation's fundamental legal framework, a vision exemplified by the knock at the door at three a.m. But the question before us is this: which represents the greater threat to the rule of law, the impeachment of President Clinton or the refusal to impeach him?

Those who support impeachment naturally think that the latter, refusing to impeach, is the greater threat. Allow a President to get away with suspected perjury and obstruction of justice, and, supposedly, Congress will countenance an irreparable tear in the seamless web of American justice. Impeach the President and, supposedly, the rule of law will be vindicated, if only in a symbolic way, proving forcefully that no American, not even the president, is above the law, and that the ladder of the law has no top and no bottom.

Yet this argument is nonsense, logically and historically. As virtually every commentator before you has noted, American impeachment procedures have never been designed to try and to punish officeholders for criminal behavior. That is what trials before our courts are for -- local, state, and federal. If anyone were to claim that, short of a pardon, President Clinton is forever immune from prosecution, that would indeed represent a breakdown in the rule of law. But no one, not even among the President's staunchest supporters, has come close to suggesting as much. For his alleged crimes and misdemeanors, President Clinton remains highly vulnerable to any number of legal actions. He could be tried by a jury of his peers in a court of law once he leaves office. He could be sanctioned by Judge Susan Weber Wright if she holds that he gave false and

misleading evidence in his deposition in the Paula Jones case. He could be disbarred. In short, he is decidedly not above the law.

Impeachment is reserved for a very select group of Americans, our highest officeholders and justices. It is not designed to root out crime – for that, again, is the responsibility of the police and the courts – but to root out severe abuses of power that pertain to those offices. To confuse the issue by conflating impeachment with ordinary judicial procedures is to do a deep disservice to our Constitution. It is also to denigrate the fundamental strength of the citizenry's basic devotion to the principles and practices of our American court system – something which the failure to impeach President Clinton will not affect one iota, especially since, under that system, he will have gotten away with exactly nothing.

But what about the threat that this impeachment process poses to the rule of law? This entire procedure raises questions, beginning with the independent counsel law under which it began. By establishing prosecutors with unlimited resources, whose reputations depend upon bringing down their prey, the law encourages the remorseless search for the least bit of evidence of any sort of violation, no matter how technical, in the hope that something, anything might stick. We witnessed that process at work in the Iran-contra affair, when Lawrence Walsh saw his prosecution of Oliver North for lying to Congress fail miserably when brought before a Washington jury. We witnessed it at work last week, when after spending $17 million of the taxpayers' money, Donald Smaltz saw all thirty counts he brought against Michael Espy get rejected by a jury. And, when all is said and done, I believe we will see that a similar process has been at work along the long and winding road that began with Whitewater and has brought us to this chamber today. As Jeffrey Rosen of the George Washington University Law School wrote recently in *The New York Times*, "If House Republicans fail to heed the lessons of the Espy investigation, our faith in the rule of law may be shaken in ways that we can only begin to imagine."[6]

There are those who agree that the independent counsel law has gotten out of hand, but who protest that as long as it in force, nothing can be done to stop the process. This is hogwash. There is nothing in the Independent Counsel law or in the Constitution which dictates that Congress is duty-bound to follow through to the bitter end each and every referral, especially if Members believe that the Independent Counsel statute is flawed. To paraphrase Brendan Sullivan, Oliver North's attorney, during the Iran-contra hearings, Congress is not a potted plant. In the case of President Clinton, Congress decided to press ahead, rashly I believe. But it can always choose to take another direction as it sees fit. In any event, responsibility for what occurs must rest with the Congress itself, and not with some mythic unalterable process initiated under a law that may very well soon be dropped or radically amended.

But there is something even more dangerous afoot, and it has to do with the increasingly cavalier attitude surrounding this impeachment here in Washington, and especially in the House of Representatives. To say that impeachment doesn't really matter because the Senate will acquit President Clinton is to take a frighteningly myopic view of the costs involved for the nation in pressing forward with a Senate trial. Even if

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[6] Jeffrey Rosen, "Stop, In the Name of the Law," *New York Times*, December 6, 1998, p. WK 19.

the Senate does acquit, the trial will inspire widespread revulsion at Congress, for extending a nauseating process that the voters have repeatedly instructed Congress should cease. More important, it will increase public cynicism about the rule of law by raising serious questions about how easily prosecutors can manipulate criminal charges and judicial proceedings for partisan ends.

4. Conclusion

I began these remarks by discussing President Clinton's accountability for the current impeachment mess. By equivocating before the American people and before a federal grand jury, not to mention before his family and friends, he has disgraced the Presidency and badly scarred his reputation. He has apologized and asked for forgiveness.

But now, as mandated by the Constitution, the matter rests with you, the Members of the House of Representatives. You may decide, as a body, to go through with impeachment, disregarding the letter as well as the spirit of the Constitution, defying the deliberate judgement of the people whom you are supposed to represent and, in some cases, deciding to do so out of anger and expedience. But if you decide to do this, you will have done far more to subvert respect for the Framers, for representative government, and for the rule of law than any crime that has been alleged against President Clinton. And your reputations will be darkened for as long as there are Americans who can tell the difference between the rule of law and the rule of politics.

Chairman HYDE. Now, the question of the day is, is it Professor Ackerman or Professor Beer?

Professor Beer, you are next. Thank you.

TESTIMONY OF SAMUEL H. BEER

Mr. BEER. Thank you, Mr. Chairman and members of the committee. It is appropriate that I should be here before this committee, this formidable committee, since just last week I was in London advising some of my friends in the House of Commons and at a conference on the American view of the constitutional reforms being proposed there; and the one reform that I particularly stressed was the need for them to beef up their legislative committees. I am sure my experience here won't change my mind on that point.

That shows really what my real concern is the political and constitutional consequences of impeachment rather than the legal and judicial aspects. The process is judicial in form, impeachment by the House being like indictment by a grand jury; and trial and conviction by the Senate, like trial and conviction by a court.

In fact, however, the consequences of successful impeachment do not resemble the usual consequences of a judicial trial, for instance, punishment by fine and/or imprisonment. As article 1, section 3, paragraph 7, provides, punishment of that kind would be invoked after the President had become a private citizen by resignation, removal, or expiration of his term of office.

Removal from office—and I see I am emphasizing what my colleague Nicholas Katzenbach said—removal from office, that grand and forbidding consequence of a successful impeachment, distinguishes this process radically from the judgment of a court. It resembles, rather, a vote of no confidence in a legislature such as the British Parliament. By such a vote, the House of Commons can bring to an end the life of a government.

In 1841, Sir Robert Peel summed up this fundamental convention of the British Constitution when, in what became a classic formulation, he successfully moved that, "Her Majesty's ministers do not sufficiently possess the confidence of the House of Commons to enable them to carry through the House measures which they deem of essential importance to the public welfare."

Now, the relevance. Like a vote of no confidence, impeachment brings to an end a President's administration. Like a vote of no confidence, it relates not merely to some specific failure, but is a judgment on his record and promise as a whole with regard to those, to adopt Peel's phrase, "measures which he deems of essential importance to the public welfare." Because of these broad and weighty consequences, impeachment is primarily a political, not a judicial act.

As a political act, impeachment, like a vote of no confidence, passes judgment on and enforces responsibility on the executive power. In the British system, that responsibility runs directly to the legislature. In the American system, on the contrary, that responsibility runs to the legislature only secondarily and in special circumstances. For us the responsibility of the President is essentially and directly to the voters. The legislature as a separate office, separately elected, likewise is held accountable by the voters. This

separation of powers is fundamental in our constitutional design and is a main point of distinction from the British system.

The direct responsibility of both branches to the voters expresses the sovereignty of the people as the ultimate authority of our Constitution and of the government established under it.

Now, as the framers struggled to give expression to that principle, they ran into a problem: How were our liberties to be protected against misuse of power by the executive between quadrennial elections?

At the Philadelphia Convention during the summer of 1787, they explored various possibilities, such as an appeal to the Supreme Court and a concoction of other bodies discarded them. The States, similarly thinking of their systems of Governors and legislatures, were experimenting in theory and practice with a variety of methods of bridging the same gap.

At the last moment, the framers incorporated a structure almost exactly in the form then being used in England in the impeachment of Warren Hastings. This device, although it had ancient roots, had come to special prominence in the 17th and 18th centuries, when Great Britain for a time displayed a certain separation of powers, as a still powerful and independent monarch faced off against the rising assertions of the Parliament. In those circumstances, impeachment was adopted by the Parliamentarians as a means of enforcing responsibility on the monarch through action against his ministers.

When finally the monarch was eased out of politics, the old fusion of executive and legislative powers was taken over by a committee of Parliament, the Cabinet. Now, the interim method of impeachment as a means of getting a hold on the executive was dropped in favor of a vote of confidence which performed more effectively in those circumstances the function of enforcing the responsibility of the executive to Parliament.

At the same time that impeachment was dying out in Britain, it was taken up by the Americans who found in it a way of supplementing the principal mechanism of democratic responsibility by quadrennial elections. And this is the point: the broad scope of impeachment was now embodied in a very different system.

Where the ultimate sovereign is the people, the interference of one power, the legislature in its exercise of such a dire responsibility as removal of a popularly elected President, imposes severe duties on the legislators. The Congress, itself not the primary source of authority but only a creature of the people, is acting in lieu of the people between quadrennial elections. At their best, the legislators will do what the people at their best would do, weighing the pluses and minuses of the record and the promise of an administration as a whole, asking as Nick Katzenbach said, this central question: Does the national interest require the removal from office of this President? It is not a little detailed question. It is a great big far-reaching question.

In the case of President Clinton, the American people have twice answered that question by electing him to the American presidency. And if we seek further light on the present American mind, surveys of opinion continue to confirm that answer, which also in no way is disturbed by the outcome of the recent midterm elections.

I conclude. The failure to consider the whole record of Clinton's presidency in foreign and domestic affairs could have severe long-run costs. The removal of a President, thanks to such superficial judgment, could substantially damage our democratic system. Consider the temptations which this precedent would excite in a Congress of a different party against a future President of a different party.

As a great historian, Henry Adams, said when commenting on the failed attempt of the Jeffersonians to remove Justice Chase, "Impeachment is not a suitable activity for party politics."

Thank you.

Chairman HYDE. Thank you very much, Mr. Beer.

[The information follows:]

STATEMENT ON IMPEACHMENT IN CONJUNCTION WITH TESTIMONY BEFORE THE HOUSE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES DECEMBER 8, 1998

Samuel H. Beers
Eaton Professor of the Science of Government,
Emeritus at Harvard University

My concern is the political and constitutional consequences of impeachment rather than its legal and judicial aspects. The process is judicial in form, impeachment by the House being like indictment by a grand jury and trial and conviction by the Senate being like trial and conviction by a court. In fact, however, the consequences of successful impeachment do not resemble the usual consequences of a judicial trial- for instance, punishment by fine and/or imprisonment. As Article I, section III, par. 7 provides, punishment of that kind would be invoked after the President had become a private citizen by resignation, removal or expiration of his term of office.

Removal from office, the grand and forbidding consequence of successful impeachment, distinguishes this process radically from the judgement of a court. It resembles rather a vote of no confidence in a legislature, such as the British parliament. By such a vote the House of Commons can bring to an end the life of a government. In 1841, Sir Robert Peel summed up this fundamental convention of the British Constitution when he successfully moved that "her Majesty's Ministers do not sufficiently possess the confidence of the House of Commons to enable them to carry through the House measures which they deem of essential importance to the public welfare."

Like a vote of no confidence, impeachment brings to an end a President's Administration. Like a vote of no confidence it relates not merely to some specific failure, but is a judgement on his record and promise as a whole with regard to those "measures which he deems of essential importance to the public welfare." Because of these broad and weighty consequences, impeachment is primarily a political, not a judicial act.

As a political act, impeachment like a vote of no confidence passes judgement on and enforces responsibility on the executive power. In the British system, that responsibility runs directly to the legislature. In the American system, on the contrary, that responsibility run to the legislature only secondarily and in special circumstances. For us, the responsibility of the President is essentially and directly to the voters. The legislature as a separate office, separately elected, likewise is held accountable by the voters. This separation of powers is fundamental in our constitutional design and is a main point of distinction from the British system. The direct responsibility of both branches to the voters expresses the sovereignty of the people as the ultimate authority of our constitution and of the government established under it.

As the framers struggled to give expression to this principle, they ran into a problem. How were our liberties to be protected against misuse of power by the executive between

quadrennial elections? At the Philadelphia convention during the summer of 1787 they explored various possibilities, such as appeals to the Supreme Court and similar bodies. The states, likewise, we may note, experimented in theory and practice with a variety of methods of bridging this gap. At the last moment, the framers incorporated a structure almost exactly in the form then being used in England in the impeachment of Warren Hastings. This device, although it had ancient roots, had come to special prominence in the 17th and 18th centuries when Great Britain also for a time displayed a separation of powers, as a still powerful and independent monarch faced off against the rising assertions of the parliament. In those circumstances, impeachment was adopted by the parliamentarians as a means of enforcing responsibility on the monarch through action against his ministers. When, finally, the monarch was eased out of politics the old fusion of executive and legislative power was taken over by a committee of the parliament--the cabinet. Now the interim method of getting a hold on the executive was dropped in favor of a vote of confidence which performed more effectively the function of enforcing responsibility on parliament. At the same time that impeachment was dying out in Britain, it was taken up by Americans, who found in it a way of supplementing the principal mechanism of democratic responsibility by quadrennial elections. The broad scope of impeachment was embodied in a very different system.

Where the ultimate sovereign is the people, the interference of one power, the legislature in its exercise of such a dire responsibility as removal of a popularly elected President imposes severe duties on the legislature. The Congress itself, not the primary source of authority, but only a creature of the people, acting in lieu of the people between quadrennial elections. At their best, the legislators will do what the people, at their best, would do, weighing the pluses and minuses of the record and the promise as a whole, asking, "Does the national interest require the removal from office of this President?" In the case of President Clinton, the American people have twice answered that question by electing him to the American Presidency. If we seek further light on the American mind, surveys of opinion continue to confirm that answer which also in no way is disturbed by the outcome of the recent midterm elections.

The failure to consider the whole record of Clinton's Presidency in foreign and domestic affairs could have severe long run costs. The removal of a President, thanks to such neglect in judgement, could damage our democratic system. Consider the temptations which this precedent would excite in a Congress of a different party against a future President of a different party. As a great historian, Henry Adams, said, on the failed attempt of the Jeffersonians to remove Justice Chase, impeachment is not a suitable activity for party politics.

Chairman HYDE. By process of elimination, we get to you, Professor Ackerman.

TESTIMONY OF BRUCE ACKERMAN

Mr. ACKERMAN. Good morning, Mr. Chairman, and the distinguished members of this committee. My name is Bruce Ackerman, and I am a Sterling Professor of Law and Political Science at Yale. I request the Chair's permission to revise and extend these remarks.

Since you have already heard so much on the subject of constitutional standards, I thought I would concentrate on two big mistakes that are characterized in the discussion up to now.

The first big mistake centers on the power of this committee and the present House of Representatives to send the case to trial in the Senate. People seem to be assuming that once the present committee and the full House vote for a bill of impeachment, the stage will be set for trial in the Senate in the coming year. Nothing could be further from the truth.

As a constitutional matter, the House of Representatives is not a continuing body. When the 105th House dies on January 3rd, all its unfinished business dies with it. To begin with the most obvious example, a bill passed by the 105th House that is still pending in the 105th Senate on January 3rd cannot be enacted into law unless it once again is approved by the 106th House of Representatives. This is as it should be.

Otherwise, lame duck Congresses would have a field day in situations like the present where the old House Majority has a setback in the polls. Recognizing that its political power is on the wane, the dominant party will predictably use its lame duck months to pass lots of controversial legislation on to the Senate in defiance of the judgment made by the voters.

This abuse was very common during the first 150 years of this Republic. Until the 20th amendment was passed in 1933, a newly elected Congress ordinarily waited 13 months before it began its first meeting in Washington, D.C. In the meantime, lame ducks did the Nation's business for a full session, often in ways that ran against the grain of the last election.

This might have been an acceptable price to pay in the 18th century when roads were terrible and it took time for farmer representatives to arrange their business affairs, but over the passage of centuries, the operation of lame duck Congresses proved to be an intolerable violation of democratic principles, and they were basically abolished by the 20th amendment to the Constitution of the United States in 1933.

This amendment aims to have the new Congress begin meeting as soon as possible after the elections. The text itself specifies January 3rd. In enacting this amendment into our fundamental law, Americans believed they were reducing the lame duck problem to vestigial proportions. Perhaps some grave, national emergency might require decisive action; but the old Congress was expected simply to fade away as the Nation enjoyed the respite from politics between Thanksgiving and New Year's Day.

Generally speaking, lame duck Congresses have proved faithful to this expectation. For example, during the 65 years since the 20th

amendment became part of our higher law, no lame duck House has ever impeached an errant Federal judge, much less a sitting President of the United States.

Such matters have been rightfully left to the Congresses that were not full of Members who had been repudiated at the polls and who were retiring from office.

These proceedings, then, are absolutely unprecedented in the post-lame duck era. Despite this fact, I don't question the raw constitutional power of the current lame duck House to vote on a bill of impeachment. But I do respectfully submit that the Constitution treats a lame duck bill of impeachment in precisely the same way it treats any other House bill that remains pending in the Senate on January 3rd. Like all other bills, a lame duck bill of impeachment loses its constitutional force with the death of the House that passed it.

This point was rightly ignored before the election, since everybody expected the new Congress to be more Republican than its predecessor. On this assumption, it was perfectly plausible for this distinguished committee to proceed in earnest. If the 105th House voted to impeach, there was every reason to suppose that the 106th House would quickly reaffirm its judgement and send the matter on the way to the Senate.

But now that the voters have spoken, the constitutional status of lame duck impeachments deserves far more attention than it has thus far been given. Worse yet, we can't rely much on the past for guidance.

The closest precedent comes from the 1988 impeachment of Federal District Judge Alcee Hastings. The 100th House had impeached Hastings but both sides wanted to delay the Senate trial to the 101st session, and the Senate Rules Committee granted their request.

The committee's perfunctory six-page report, however, does not resolve any of the key issues raised by the present case. Hastings was a judge, not a President. And he was impeached during a normal session of Congress, not by a Congress of lame ducks.

As a consequence, the Senate report does not even pause to consider the implications of the fact that the people themselves have decisively sought to limit the capacity of lame duck Congresses by solely enacting the 20th amendment.

If we take this amendment seriously, it means that a lame duck House should not be allowed to relieve its freshly elected successor of the most solemn obligation it can have: to pass upon an impeachment resolution. Moreover, if the next House of Representatives seeks to duck this responsibility, the Senate will not be free to dispense with the problem of lame duck impeachment by a simple reference to the 1988 decision in Judge Hastings' case.

Instead, the constitutionality of a lame duck impeachment will be the first question confronting Chief Justice Rehnquist, the designated presiding officer at the Senate trial.

Following the precedent established by Chief Judge Chase before and during the trial of Andrew Johnson, the Chief Justice will rightly assert his authority on all procedural issues; and the first of these should undoubtedly be a motion by the President's lawyers

to quash the lame duck impeachment as constitutionally invalid unless reaffirmed by the 106th House.

Now, Chief Justice Rehnquist is, in fact, a scholar of the impeachment process, having written an entire book on the subject. I am sure that he will be fully aware of the historical importance of his conduct of this proceeding and will quickly grasp the obvious dangers of lame duck impeachment.

Moreover, there are many strands in the Chief Justice's jurisprudence which would lead him to give great weight to the idea that it is only a truly democratic House and not a collection of lame ducks that has the constitutional authority to proceed against a man who has been fairly elected to the presidency by the people of the United States. Without any hint of partisanship, he would be well within his rights to quash the lame duck impeachment and remand the matter back to the new House of Representatives.

Since the status of lame duck impeachments has never been briefed and argued in the modern era inaugurated by the 20th amendment, it is impossible to make a firm guess as to the way the Chief Justice will rule on this matter.

Only one thing is clear: It would be far better for the country and the Constitution if the Chief Justice is never put to this test. As Alexander Bickel, my great predecessor in the Sterling chair at Yale frequently reminded us, the health of our constitutional system is not measured by the number of hard cases that have been resolved by clear rulings. It is measured, instead, by the number of statesmen in our history who, seeing hard cases on the horizon, act in sensible ways so as to avoid ever precipitating a constitutional crisis. And that is what we are going into.

If this committee and the present House choose to go forward and vote in favor of a bill of impeachment, I respectfully urge the new Speaker of the 106th Congress to do the right thing and remit the matter once again for consideration by the new House.

Suppose, however, he doesn't do so. Suppose further that, if pressed, the Chief Justice upholds the continuing validity of the lame duck impeachment despite the expiration of the 105th Congress. Even then, the new House of Representatives will not be able to escape the need to consider whether a majority of the Members newly elected continue to favor the impeachment of the President.

To see why, consider that the House must select a group of Members, called impeachment managers, to present its case again the President at the Senate trial. Without the energetic prosecution of the case by the managers, the Senate trial—I am sorry, I'll end up here—the Senate trial cannot go forward. No managers, no trial. But only the new House can appoint managers. This was done in Judge Hastings' case, and it certainly should be required in the case of a sitting President facing a lame duck impeachment.

Thus, even if the new House leadership chooses to rely on a lame duck impeachment and refuses to allow another vote on a fresh bill before sending the matter to the Senate, there is no way it can avoid the need to test the Majority's sentiment of the new House. By voting against the slate of managers, a majority of the new House will be in a position to stop the impeachment process dead in its tracks. It is a big mistake.

Mr. SENSENBRENNER [presiding]. Professor Ackerman, do you think you could wrap up?

Mr. ACKERMAN. This is the last paragraph. It is a big mistake, then, for the distinguished Members of this committee and this House to suppose that they are the final judges of this bill of impeachment.

To be sure, the recommendation of this committee and the vote of the entire House deserves serious consideration by the Members taking office next month. But so do the judgments of the voters as expressed at the elections in November. I respectfully urge you to consider this point as you determine your present course.

To put my point in operational terms, if you don't believe that a bill of impeachment or the election of impeachment managers will gain the Majority's support of the next House, the wise thing to do is to stop the process now. While it may be embarrassing to reverse gears after so much momentum has been generated in favor of the bill of impeachment, the leadership of the next House will confront a much more embarrassing situation——

Mr. SENSENBRENNER. Professor Ackerman, I do think you are abusing the committee's time. You have gone much further—Professor Ackerman, could you please wrap it up? The red light has been on for about 3 minutes now. Everybody else has been a little bit better in terms of watching the red light. Are you done?

Mr. ACKERMAN. Yes.

[The information follows:]

Testimony Submitted to the House Committee on the Judiciary
Bruce Ackerman
Sterling Professor of Law and Political Science, Yale University
Tuesday, December 7, 1998

Good morning, Mr. Chairman, and the distinguished members of this Committee. My name is Bruce Ackerman. I am Sterling Professor of Law and Political Science at Yale, and the author of many books on constitutional law, including work on impeachment. I request the Chair's permission to revise and extend these remarks.

Since you have already heard so much on the subject of constitutional standards for impeachment, I thought I would concentrate on three big mistakes that have characterized the discussion up to now.

I.

The first big mistake centers on the power of this Committee and the present House of Representatives to send a case to trial in the Senate. People seem to be assuming that once the present Committee and the full House vote for a bill of impeachment, the stage will be set for a trial in the Senate during the coming year, and that the next House will not have to take any further actions on the matter.

Nothing could be further from the truth. As a constitutional matter, the House of Representatives is not a continuing body. When the 105th House dies on January 3, all its unfinished business dies with it. To begin with the most obvious example, a bill passed by the 105th House that is still pending in the 105th Senate on January 3rd cannot be enacted into law unless it once again meets the approval of the 106th House.

This is as it should be. Otherwise lame-duck Congresses would have a field-day in situations like the present, where the old House majority has had a set-back in the polls. Recognizing that its political power is on the wane, the dominant party will predictably use its lame-duck months to pass lots of controversial legislation on to the Senate in defiance of the judgment made by the voters.

This abuse was very common during the first 150 years of the Republic. Until the Twentieth Amendment was passed in 1933, a newly elected Congress ordinarily waited 13 months before it began its first meeting in Washington. In the meantime, lameducks did the nation's business for a full session, often in ways that ran against the grain of the last election. This might have been an acceptable price to pay in the eighteenth century, when roads were terrible and it took time for farmer-representatives to arrange their business affairs. But over time, the operation of lameduck Congresses proved to be an intolerable violation of democratic principles, and they were finally abolished by the twentieth amendment in 1933.

This amendment orders the new Congress to begin meeting as soon as possible after the elections – the text specifies January 3. In enacting it into our fundamental law, Americans believed they were reducing the lame-duck problem to vestigial proportions.[1] Perhaps some grave national emergency might require decisive action, but the old Congress would simply fade

[1]See John Copeland Nagle, A Twentieth Amendment Parable, 72 N.Y.U. 470 (1997).

away as the nation enjoyed a respite from politics between Thanksgiving and New Year's Day.

Generally speaking, lame-duck Congresses have proved faithful to this expectation. For example, during the sixty-five years since the twentieth amendment became part of our higher law, no lame-duck House has ever impeached an errant federal judge, much less a sitting president. Such matters have been left to the judgment of Congresses that were not full of members who had been repudiated at the polls or were retiring from office.

These proceedings, then, are absolutely unprecedented in the post lameduck era. Despite this fact, I do not question the raw constitutional power of the current lame-duck House to vote out a bill of impeachment. But I do respectfully submit that the Constitution treats a lame-duck bill of impeachment in precisely the same way it treats any other House bill that remains pending in the Senate on January 3. Like all other bills, a lame-duck bill of impeachment loses its constitutional force with the death of the House that passed it.

This point was rightly ignored before the election, since everybody expected the new Congress to be more Republican than its predecessor. On this assumption, it was perfectly plausible for this distinguished committee to proceed in earnest – if the 105th House voted to impeach, there was every reason to suppose that the 106th House would quickly reaffirm its judgment, and send the matter on its way to the Senate. But now that the voters have spoken, the constitutional status of lameduck impeachments deserves far more attention than it has been given.

Worse yet, we cannot rely much on the past for guidance. The closest precedent comes from the 1988 impeachment of federal district judge Alcee Hastings. The 100th House had impeached Hastings, but both sides wanted to delay the Senate trial to the 101st session, and the Senate Rules Committee granted their request. The Senate's perfunctory six-page Report, however, [2] does not resolve any of the key issues raised by the present case.

Judge Hastings wanted to delay his Senate trial as long as possible, and did not even try to argue that his bill of impeachment expired on January 3rd in fear that his Senate trial would be expedited. What is more, Hastings was a judge not a president; and he was impeached during a normal session of Congress, not by a Congress of lame-ducks. As a consequence, the Senate committee understandably failed to consider any of the crucial constitutional issues raised by the present case. It did not even pause to consider the implications of the fact thatthe People decisively sought to limit the capacity of lame duck Congresses by solemnly enacting the twentieth amendment. If we take this amendment seriously, it is means that a lame-duck House should not be allowed to relieve its freshly elected successor of solemn obligation to determine whether the nation's political life should be disrupted by a lengthy trial in the Senate. In short, whatever decision is reached by this Committee and this House this month, the Constitution requires the newly elected House to consider impeachment afresh in January..

Moreover, if the next House of Representatives seeks to duck this fundamental constitutional responsibility, the Senate will not be free to dispense with the problem of lameduck impeachment by a simple reference to its 1988 decision in Judge Hastings' case. Not only does this Report fail to confront the basic issues, but the Senate Rules Committee, which authored the Report, will not even be the final judge of the matter this time around. Instead, the

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[2]Sen. Rep. 100-542, 100th Cong., 2 Sess. (Sept 22, 1988).

constitutionality of a lame-duck impeachment will be the first question confronting Chief Justice Rehnquist, the designated presiding officer at the Senate trial. Following the precedent established by Chief Justice Chase before and during the trial of President Andrew Johnson, the Chief Justice will rightly assert his authority to rule on all procedural issues.[3] And the first of these should undoubtedly be a motion by the President's lawyers to quash the lameduck impeachment as constitutionally invalid unless reaffirmed by the 106th House.

Now Chief Justice Rehnquist is in fact a scholar on the impeachment process, having written an entire book on the subject. I am sure that he will be fully aware of the historical importance of his conduct of the proceeding, and will quickly grasp the obvious dangers of lameduck impeachment. Moreover, there are many strands in the Chief Justice's jurisprudence which will lead him to give great weight to the idea that it is only a truly democratic House, and not a collection of lameducks, that has the constitutional authority to proceed against a man who has been fairly elected to the Presidency by the People of the United States. Without any hint of partisanship, he would be well within his rights to quash the lameduck impeachment and remand the matter back to the House..

Since the status of lameduck impeachments has never before been briefed and argued in the modern era inaugurated by the twentieth amendment, it is impossible to make a firm guess as to the way the Chief Justice will rule on the matter. Only one thing is clear. It would be far better for the country and the constitution if the Chief Justice is never put to this test. As Alexander Bickel, my great predecessor in the Sterling chair at Yale, frequently reminded us, the health of our constitutional system is not measured by the number of "hard cases" that have been resolved by clear rulings. It is measured instead by the number of statesmen in our history who, seeing a hard case on the horizon, act in sensible ways so as to avoid ever precipitating a constitutional crisis.[4]

If this Committee and the present House choose to go forward and vote in favor of a bill of impeachment, I respectfully urge the new Speaker of the 106th Congress to do the right thing, and remit the matter once again for consideration by the new House. Suppose, however, he does not do so; suppose further that, if pressed, the Chief Justice upholds the continuing validity of the lameduck impeachment despite the expiration of the 105th Congress. Even then, the new House of Representatives will not be able to escape the need for another up or down vote to determine whether a majority of members continue to favor impeachment.

To see why, consider that the House must select a group of its members, called Impeachment Managers, to present its case against the President at the Senate trial. Without the energetic prosecution of the case by the managers, the Senate trial cannot go forward. No managers, no trial, but only the new House can appoint the managers. This was done in Judge Hastings' case, and it certainly should be required in the case of a sitting President facing a lame-duck impeachment.

Thus, even if the new House leadership chooses to rely on a lameduck impeachment, and

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[3]See Bruce Ackerman, We the People: Foundations 467-68 (1998).

[4]This is a leitmotiv linking early works like *The Least Dangerous Branch* to his posthumous *The Anatomy of Consent*.

refuses to allow another vote on a fresh bill before sending the matter to the Senate, there is no way it can avoid the need to test the majority sentiment of the new House. By voting against the slate of managers, a majority of the new House will be in a position to stop the impeachment process dead in its tracks.

It is a big mistake, then, for the distinguished members of this Commitee and this House to suppose that they are the final judges of the bill of impeachment. To be sure, the recommendations of this Committee and the vote of the entire House deserve serious consideration by the members taking office next month. But so do the judgments of the voters, as expressed at the elections in November. I respectfully urge you to consider this point as you determine your present course.

To put my point in operational terms: If you don't believe that a bill of impeachment or the election of impeachment managers will gain the majority support of the next House, the wise thing to do is to stop the process now. While it may be embarrassing to reverse gears after so much momentum has been generated in favor of a bill of impeachment, the leadership of the next House will confront a much embarrassing situation if it becomes evident that its slender pro-impeachment majority has vanished over the Christmas recess.

II.

So much for the first big mistake. A second mistake involves a persistent confusion about impeachment standards. People keep on talking as if the standards that apply to judges also apply to presidents. But the constitutional text establishes that this is a mistake. Under Article three of the Constitution, any federal judge may be deprived of his lifetime job if he fails the test –and I quote -- of "good Behavior." Thus, the House and Senate may remove a judge even if his "bad" behavior would not otherwise amount to a "High Crime and Misdemeanor."

In contrast, the Constitution does not allow Presidents to be removed for want of "good behavior" -- for the obvious reason that he does not serve for life, but is under regular electoral scrutiny by the People. Moreover, there should be no doubt that the Framers were serious in restricting themselves to *high* crimes and misdemeanors. In contrast to the impeachment clause, other textual references to crime do not contain similar emphasis on high crime. Thus, the Extradition Clause requires states to extradite anyone charged in another state whenever they commit "Treason, Felony of other Crime," and Article 1, Section 6 gives every Congressman an immunity from arrest except in cases of "Treason, Felony, and Breach of the Peace." This stands in sharp contrast to the *high* crimes required of Presidents, and the mere breaches of "good behavior" required in the impeachment of judges. It is a bad mistake, then, to assume that the relatively low impeachment standard also applies to the President.

Which leads me to the third and last mistake. Perhaps because of the introduction of the Special Prosecutor in this case, there has been a constant temptation to imagine that what we are doing here is something similar to a criminal indictment. In fact, there was a time when it might have been plausible to view impeachment as a criminal trial. When impeachment began in the English parliament five hundred years ago, this medieval assembly still thought of itself as a High Court, and often subjected the victims of impeachment to dire criminal punishments. But the Framers of our Constitution rejected these precedents. They carefully limited the sanctions for impeachment to removal from office. Once a President departs, he is fully subject to the

rigors of criminal prosecution. Rather than standing above the law, William Jefferson Clinton probably runs a much higher risk of an indictment for perjury in the year 2001 than any other American citizen alive today. This committee does not sit as a grand jury of the District of Columbia, but must ask itself a very different question: Does the conduct constitute alleged in this case such a threat to the very foundations of the Republic that it is legitimate to deprive the People of their freely elected choice as President?

For two centuries, the Congress has shown the greatest restraint in answering this question in the affirmative. From the era of George Washington to that of Ronald Reagan, Presidents have often stretched their constitutional authority to the very limits, making unpopular decisions which have often proved to be in the larger interest of the Nation. And yet only one President -- Andrew Johnson -- has been impeached, and only one -- Richard Nixon -- has resigned under threat of impeachment. The Presidential conduct involved in both cases amounted to an assault on the very foundations of our democracy. Andrew Johnson sought to make it impossible to enact Fourteenth Amendment, and its guarantees of equal protection and due process to all American citizens. Richard Nixon sought to undermine the very foundations of the two-party system. Once we lower the impeachment standard to include conduct that does not amount to a clear and present danger to our constitutional order, we will do grievous damage to the independence of the Presidency.

James Madison saw this. At the Convention, he opposed the addition of any language which would would water down the solemn requirement of a "high crime and misdemeanor." A lower standard, he said, would transform the Presidency from an office with a fixed four year term to one " whose term will be equivalent to a tenure during the pleasure of the Senate."[5] Indeed, when the Founders voted on the impeachment standard, they did not in fact vote on the provision that appears in the text today. Instead, they actually approved a standard that required the proof of a "high crime and misdemeanor *against the state*." These last three words were later eliminated by the Committee on Style, which had absolutely no authority to change the substance of the provision. Instead, the Committee believed that the text's insistence on "*high* crime and misdemeanors" already included the requirement of an assault on the foundations of the American state.

And as we have seen, this is the standard that has in fact consistently governed the House's actions over the past two centuries. If the House had been operating under any lower standard, our history books would have been littered with many, many bills of impeachment, and not only two. When judged against this consistent history of restrained Congressional interpretation of the impeachment clause, there can be little doubt that the present case falls far short of the standard set by the Framers when they insisted on "high crimes and misdemeanor against the state."

Indeed, if the Committee does find President Clinton's conduct impeachable, you will be setting a precedent that will haunt this country for generations to come. Under the new and low standard, impeachment will become an ordinary part of our political system. Whenever Congress and the Presidency are controlled by different political parties, the Congress will regularly use impeachment as a weapon to serve its partisan purposes..

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[5] 2 Farrand, Records of the Constitutional Convention 550 (1966).

After all, Presidents are often been called upon to make fateful decisions of the first importance, and, in the short term at least, these decisions are often very unpopular. Once the House's centuries-long tradition of constitutional restraint has been destroyed, the future leadership of the House will be sorely tempted to respond to unpopular decisions by regularly seeking to force the President from office. The result would be a massive shift toward a British-style system of parliamentary government.

This is what happened in the aftermath of the impeachment of President Andrew Johnson in 1868. Though this impeachment effort barely failed to gain two-thirds support in the Senate, it drained effective power from the Presidency – to the point where Woodrow Wilson, writing in 1885, could describe our system as "congressional government." And it could readily happen again. Imagine, for example, that the political wheel turns once again, and that a Democratic Congress confronts a Republican President in the year 2001. Can there be any doubt that enterprising members of the House will be tempted to use the Clinton precedent to unseat the next Republican President at the first politically propitious opportunity?

My study of history and human nature convinces me that once such an abusive cycle of impeachments has begin, it will be very difficult to keep the bitter disagreements generated by our often-divided government under control. Let me emphasize that, though the lawyers for President Clinton asked me to testify today, I would be equally emphatic in my opposition to any future effort by a Democratic Congress to impeach a Republican President for anything short of an outright assault on the foundations of the Republic. But it is a far far better thing to cut short a cycle of incivility before it starts. I respectfully urge the distinguished members of this Committee to defer further action on impeachment to the next session of Congress, where our newly elected Representatives will be in a much better position to decide on the kind of action -- ranging from impeachment to censure to nothing -- that is most appropriate in this case.

Mr. HUTCHINSON. Mr. Chairman, I have a unanimous consent request.

Mr. SENSENBRENNER. Would the gentleman from Arkansas please state the unanimous consent request?

Mr. HUTCHINSON. This appears to be the appropriate time for a unanimous consent request. I have a Congressional Research Service memorandum discussing that impeachment proceedings may be continued from one Congress to the next. I ask unanimous consent that this be entered into the record as a part of this proceeding and distributed to the Members.

Mr. SENSENBRENNER. Without objection.

Mr. BERMAN. Mr. Chairman, I think the first copy should be distributed to Professor Ackerman.

Mr. SENSENBRENNER. The first copy out of the Xerox machine will be given to Professor Ackerman.

Mr. ACKERMAN. I have read it, sir.

Mr. SENSENBRENNER. Is there any objection to the request of the gentleman from Arkansas?

Mr. BARRETT. Mr. Chairman, reserving my right to object, I just want to make sure that that CRS report comes to us before we get to questioning. I realize the witness should have the first copy, but I think it is important that we have that.

Mr. SENSENBRENNER. We will see how fast the Xerox machine can make copies.

Mr. BARRETT. Thank you very much.

Mr. CHABOT. Parliamentary inquiry, Mr. Chairman.

Mr. SENSENBRENNER. Is anybody reserving the right to object to the——

Ms. WATERS. I reserve the right to object.

Mr. SENSENBRENNER. The gentlewoman from California on her reservation is recognized.

Ms. WATERS. Mr. Chairman, I reserve the right to object because I think we have hit upon an extremely important point that is being made by Professor Ackerman. And if the gentleman would like to—if he has different information, if he is in receipt of information that suggests otherwise, I think it deserves discussion in this committee rather than simply the submission of the information to us.

Mr. SENSENBRENNER. If the Chair may interrupt, the request is that the CRS report referred to by the gentleman from Arkansas in his unanimous consent become a part of the record. Once it becomes a part of the report, then anybody can discuss it as they would like.

But it seems to me we have been very liberal in putting statements and materials in the record since the beginning of this inquiry. And the gentleman from Arkansas has something that he thinks is relevant.

Is there objection to including the CRS report referred to by the gentleman from Arkansas in the record?

Hearing none, so ordered.

[Information not available at time of printing].

Mr. CHABOT. Mr. Chairman, parliamentary inquiry.

Mr. SENSENBRENNER. The gentleman from Ohio will state the parliamentary inquiry.

Mr. CHABOT. Is it not the practice of the committee that when witnesses testify here, we should have the statements of the witnesses in writing prior to their testifying so we can follow it as they are going through?

Mr. SENSENBRENNER. That is in the rules of the committee, yes.

Mr. CHABOT. Can we ask the other witnesses that come today and tomorrow, that we could get their statements ahead of time so we can follow that?

Mr. SENSENBRENNER. That is in the rules, and that is certainly a legitimate request. And I will direct that request to Counsel Craig who is responsible for orchestrating the witnesses in defense of the President.

Mr. GEKAS. Mr. Chairman.

Mr. SENSENBRENNER. The gentleman from Pennsylvania.

Mr. GEKAS. In response partially to the gentleman of Ohio, I believe that we had decided in advance, or someone did, to which we acceded, that because of the late start, as it were, for the witnesses to appear before this committee, that we in effect waive the necessity of their providing statements before the hearing. So I would let the—I would allow the record to show, as far as my statement is concerned, that I believe that that was waived with respect to this panel.

Mr. SENSENBRENNER. Mr. Craig, do you think that it would be possible to give committee members advance statements for future witnesses today and tomorrow?

Mr. CRAIG. We will do our best to do that, Mr. Chairman.

Mr. SENSENBRENNER. Thank you. Mr. Hyde will be out of the room for a bit. And we will begin the questioning. I will begin with myself. And again I will reiterate Mr. Hyde's admonition that the questions will be limited to 5 minutes. And when the red light goes on for each questioner, we will state that the time has expired and go on to the next questioner. So I yield myself 5 minutes.

Mr. Craig, in your opening statement, you asked members of the committee to open their hearts and open their minds and to look at the record. I think, since the 9th of September, committee members have spent a lot of time looking at the record, first in executive section and then in the public meetings, that this committee has had pursuant to the resolution that the House of Representatives directed us to conduct an impeachment inquiry.

We have heard an awful lot of academic discourse and discussion on what constitutes an impeachable offense, what constitutes perjury. But we have heard nothing from the President contradicting the fact witnesses and the grand jury testimony that Judge Starr sent over to us in 18 boxes' worth of evidence.

I am disappointed that there are no fact witnesses rebutting any of the evidence that was contained in the 18 boxes in your presentation today and tomorrow. Are you disputing any of the facts? And if so, why are you not bringing forth witnesses that can provide direct fact testimony rather than opinion or argument disputing the facts?

Mr. CRAIG. Congressman, let me respond to that this way: We have submitted in writing three different responses to the referral that was presented to the House of Representatives by Mr. Starr and the Office of Independent Counsel. And we in those—in those

responses, we take issue with many of the facts laid out by Mr. Starr in those—in that referral.

We do dispute representations and characterizations that the Independent Counsel has made, and we do dispute some of the testimony that has been presented in the grand jury. And we, in particular, urge the committee not necessarily to take at face value the characterizations of that testimony or the President's testimony that are to be found in the referral by Mr. Starr.

We find that frequently he mischaracterizes that testimony, or the Office of Independent Counsel in the referral has mischaracterized the testimony of the President in order to construct a perjury of allegation.

Mr. SENSENBRENNER. Well, let me get to the heart of this case. Did Monica Lewinsky provide false testimony to the grand jury, in your opinion?

Mr. CRAIG. We think in some areas she provided erroneous testimony that is in disagreement with the President's testimony and particularly in specific areas having to do with the grand jury. Now, you are going to have to make the determination as to how important the divergence, the disagreement, or the disagreement on the testimony is.

Mr. SENSENBRENNER. There have been complaints by the President's counsel and by the Minority Democrats on this committee that grand jury testimony is not subject to cross-examination and that Ms. Lewinsky and the other witnesses that came before the grand jury were not cross-examined. How come you're not bringing any of these people before this committee to provide the cross-examination that the grand jury procedure denied you?

Mr. CRAIG. We have found, Mr. Chairman, many inconsistent statements in the grand jury testimony itself that we believe we can use to support our case. We believe that the President should be given a presumption of innocence and that the burden should be on the committee to call fact witnesses and determine whether the credibility of the fact witnesses is such that——

Mr. SENSENBRENNER. Well, the investigation was done pursuant to the Independent counsel statute. And I would just observe, Mr. Craig, that if the President had told the truth in January, there would have been no Independent Counsel investigation of this whole matter, and we wouldn't be sitting here today. My time has expired.

The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Well, let me begin by reminding my acting Chairman that it wouldn't have affected whether there would have been an Independent Counsel appointed at all.

One of the—well, let me put all three of these together, Mr. Craig. Mr. Starr alleged that the President lied about sexual relations before the Paula Jones deposition and in grand jury. It is also alleged that the President obstructed justice by assisting Ms. Lewinsky with a job search and that he further obstructed justice in conversations with Betty Currie after his January 17 deposition.

Could you put those in context for us, please?

Mr. CRAIG. Let me talk first about the President's testimony in the civil deposition. In the civil deposition, in accordance with the definition that he had been provided as to what a sexual relation-

ship was, he denied having a sexual relationship as it was defined in the deposition by the Jones' judge.

There may be disagreement as to whether his testimony fell within or without that definition. But there is no disagreement that the President himself and, in fact, Monica Lewinsky, as she wrote her affidavit and testified in the grand jury, believed that what he was testifying was within the definition as given to him by the court.

The point I'm trying to make here is that there was an effort by the President to testify accurately but not to disclose information about his relationship. That may be blameworthy. It may be wrong. You may judge that he crossed the line. But, in fact, there is no testimony or no proof that President Clinton knew he was wrong when he looked at that definition, and that he intentionally lied.

I would say when it comes to the job search, Mr. Chairman, that there's a good deal of additional information, and this is why I so strongly argue that the committee should look at the actual record.

There's a lot of information about the job search that is simply not included in the referral: the fact that Ms. Lewinsky's desire to leave Washington arose in July, long before her involvement in the Jones case; the fact that the President provided Ms. Lewinsky with only modest assistance, if any at all; the fact that the job assistance that was provided by friends and associates of the President for Ms. Lewinsky was in no way unusual as opposed to other people who were also receiving that kind of job assistance; the fact that there was absolutely no pressure applied to obtain Ms. Lewinsky a job; the fact that there was no timetable for Ms. Lewinsky's job search, let alone any timetable linked to her involvement in the Jones case; and the fact that all the people that participated in that job search testified that there was nothing linked to any testimony or affidavit.

It is the testimony of Vernon Jordan, it is the testimony of Ms. Lewinsky, and it is the testimony of the President that there was no obstruction of justice involved in that job search.

Now when it comes to the questions relating to Ms. Currie, Ms. Currie at the time she had this conversation with the President was not a witness in any proceeding. Her name had not appeared on the Jones' witness list. She had not been named as a witness in the Jones case, and the discovery period was down to its very final days. There was no reason to suspect that she would play any role in the Jones case as a witness. And the President did not know that the OIC at that point had embarked on an investigation of him on the Lewinsky Matter.

To obstruct a proceeding or to tamper with a witness, Mr. Conyers, there must be both a proceeding and a witness. Here, as far as the President knew, there was neither.

And there is a second important point that was also deleted or left out or ignored in the presentation of the referral. Ms. Currie testified about this conversation with the President on numerous occasions and repeatedly testified that she felt absolutely no pressure to agree with the questions that the President asked her. Let me just cite one excerpt from the transcript of Ms. Currie's testimony.

Mr. SENSENBRENNER. The gentleman's time is expired. You know, somebody else can bring that up if we are to keep on time.

Mr. CONYERS. Mr. Chairman, might he finish the sentence? Could he finish the sentence?

Mr. SENSENBRENNER. Finish the sentence.

Mr. CRAIG. It's very quick, Mr. Sensenbrenner. She was asked, "Did you feel pressured when he told you those statements?" She said, "None whatever." She was asked, "Did you feel any pressure to agree with your boss?" She said, "None."

Mr. SENSENBRENNER. Okay.

Mr. CONYERS. Thank you very much, Mr. Craig.

Mr. SENSENBRENNER. The gentleman from Florida, Mr. McCollum.

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

Mr. Craig, I am glad we're getting into facts. I think it's very important that we do that. And although I, too, am disappointed there are no fact witnesses, I think the discussion is important.

With respect to the Betty Currie, the record I read indicates that indeed the President, numerous times in his deposition said, you'll have to ask Betty about that, referring to a lot of times in his deposition in the Jones case. And surely he would have expected that somebody would have called her as a witness whether she was on a witness list at the time he had these conversations with her or not. And that, therefore, seems to me it's immaterial whether she was on a witness list or she wasn't. But that's the type of thing we should be discussing. And again it's long overdue.

I also would like to point out that, as we look through these things, there are a lot of things in the record that you are obligated to tell us where we are wrong about because—or where the record may be different. And I am looking forward to that.

The record I see with regard to the grand jury testimony indicates that the President swore that he did not know that his personal friend, Vernon Jordan, had met with Monica Lewinsky and had talked about the case. And I would say that the evidence indicates that he lied about that when he made that swearing.

The President in that deposition swore that he could not recall being alone with Monica Lewinsky. The evidence that I've read so far indicates that he lied about that. The President swore he could not recall ever being in the Oval Office hallway with Ms. Lewinsky except perhaps when she was delivering a pizza. The evidence indicates he lied about that.

The President swore he couldn't recall gifts exchanged between Monica Lewinsky and himself. The evidence indicates he lied about that.

The President swore that he was not sure whether he had ever talked to Monica Lewinsky about the possibility that she might be asked to testify in the Jones case. The evidence indicates he lied about that.

The President swore he did not know whether Monica Lewinsky had been served a subpoena to testify in the Jones case the last time he saw her in December of 1997. The evidence I read indicates he lied about that.

The President swore that the last time he spoke to Monica Lewinsky was when she stopped by before Christmas in 1997 to

see Betty Currie at a Christmas party. The evidence I read indicates he lied about that.

The President swore the contents of an affidavit executed by Monica Lewinsky in the Jones case, in which she denied they had sexual relations, were absolutely true. The evidence I read, he lied about that. And before the grand jury as well as in the deposition, the President swore that he did not have sexual relations with Monica Lewinsky. The evidence indicates that he lied, even according to his own interpretation of the Jones court's definition of the term sexual relations; because if you believe Monica Lewinsky, you have to conclude that indeed the President lied with respect to this, because she explicitly said they had certain relationships described in that definition.

And the President initiated an agreement with Monica Lewinsky in which she would lie in a sworn affidavit to be filed in the Jones case and each would lie under oath if called to testify in a case brought against the President. This's what I read the evidence as indicating.

I am curious to know if you find anything in any of the testimony, Mr. Craig, that we have before us from Vernon Jordan where Mr. Jordan lied? I—is there anything in the record that——

Mr. CRAIG. Not that I'm aware of. And this is a problem that we have run into throughout this proceeding, that is to identify precisely what kind of testimony you're talking about so that we can have an accurate and prepared response. I am not——

Mr. MCCOLLUM. Well, I'm curious about many things.

Mr. CRAIG. Can I respond to your allegations about the civil deposition and about the grand jury that you strung together?

Mr. MCCOLLUM. I strung those together only to give you illustrations with respect to where I see the evidence being. Let me ask you one other question. You answered the Vernon Jordan one. Is there any anything in the record where you see Betty Currie lied?

Mr. CONYERS. Mr. Chairman, regular order.

Mr. ROTHMAN. Can the witness be permitted to answer the question?

Mr. MCCOLLUM. In all due respect, it was my time. I asked him whether there was anything in the record about Vernon Jordan lying. He said no. And I asked him the question of whether or not there was anything in the record about Betty Currie lying. I would like an answer, if I could.

Mr. ROTHMAN. Mr. Chairman, regular order.

Mr. SENSENBRENNER. The gentleman from Florida has got the time. I would ask members of the committee not to interrupt other members of the committee during their own time. The gentleman from Florida is recognized.

Mr. MCCOLLUM. I would like to know if there is anything you have seen in the record that would indicate that you believe Betty Currie lied in the testimony she gave that we have in the record.

Mr. CRAIG. Congressman, the answer is I am aware of nothing in the testimony suggesting that Ms. Currie or Vernon Jordan lied.

Ms. JACKSON LEE. Parliamentary inquiry.

Mr. FRANK. Mr. Chairman, it's my time.

Mr. SENSENBRENNER. It's not your time until I recognize. The gentleman from Massachusetts, Mr. Frank.

Mr. FRANK. Thank you, Mr. Chairman. That was very important.

Mr. Craig, I wonder if you might like to answer the accusations. I must say with Mr. McCollum I had trouble, because it seemed to me there was a mixture of grand jury and deposition, and it wasn't clear which was which. And while Mr. McCollum obviously did not want you to respond to that, understandably, I would like you to respond.

Mr. CRAIG. I will try to be very quick, Congressman Frank.

Mr. FRANK. Why? He wasn't.

Mr. CRAIG. And thank you. First let me say, Congressman McCollum, that we are going to file with the committee today a written response which I think will address every single one of those allegations that you just went through. You can find them consolidated on pages 18 and 19 of Mr. Starr's presentation before this committee.

And there are two things that I think are very important to get straight. One is that the characterization of the President's testimony in each one of those incidents is inaccurate.

And the second thing is that you have mixed up grand jury testimony with civil deposition testimony in very dangerous and misleading ways. And I hope—I heard you answer questions over the weekend, and I was very pleased with your response on the issue of separating allegations of perjury on the civil deposition from allegations of perjury in the grand jury. And I hope we can have further conversation about that.

Mr. FRANK. Thank you, Mr. Craig, because I think it is important to separate them out. There was some allegations of grand jury perjury which clearly went beyond anything Kenneth Starr charged the President with. And the notion that Kenneth Starr was too soft on the President is a new one to me, even this late in the proceedings.

Before I get to that, I would like to say two procedural points. People have criticized you for not calling witnesses. Well, the Majority had the ability to call witnesses. And I must say I take exception, I must tell my friend from Florida, to the suggestion that Vernon Jordan might have been lying. I think Vernon Jordan is a man of great integrity. His testimony, of course, completely supports the President's position and refutes the accusations. And if you think Vernon Jordan was lying, I don't think so, but have the courage to call him up here and defend himself.

I think that kind of imputation raising the issue about Vernon Jordan's integrity without calling him forward is a great error. I understand why you don't want to call him forward, because I think he would make mincemeat of that accusation.

Let me just say, Mr. Craig, with regard to grand jury perjury, as I understand it, there were three accusations of grand jury perjury from Mr. Starr. One was, am I correct, that Ms. Lewinsky said that the sexual activity began in November of 1995 and the President said February of 1996?

Mr. CRAIG. That's correct.

Mr. FRANK. That that was one of the accusations of the grand jury perjury?

Mr. CRAIG. That's correct.

Mr. FRANK. I wonder if anybody here as a lawyer would think that a charge would be brought—this is more than 2 years after that has happened. Nothing turned on that. In other words, Ms. Lewinsky did not reach a certain age in the interim that would have made it more or less legal; is that correct?

Mr. CRAIG. That's correct.

Mr. FRANK. The second question—the second charge of perjury is one that I have trouble understanding. Am I correct that it was—and I think we ought to differentiate, because Mr. McCollum listed a number of things that he said were perjurious; Mr. Starr only had three.

The second one was when the President told the grand jury that he believed in the deposition that the definition excluded certain kinds of sexual activity, that he was lying; that he didn't really believe it. In other words, the accusation is when he said in August that he believed in January that the definition excluded certain kinds of sex, that that was a lie. Is that correct that that's the second one?

Mr. CRAIG. Yes, sir.

Mr. FRANK. I asked that because people have said where are the President's witnesses. Well, what witness could he bring to show that the sexual activity began in February rather than November? He admitted trying to conceal it. What witness could he bring to show that he really believed this in January? Do people think there was a secret witness that he said, hey, I'm only kidding, I don't really believe this. The fact is, there is no witness you could have believed.

Last question. With regard to the obstruction, is it the case that everybody who was supposedly involved in the obstruction—Mr. Jordan, Ms. Currie, Ms. Lewinsky, and the President—all denied that obstruction of justice happened? And if you were in fact to prosecute the case, who in fact would you bring as a witness?

Mr. CRAIG. That is the case. I wouldn't know how to prosecute this case. May I make one comment, Mr. Frank, since I still have time. I would urge the committee to remember that Mr. Ruff is coming. I am perfectly happy to deal with the committee's questions. But the purpose of this panel, in addition to my introductory comments, the purpose of the panel was to discuss some of the new ideas that I think these witnesses——

Mr. FRANK. Mr. Craig, you need to finish the sentence without any dependent clauses, under the rule.

Mr. CRAIG. I'm done.

Mr. SENSENBRENNER. The gentleman from Massachusetts' time has expired. The gentleman from Pennsylvania, Mr. Gekas.

Mr. GEKAS. Mr. Chairman, I yield 10 seconds, I hope, to the gentleman from Florida.

Mr. MCCOLLUM. Thank you very much for yielding. I wanted to make a point. I was not imputing Vernon Jordan's integrity. In fact, I was trying to corroborate the fact that he has been telling the truth, that I think is damaging to the President.

Mr. FRANK. Will the gentleman from Pennsylvania yield to me for 5 seconds?

Mr. GEKAS. No, I cannot.

Mr. FRANK. You could if you wanted to.

Mr. GEKAS. I really cannot.

Mr. SENSENBRENNER. The gentleman from Pennsylvania.

Mr. GEKAS. Professor Wilentz, your testimony has really astounded me, and I want to question you on one phase of it. You seem to indicate that if any one of us, any Member of Congress should vote for impeachment, there will always be the question in your mind as to whether we did it out of cravenness or under a resolution and study and analysis and conscience.

And I hope that after this is over, that you take a roll call of those who voted and then analyze for us. It will take you 100 years to determine whether we did it out of cravenness or not. I think that's a despicable way to characterize, in advance, our possible vote on some serious note as this. That's number one.

General Katzenbach, you seem to have placed a great deal of emphasis on the difference between a criminal offense and a political offense that is couched in impeachment. And I agree with you that it is substantially, if not totally, a political process.

If the President of the United States refused to grant requests of the Congress time and time again, and the Congress felt that it should adjudge the President in contempt of Congress, you would consider that a political, not a criminal offense, would you not?

Mr. KATZENBACH. If it was an offense at all, it would be political, yes.

Mr. GEKAS. Pardon me?

Mr. KATZENBACH. If it was an offense at all, it would be political.

Mr. GEKAS. Yes. And so the Congress, if it felt on a series of contempt instances that it would proceed, you would not automatically discount that as an impeachable offense, would you? Would this not be a refutation or a knock in the eye to another branch of government that the President was indulging in?

Mr. KATZENBACH. It might be that, sir, but I don't think that the Constitution provides under high crimes and misdemeanors for refusal of the President to do what the Congress wants it to do. There are other ways with which the Congress deals with that problem. And, frankly, sir, this is simply not one of them. No, I would not regard that as grounds for impeachment.

Mr. GEKAS. So that you have no idea, as you testify here, what high crimes and misdemeanors might be?

Mr. KATZENBACH. Oh, I have a good idea; yes, sir.

Mr. GEKAS. You are saying that perjury, which would be a direct affront to the judicial process, could not be considered fairly by any of us as being an impeachable offense. If indeed giving false statements under oath in a judicial proceeding can be fairly characterized by many of us who are analyzing this as an affront to the other branch of government—meaning the judiciary, the judicial branch of government—you think that the commission of a statutory crime, common law crime of false statements under oath, or just obstructing justice by giving false statements under oath would not arise to an impeachable offense; is that what you're saying to us?

Mr. KATZENBACH. No, sir; that's not what I'm saying. I'm saying that all of those could be impeachable offenses if the effect of that was to destroy public confidence in the ability of the President to play his role in the government.

Mr. GEKAS. And you say that the fact that he confronts the judiciary and attacks the judiciary by virtue of a perjury would not be an attack on the constitutional system, is what I hear you saying.

Mr. KATZENBACH. That's not what I'm saying. You hear it, but it's not what I'm saying.

Mr. GEKAS. I'm not hearing right.

Mr. KATZENBACH. That's correct, sir.

Mr. GEKAS. But would you agree that we have a difference of opinion, then? We would not be craven if we decided that perjury committed by the President of the United States, if so concluded in a judicial proceeding involving the rights of a fellow American citizen, would amount to an impeachable offense?

Mr. KATZENBACH. If—the red light is on, Mr. Chairman. How can I answer it?

Mr. SENSENBRENNER. Quick answer.

Mr. KATZENBACH. A quick yes? My answer is, no, sir.

Mr. SENSENBRENNER. A quick answer.

Mr. KATZENBACH. Oh. It would be an impeachable offense, sir, only if the effect of that was regarded by the Members of Congress as so serious that it destroyed public confidence in the ability of the President to play his role in government.

Ms. JACKSON LEE. Mr. Chairman, I do have a parliamentary inquiry.

Mr. SENSENBRENNER. The gentleman's time has expired. State your parliamentary inquiry.

Ms. JACKSON LEE. The inquiry, Mr. Chairman, is this is the only time that the President has the opportunity to present his case to this committee and to the American people. I noticed that Mr. Gekas asked a question or made a comment of Professor Wilentz. I do think it is important to allow witnesses to respond to either comments or questions made to them.

Mr. SENSENBRENNER. That is not a proper parliamentary inquiry. And how the 5 minutes would be allocated and enforced was stated by Mr. Hyde at the beginning of the meeting.

Ms. JACKSON LEE. I appreciate that, Mr. Chairman. Is there any way for the professor to answer the question?

Mr. SENSENBRENNER. Nobody objected at that point in time. A subsequent questioner, if they feel that it is important that a witness give an answer to a question that there was no time to answer, can decide in his or her best judgment whether to reiterate that question. That's what Mr. Frank did in response to some of the statements that Mr. McCollum made. I think that that's the way we will be able to allow the President to spend more time presenting witnesses rather than responding to parliamentary inquiries.

Mr. ROTHMAN. Parliamentary inquiry.

Ms. JACKSON LEE. I maintain a continuing objection.

Mr. ROTHMAN. Mr. Chairman, parliamentary inquiry.

Mr. SENSENBRENNER. The gentleman from New Jersey.

Mr. ROTHMAN. Thank you, Mr. Chairman. I want to point out, inquire of the Chair, whether the procedures adopted by the Chairman, Mr. Hyde, when he was sitting where you are, with regards to the panel called predominantly by the Republican Majority, will

prevail in this panel when the President's counsel has called its panel.

In particular, Chairman Hyde chose, when the Democrats were asking questions of Republican experts and Democratic experts on the last panel, to allow each member of the panel to respond to our questions even when we did not specifically ask them questions. And I wonder why today the present Chair is changing that procedure and not allowing the panelists to respond.

Mr. SENSENBRENNER. That is not a proper parliamentary inquiry.

Mr. ROTHMAN. It is an inquiry of fairness, Mr. Chairman.

Mr. SENSENBRENNER. The Chair will state that he is merely enforcing the rules that were outlined by Mr. Hyde at the beginning of the hearing, which no one objected to.

The Chair now recognizes the gentleman from New York, Mr. Schumer.

Mr. SCHUMER. Thank you, Mr. Chairman. And you know as we come close to finishing these proceedings and going to a vote, I guess most people assume to regard it as an assured conclusion on the floor of the House, I am sort of befuddled by the direction with which we go. And I would like to direct some questions at all of the panelists in this regard.

We are ready in this committee, and maybe in the full House, for the second time in our history to pass articles of impeachment to the Senate. And there are maybe 20 or 30 people who haven't really committed, whose minds aren't made up. They tend to be the so-called moderate Republicans. And at least to read from the newspaper statements of those moderate Republicans, what has pushed them in more of a direction to do the unthinkable, or what was unthinkable a few weeks ago and is still probably unthinkable to most of the American public, are two things: one, that the President didn't apologize in a fulsome way enough. I mean, one of these swing votes is saying please, Mr. President, apologize fully, and then I won't have to vote for impeachment. The other is that the answers to the 81 questions submitted by this committee weren't direct enough.

And so what I worry about, I would say to this panel and to all of my colleagues in the full House, since I think this committee is already—sort of what we are doing is we are going through motions, but it seems minds are made up. But I say to my colleagues that we may, the American people may wake up next week and find out that the Congress impeached the President for not being contrite enough to certain Members of Congress.

I just don't get that, because it seems to me that the standard of what the President did, and whether what he did reaches high crimes and misdemeanors, should be totally irrelevant to a level of contrition. You may judge the President as what kind of man he is by the level of contrition, but not whether he should be impeached, or by whether the President answered a series of questions here directly enough. Unless someone wants to allege that in the answers to the questions, perjury was committed as well. And I haven't heard anybody allege that.

So I would like to ask each of the panelists and particularly the constitutional experts, the professors, but all of the panelists, in

your legal opinion, even in your political opinion, does the contrition of the President go to whether the President should be impeached? Does the level of apology, the fulsomeness of apology, the sincerity of apology, should that be entering into one's mind as to whether the President should be impeached?

And, similarly, should the President's answers to a list of questions, assuming that no perjurious statements were made in answers to those questions, and I guess, I don't know if they are technically sworn under oath and made a standard to perjury, but just assuming that, should that go to whether we should impeach the President as well?

So maybe Professor Wilentz or Ackerman or Beer first.

Mr. WILENTZ. Maybe I can reply to your question, too, Mr. Gekas.

Mr. SCHUMER. Well, do that on his time, please.

Mr. WILENTZ. The answer is, no, it should not. There is no constitutional standard for lack of contrition. The ways in which—and my comments about cravenness, et cetera, were directed towards that process of getting those moderates perhaps to get in line. If any standard other than the constitutional standard of high crimes and misdemeanors becomes the reason for a vote for impeachment, that vote is, to my mind, a dereliction of constitutional duties.

Mr. SCHUMER. So level of contrition would not go to whether someone committed a high crime or misdemeanor, by any stretch of the imagination?

Mr. WILENTZ. Absolutely not. Absolutely not.

Mr. SCHUMER. Do you agree with that, Professor Ackerman?

Mr. ACKERMAN. Yes. The operational question is whether the conduct alleged represents a clear and present danger to the foundations of the Republic. Contrition, it seems to me, does not enter into that. Nor would the answer to these 81 questions——

Mr. ACKERMAN. That's correct.

Mr. SCHUMER [continuing]. Which don't deal with the acts of the President for which we're examining impeachment.

Do you agree with that, Professor Beer?

Mr. BEER. Yes, I agree. It seemed to ask him to come and confess things which he didn't do and does not think he did. I wouldn't call that contrition.

Mr. SCHUMER. Do you have any comments on this, Mr. Craig?

Mr. CRAIG. I agree with you, Mr. Schumer. You will not be surprised to know that I agree with you, Congressman.

Mr. SCHUMER. No. I mean since there's a minute left, it seems to me people are looking to avoid the direct, bald, naked confrontation with whether we should impeach or not when they're coming up with these kinds of answers. You better be convinced in your own head that these actions either imperil the Republic or at least meet a standard of high crimes and misdemeanors, and not look for an excuse like the President didn't apologize enough or he didn't answer someone's question directly enough. It's almost trivializing what ought to be a very sacred process.

Mr. SENSENBRENNER. The gentleman's time has expired. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. I thank the Chair. Gentlemen, good to have you all with us.

President Clinton, then-Candidate Clinton, assured us, I think it was in 1992, that he would bring to us an administration that was very ethical. In fact, he may have said the most ethical administration in history.

Well, the President has developed a pattern of being evasive and being deceptive which has caused those words not to be prophetic. Now having said all of that, Mr. Craig, let me put a question to you, and I am doing this from memory, so if my memory is faulted, don't be reluctant to correct me.

After the deposition for the Paula Jones case, I recall having read among my many notes here that the President contacted Dick Morris, the political consultant, to get his spin on it. This has turned into a spin operation. And it appears that Mr. Morris in a response to that question said, Mr. President, the American public will tolerate adultery, but they will not tolerate perjury. Well, at that point, the cow was out of the barn because he had already been deposed.

The President denied under oath having involved himself with any intimate touching. Ms. Lewinsky consequently admits, very forthrightly, that there was, in fact, intimate touching. Now, both these statements were given under oath, under sworn oath. Do you have any opinion, Mr. Craig, as to who's lying? Because it seems inevitable that one of those parties is lying. And you may not have an opinion to that.

Mr. CRAIG. Congressman, I represent the President of the United States. And the President of the United States has said and testified about that activity. And I accept his word about that. The problem for those of you who are here in a fact-finding capacity is precisely that problem. There is no other way to determine or corroborate—or corroborate the testimony. It's an oath-against-oath, a "he says/she says" situation. This is hardly, I think, the kind of issue that the House of Representatives should send to the Senate for a trial before the American people to determine whether or not the President of the United States should be removed from office.

Let me just make one comment if I might, Congressman.

Mr. COBLE. Sure.

Mr. CRAIG. We intend today to file a very, very complete brief dealing with the law and the facts in greater detail, in a greater and more systematic way than we have ever done before. And then we are going to have Mr. Ruff to go through these facts when he is here all afternoon tomorrow.

Mr. COBLE. And I thank you for that, Mr. Craig. And, of course, the Senate will be the ultimate fact-finders in this operation, assuming it advances that far.

Gentlemen, put on your alternative hats. I want to talk about censure. And I will excuse Mr. Craig. I will let one of you other four, if you will, come forward; not that you're not capable, Mr. Craig, but I have already given you time.

There's a balloon being floated on this Hill labeled censure, and some are suggesting that attached to that would be a financial forfeiture or penalty. Now my constitutional anxiety becomes activated at this point. I think that would be vulnerable. I think it would probably amount to a bill of attainder. Can you all confirm or reject my anxiety process?

Mr. ACKERMAN. Congressman, I think you are completely correct. Any financial sanction against a named individual by this Congress is a bill of attainder, and it doesn't matter whether it's Bruce Ackerman or Bill Clinton.

Mr. COBLE. I thank you for that. And, Mr. Chairman, I want you to know it can be done before the red light illuminates. And I yield back the balance of my time.

Mr. SENSENBRENNER. That is appreciated. The gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you very much, Mr. Chairman. Mr. Craig represents the President. I would like you to put aside his points and the points made before with respect to the factual allegations, and I would like you to assume for a moment that the narrative portion of the Starr report is true, and also for this purpose take the conclusions he draws from that narrative. And then as each of you have touched on in your testimony, I would like you very concisely to tell us why you don't think the sum total of those conclusions he draws from his narrative are not impeachable.

I realize you've talked about this, but I would like to do it particularly in the context of the argument that is frequently made by those who have come to the conclusion that the President should be impeached; that, particularly, lying under oath has repercussions and consequences with regard to our constitutional system of government and respect for the judicial process and these kinds of issues. However you want to do it.

Mr. KATZENBACH. Let me be brief, Congressman. I am perfectly willing to take everything that Mr. Starr says and still conclude that that does not reach the level of high crimes and misdemeanors in this situation. I reach that because the purpose is to remove the President. The reason you have high crimes and misdemeanors as grounds for removing the President is that there is no confidence left of the public in his ability to conduct that office. And I do not believe—if you came to that conclusion, you would have to explain why it is that the public seems to still have confidence in the President.

Mr. ACKERMAN. This committee does not sit as a grand jury of the District of Columbia. There is probably no person in the United States today who runs a greater risk in the year 2000 of an indictment for perjury than William Jefferson Clinton. You sir as the grand inquest of the Nation—and the question for you is whether the conduct alleged represents an assault on the fundamental principles of government. If this conduct represents that, our history over the last 2 centuries would be littered with bills of impeachment.

Congress has exercised its responsibilities in a very restrained way. The most important fact is that over 2 centuries, only twice has presidential conduct got up to the level of an impeachable offense. And so I think that this is simply, on the state of the evidence, just not nearly the kind of conduct that you, as opposed to the grand jury sitting in the District of Columbia, should consider.

Mr. WILENTZ. Yes, I think that unless this misconduct rises to the level of an assault on our fundamental political system that they are not impeachable, even if every one of the charges is true.

I think, however, that the argument that we must impeach the President for symbolic reasons, that somehow this misconduct represents a breach in the seamless web of justice, is, too, nonsense. What it does is to confuse the process of impeachment with what our legal system is for, our system of courts. We try crimes in courts. We do not impeach people over mere crimes. That is a fundamental constitutional principle. It has been lost amidst all of this talk of symbolism.

Mr. BEER. I couldn't improve on what my colleagues have said, but I will say it again. The thing to focus on is——

Mr. SENSENBRENNER. Professor Beer, could you please turn the microphone on so the court reporter can catch your words?

Mr. BEER. I couldn't improve on what my colleagues have said. I will repeat it and say that the thing to do is to focus on the meaning of the word impeach, which means remove from office. It tends to—it is said so much, it tends to lose its power. But when you say these things, even as Nick Katzenbach has said, even if the Starr charges are true, they don't begin to outweigh the enormous damage of removing a President.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Chairman, under this process of ours, we inevitably have, I think, two sides, and each side feels strongly about representing their client.

In this case we have individuals who feel strongly that the President did not commit an impeachable offense. We have other individuals who feel just as strongly that his wrongful actions did reach that level.

If the system is functional, and I believe that it is, what we all hope is that the truth is going to shake out.

Mr. Craig, my first question is this, you have admitted in your statement that the President did make, you call them, I think, evasive and misleading statements.

Have you ever counseled the President to go before the American people and tell the whole truth and nothing but the truth, which is to say forget about the polls—in fact, it is likely that the White House conducted a poll to find out generally what you ought to say today—but forget the polls; forget the partisan politics; and no matter how much it hurts, level with the American people and tell the whole truth?

Mr. CRAIG. Well, Congressman, let me just say that he has acknowledged the wrongdoing. He has himself acknowledged that he was evasive, that he misled people and that he went out of his way to conceal his conduct—if I could just finish what I am saying.

Mr. SMITH. Right. Mr. Craig, let me follow up on that by asking you this question then: Does the President intend to specifically correct any of those evasive and misleading statements that you have acknowledged that he has made?

Mr. CRAIG. Well, I think he has gone a long way, Congressman, when he gave that statement on August 17 in which he made the painful admission and acknowledgment that he did, in fact, have——

Mr. SMITH. Right. Mr. Craig, he also said he regretted it. It is very easy to say you have regretted something after you have been caught. But my question was, specifically, is he going to go back and correct the record and correct any of those misleading and evasive statements?

Mr. CRAIG. Congressman, I think he has, in fact, corrected the most central element of what he testified evasively about.

Mr. SMITH. Okay, Mr. Craig.

Mr. CRAIG. That had to do with the relationship that——

Mr. SMITH. I appreciate your answer.

Mr. CRAIG [continuing]. He denied and that he has now acknowledged, and he has told everybody that he was wrong in denying it.

Mr. SMITH. Mr. Craig, I understand all of that, but you have answered my question, and that is, I gather, there are no plans to go back and correct those false and misleading statements.

Mr. Katzenbach, may I address my next question to you. I would like to read a statement by Leon Jaworski, who was the special prosecutor during the Nixon proceeding. And he wrote this: "The President, a lawyer, coached Haldeman on how to testify untruthfully and yet not commit perjury. It amounted to subornation of perjury. For the number one law enforcement officer of the country, it was, in my opinion, as demeaning an act as could be imagined."

Wouldn't you agree with that statement, at least as it pertained to the situation in 1974?

Mr. KATZENBACH. I am not sure, Congressman, that I heard everything that you said. I am inclined to think that I would agree with what Mr. Jaworski said because I think he was saying you can have an impeachable offense whether or not it amounts to perjury.

Mr. SMITH. Right.

Let me read a couple of more statements. This is a quotation from the Lewinsky proffer: "At some point in the relationship between Ms. Lewinsky and the President, the President told Ms. Lewinsky to deny a relationship if ever asked. He said something to the effect that, if the two people who are involved said it didn't happen, it didn't happen."

And then this as well: Ms. Lewinsky has testified that on December 17th, 1997, when she and the President discussed her possible appearance in the Jones case, the President told her, quote, "You know you can always say you were coming to see Betty or that you were bringing me letters."

In your judgment, didn't the President's actions amount to coaching a witness to testify falsely?

Mr. KATZENBACH. As you have quoted them, Congressman, I wouldn't think so. But I am not trying to trivialize that. If that is true, that was the wrong thing to say.

Mr. SMITH. I heard your answer as part of—let me state——

Mr. KATZENBACH. It does not amount to grounds for impeachment.

Mr. SMITH. Let me say to you that I think 99 percent of the American people would consider this to be tampering with a witness, which is a serious felony and might well be an impeachable offense.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Virginia, Mr. Boucher.

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

I share the view that this morning was very eloquently expressed by General Katzenbach that the impeachment power was not intended for the punishment of an individual for his conduct. He can be punished even if he is President in the same manner as any other citizen in our criminal courts.

The impeachment power is designed to advance the national interest and to remove from office an official whose conduct is so severe that he threatens the Nation.

This committee in its 1974 report in the Watergate inquiry on a broad bipartisan basis concluded that the impeachment power can only be used for conduct that is seriously incompatible with our constitutional form of government or the performance of the constitutional duties of the office of the President. Any other use of the impeachment power falls short of that high standard.

I am concerned that some Members of the House may view the application of a lesser standard as appropriate, that they may think that the House should simply send to the Senate for trial any charges for which there may be probable cause that an offense may have been committed, and then leave to the Senate, as the trier of fact, the resolution of the matter.

I would like to ask for your opinions of that view of the impeachment standard, and I would also welcome your thoughts on the gravity of the act of the House alone approving articles of impeachment. In considering whether to apply a higher or a lower standard of what conduct is impeachable, should the Members of the House consider the harm to the Nation that House approval of articles of impeachment will cause? Should Members consider the divisiveness and the polarization that will occur pending a Senate trial and during the trial in the Senate? Should they consider the fact that for months the Congress and the President will be diverted from the real business of this Nation?

So there are three questions that I would pose to you. First, should the House view its standard as probable cause or something higher?

Second, what harms will occur to the Nation based on the House approval alone of the articles of the impeachment?

Third, should those harms be considered by the Members of the House in deciding the proper course on approving articles of impeachment given that the protection of the Nation is the ultimate test?

And I would like to begin with Professor Ackerman.

Mr. ACKERMAN. I think that the standard, so far as evidence is concerned, should be clear and convincing evidence. This is not a normal grand jury indictment. You are indeed correct, Congressman Boucher, that what you are doing is deciding whether the Nation's political attention will be diverted for a year.

In the case of a normal grand jury, there is no great public interest in preventing an indictment. Here, there is a great public interest in diverting—against diverting attention away from normal poliical problems. So you are absolutely right, that the standard has to be high; the evidentiary standard should be clear and con-

vincing, and it is, therefore, very difficult to evaluate little snippets of testimony without understanding the much larger context.

The second crucial point is that a vote of impeachment is itself a terrible political precedent for the next generation or two. If this dramatic lowering of the standard from the historical examples is tolerated, every time we have one party, let's call them the Democrats, in control of Congress, and a Republican President in the year 2001, there is going to be an overwhelming political temptation to exploit a moment of political vulnerability for the President to once again use a low standard for high crimes and misdemeanors.

Mr. BOUCHER. Professor Wilentz, let me ask you, if I might, in the time remaining, would you care to comment on the harm to the Nation that the mere act of the House passing articles of impeachment might cause?

Mr. WILENTZ. I have really little to add. I mean, it is true that it will open up the possibility for future Presidents to be subject to harassment by Congress' caprices if it so desires.

But also I should add that as representatives of the people, you should be well aware that the public has shown again and again and again that it has no stomach to watch this nauseating spectacle continue. To ignore that, I think, is something that no Congressman ought to do.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from California, Mr. Gallegly.

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

Mr. Craig and other members on the witness panel today, thank you for being here.

Mr. Craig, do you believe our legal system is dependent on telling the truth?

Mr. CRAIG. Absolutely. I think it is very important.

Mr. GALLEGLY. Thank you, Mr. Craig.

Do you believe that perjury represents an attack on the integrity of our judicial system?

Mr. CRAIG. It certainly is not consistent with the high standards of the judicial system.

Mr. GALLEGLY. Thank you, Mr. Craig.

Mr. Craig, on Meet the Press on Sunday, November the 22nd of this year, just a couple of weeks ago, Tim Russert asked you, do you believe the President, President Clinton, ever lied under oath? And your statement was, no.

Do you stand by that?

Mr. CRAIG. Yes, sir.

Mr. GALLEGLY. Mr. Craig, you concede that the President's testimony in the Jones case was evasive, incomplete, misleading and even maddening. How could his testimony be those things without being a lie?

Mr. CRAIG. There is one element that's absolutely central to the elements of a perjury offense, and that is an absolute intent and knowledge that what you——

Mr. GALLEGLY. Pardon me, Mr. Craig.

Mr. CRAIG. Excuse me.

Mr. GALLEGLY. Are you saying that all lies are perjurious then?

Mr. CRAIG. No, I am not. I am talking about the elements——

Mr. GALLEGLY. We are dealing with lying, and now you are bringing in the issue of perjury.

Mr. CRAIG [continuing]. Of specific intent.

He did not intend to help. He did not intend to volunteer. He tried, I think, to answer accurately in a very narrow way.

You may conclude, Congressman, that he did not succeed. I can understand what he was trying to do and how he read that definition. He may not have been successful. I think we could defend his testimony in any court in this country.

Mr. GALLEGLY. Mr. Craig, I appreciate your assessment as a very capable lawyer and as someone who has studied the law, I imagine, the majority of your life. Could you please give me in as succinct a manner as is humanly possible your definition of what it means when you hold up your right hand and you swear to tell the truth, the whole truth and nothing but the truth, so help you God?

Mr. CRAIG. It means what the words of the oath are clearly intended to mean, the truth, the whole truth and nothing but the truth.

Mr. GALLEGLY. At this point, do you believe that the President has told the truth, the whole truth and nothing but the truth, so help him God, to the American people?

Mr. CRAIG. I do not think he violated the oath knowingly when he testified in the Jones deposition.

Mr. GALLEGLY. Do you think he has violated his oath to the American people in telling the truth, the whole truth and nothing but the truth?

Mr. CRAIG. I disagree with your sense that he did. He did not violate his oath.

Mr. GALLEGLY. Thank you very much, Mr. Craig.

I think probably one of the problems that we are dealing within the President's defense today is that any reasonable analysis shows that the President lied on several occasions in both the deposition and the grand jury testimony.

For example, in the deposition of January 17th, the President was asked, "Have you ever given any gifts to Monica Lewinsky?" He answered, "I don't recall."

Yet, just 2½ weeks before the deposition, President Clinton had given Miss Lewinsky six gifts: a marble bear's head, a Rockettes blanket, a Black Dog stuffed animal, a small box of chocolate, a pair of joke sunglasses and a pin of the New York skyline.

The question was important because it goes directly to the issue of a cover-up by the President and possibly his attempt to influence the testimony of a witness.

We have all heard that the President has an extraordinary memory. However, at the same time we are expected to believe that he does not remember giving six gifts to Miss Lewinsky just 2½ weeks earlier, and, oh, by the way, when the President gave the gifts to Miss Lewinsky, he knew that she was on the witness list for the Jones sexual harassment case.

Quite frankly, this is an insult to our intelligence and frankly indicates that the President is still not telling the truth.

Mr. Chairman, I yield back.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman.

My question is for Professors Wilentz and Ackerman. Gentlemen, I want to follow up sort of on what my colleague Mr. Boucher asked about standards of proof. We have heard quotes that we just have to see if there is credible evidence, send it over to the Senate, let them be the trier of facts.

In my view, that simply transforms the role of the House into a rubber stamp for the special prosecutor, just a transmission belt, and it is incorrect.

We have also heard other comments. Special Prosecutor Smaltz, after Mr. Espy was acquitted, said that indictment by itself is a deterrent to corruption, as if you seek to punish someone by indictment. And a member of this committee was quoted as saying that impeachment itself, even if not followed by conviction, even if you know that there is no real possibility of a conviction, is a punishment for misconduct, a scarlet letter, even if the Senate acquits, and even if you know there is no possibility the Senate will, in fact, convict.

Now, we know that the Canons of Legal Ethics say that it is unethical for a prosecutor to seek an indictment if the prosecutor does not believe that he can get a jury to convict the defendant.

Could you comment on the view that it is proper to seek an impeachment as a punishment for improper conduct, even if you know or think that the evidence will not produce a conviction by the Senate?

Mr. WILENTZ. Let me start, Congressman Nadler, by quoting Oliver North's attorney, Brendan Sullivan, or paraphrase him rather, to say that Congress, or rather, the House of Representatives, is not a potted plant. You are not just sitting here passing things along to the Senate. To see that as your role, I think, is a violation of your oath of office. It certainly goes towards that, your oath to uphold the Constitution. That is what you are here for. And if you are derelict in that, if you back off from that, out of fear, out of desire just to get it over with——

Mr. NADLER. So it is not like a grand jury, if there is any probable cause?

Mr. WILENTZ. No. This is no more like a grand jury than an impeachment is like a normal jury trial. It is not. They are two different species.

Mr. NADLER. Could you comment on the second half of the question?

Mr. WILENTZ. Could you remind me of that?

Mr. NADLER. The second half of the question is the propriety of voting for impeachment as a punishment in and of itself, and if you think that the Senate probably will not convict on the evidence there?

Mr. WILENTZ. Historically that just runs against the entire tenor of what impeachment has been about. There has never been a case where a House of Representatives has decided to move on an impeachment proceeding with the idea that the Senate would not convict. The entire reason—I think Elliot Richardson said this every eloquently the other day: A vote to impeach is, in effect, a vote to remove.

Mr. NADLER. And briefly, Professor Ackerman and Attorney General Katzenbach, on the second half of that question?

Mr. ACKERMAN. It is especially inappropriate when you know that the 106th House is going to have to vote on it again. And if there is no reason to believe that the 106th House would be willing to vote an impeachment, this is to trivialize the impeachment process completely.

Mr. NADLER. So you think it is improper to vote for impeachment if you don't think the Senate would be likely to convict?

Mr. ACKERMAN. Or if the next House won't, won't confirm you.

Mr. NADLER. Attorney General?

Mr. KATZENBACH. It seems to me that nothing could be more improper than to use the impeachment process as a punishment, and that is what you are suggesting. It is absolutely clear constitutionally that however bad the acts, impeachment is not a punishment. It is to remove somebody from office, the President or a judge or somebody else.

Mr. NADLER. So do you think it would be proper or improper to vote for impeachment, even if you thought the President should be removed from office, if you thought the likelihood the Senate would remove him from office was nil?

Mr. KATZENBACH. If you met the standards, if the House met the standards of impeachment as a high crime and misdemeanor, if those were met and sincerely met, then I would think simply to consider what the Senate would do might be a factor in the voting, but not necessarily from a matter of principle.

Mr. NADLER. Anybody else want to comment on that?

Mr. SENSENBRENNER. The gentleman's time has expired.

Mr. BEER. Again, this points to the political and constitutional consequences. I mean, this is not just something that is happening now. This goes on down and into the future history of the relation of the Congress and President. It is a further attack on the separation of powers, this entire precedent. I entirely agree with what my colleagues said.

Mr. NADLER. Thank you very much.

Mr. SENSENBRENNER. The gentleman from Florida, Mr. Canady.

Mr. CANADY. Thank you, Mr. Chairman. I want to thank the members of this panel for being here today.

I will candidly state that with the exception of Professor Ackerman's argument concerning the procedural status of the resolution of impeachment passed by this House, I didn't find any new arguments advanced with respect to the grounds for impeachment or the proper circumstances for impeachment, but I appreciate your being here.

I want to say something about that issue, but before I do that, I want to also thank Mr. Craig for indicating that we will soon be receiving an exhaustive defense in writing of the President's conduct that's set forth in the record. And I am not going to dwell on that, but I do want to ask one question, which just stands out to me, of Mr. Craig.

Mr. Craig, in the President's deposition last January, he was asked this question: "At any time, were you and Monica Lewinsky alone together in the Oval Office?"

He answered, "I don't recall." He gave kind of an extended discussion there about working on the weekends, in which he indicated to me, "it seems to me she brought things to me once or twice on the weekends."

There was then a follow-up question: "So I understand your testimony is that it was possible then that you were alone with her, but you have no specific recollection of that ever happening?"

Answer from the President: "Yes, that's correct."

Now, Mr. Craig, is it your position here today, on behalf of the President, that when the President gave those answers in the deposition, he was telling the truth?

Mr. CRAIG. That's correct, Congressman. He answered the question that it was possible that he was alone with her. This is in the civil deposition. So the description that I gave of that civil deposition is accurate. It was evasive; it was misleading; he tried to be narrowly accurate, but, Congressman, he did not violate his oath.

Mr. CANADY. Mr. Craig, let me just say this: I read it. It is here in writing. I believe this is an accurate transcription of what took place. This is in the public domain. It seems to me that the President unequivocally denied that he had any specific recollection of being alone with Miss Lewinsky. And for you to contend today that that is truthful I think is not credible. That's just an observation.

There are other questions about other parts of the record that I am sure we will focus on as we move forward with this, but I must candidly state that I don't see how anyone in this country could believe that that was a truthful answer in light of all of the evidence that is before us.

Let me address the issue about the standards for impeachment, and I think it is important that all of us acknowledge that not all criminal acts are impeachable. No one here contends that.

We also understand that impeachment should not be for trivial matters. Impeachment, we all understand, is a grave step to take. And, yes, I believe, and I believe most of the members of the committee understand, that we need more than probable cause to move forward with an impeachment. We need convincing evidence. But I believe that on the record before us, we have convincing evidence of a pattern of lying under oath and obstruction of justice. I can't detail that here, but I believe that's in the record, and we will discuss that. I think we need to look at the effect of such conduct on the system of government.

I refer back to the report of the committee in the Nixon inquiry. It said, the emphasis has been on the significant effects of the conduct undermining the integrity of office, disregard of constitutional duties and oath of office, arrogation of power, abuse of governmental process, adverse impact on the system of government. I believe that there is a convincing case here of such an adverse impact.

Let me quote, finally, Chief Justice Jay, who delivered the following charge to a grand jury. He said, "independent of the abominable insult which perjury offers to the Divine Being, there is no crime more extensively pernicious to society. It discolors and poisons the streams of justice, and by substituting falsehood for truth saps the foundations of personal and public rights."

He goes on to say——

Mr. SENSENBRENNER. The gentleman's time has expired.

Mr. CANADY. Thank you.

Mr. SENSENBRENNER. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, earlier this morning I mentioned a motion that I would like to introduce. The motion would have been, had it been in order, that I move that the committee establish a specific scope of inquiry prior to the White House's rebuttal of still undefined allegations. If it shall be necessary to expand the scope of inquiry, then such expansion shall be permitted by majority vote of the committee.

In addition, once specific allegations of inquiry have been designated, the committee shall hear from witnesses with direct knowledge of these allegations before it considers any articles of impeachment.

When that is in order, Mr. Chairman, I would like to introduce that.

But in the meanwhile, I would like to ask Mr. Craig whether or not he has been given a list of allegations, noting that Mr. Starr's original report had 11 allegations, he came back with 10. Mr. Schippers, the Republican counsel, came up with 15; our Democratic counsel came up with three. Kathleen Willey has been mentioned as a possible scope. Campaign finance reform was in one day and out the next. Insult by the virtue of the response to the 81 questions has been mentioned as an impeachable offense, or lack of candor.

Do you have a list of the allegations that you are responding to?

Mr. CRAIG. We do not, Congressman. And may I just say one thing about that problem, which I think has been highlighted by what Congressman Canady just did. Particularly when allegations are being made about perjury, it is very important to particularize what the false statement is or what the alleged testimony is that is perjurious. And if this committee is going to be considering those kinds of articles, it would be of benefit to the world as well as to this individual, trying to serve the purpose of a defense lawyer, to know precisely what it is that the President said in the grand jury that is supposed to be perjurious. This is the way, in fact, it is the common pleading way, that you deal with indictments for perjury or allegations of false testimony.

Mr. SCOTT. Okay. Much has been said about 17 boxes of material. It is my understanding that you have been given access to about a third of that material. Is that right?

Mr. CRAIG. I think we have been given some access, yes.

Mr. SCOTT. But not entirely?

Mr. CRAIG. We are not allowed to take notes or to make copies.

Mr. SCOTT. Okay. Mr. Ackerman, you indicated—I think you acknowledged in your testimony that there is precedence for carrying over impeachments from one Congress to the next. Is there any question about the need to appoint managers by the House in the new Congress? Is there any question about that aspect of it?

Mr. ACKERMAN. There is only one case of carrying over in the last 65 years. That's the Hastings case. The previous carry-overs are the trial of Pickering in 1804, which is the high point of no due process throughout the entire—this was the worst possible prece-

dent in the history of the United States. And then there was Judge Louderback, I think it was in 1933, which was just before the 20th amendments—this was sort of the final revenge of the lame duck Congress. So there is only one case.

Mr. SCOTT. The question is is there any new question that the new House would have to appoint managers?

Mr. ACKERMAN. Absolutely. And in the Hastings case, the new House appointed managers. So there is absolutely no precedent for holding over the managers appointed by one House to the new House.

Mr. SCOTT. The other question I have is I would like to ask, I guess, Professor Wilentz, the title of the offense has been mentioned as the impeachable offense. Can you comment on why the title of the offense should not be used as the measure of whether it is an impeachable offense but the underlying behavior?

Is perjury an impeachable offense? Usually it is perjury, because you lied about bribes and things like that, that we ought to be looking at?

Mr. WILENTZ. Under some circumstances, perjury is plainly an impeachable offense.

Mr. SCOTT. How do you measure—rather than the title, what do you look to to determine whether it is an impeachable offense?

Mr. WILENTZ. When it goes to a fundamental assault on political institutions. When it goes to, as Mason said, in the Constitutional Convention, when it is a crime against the state. That is the spirit of the Constitution, as well as the letter.

Mr. SENSENBRENNER. The gentleman's time has expired.

Mr. SCOTT. Without that, it is not an impeachable offense?

Mr. SENSENBRENNER. The gentleman from South Carolina, Mr. Inglis.

Mr. INGLIS. Thank you, Mr. Chairman.

Mr. Craig, you said in your testimony that you would address the factual and evidentiary issues directly today and tomorrow. You haven't done that yet. I hope we have got more to come. I understand that what you are talking about here today, in this panel, is the standards of impeachment, but as some of my colleagues have pointed out, there is nothing new here, nothing new at all, except possibly Professor Ackerman's statements. So we have heard all the rest of this before.

Now I think you have raised a level of expectation, and now I am counting on you to meet that over the next—today and tomorrow. You need to meet that expectation. It is very unusual for the White House spin operation to go out there and set up expectations they can't fulfill. Usually they do it the opposite. So you have now established a very high expectation that I am going to count on you to meet.

Now, you also said in your testimony that the President, if we—you are asking us to believe this, that the President has insisted and personally instructed his lawyers that no legalities or technicalities should be allowed to obscure the simple moral truth that his behavior in this matter was wrong.

Mr. Craig, did the President lie about never being alone in the Oval Office with Monica Lewinsky?

Mr. CRAIG. Congressman, I have made a distinction between what was morally wrong and what was——

Mr. INGLIS. No, no, Mr. Craig. Answer that question. This is what—let me give you a little bit further background now.

Mr. CRAIG. Yes.

Mr. INGLIS. This is a question put to the President in the deposition. And I understand you are drawing a distinction, a technicality, a nicety, as you said, between grand jury and deposition. So let me be absolutely clear, we are talking here deposition.

Paula Jones' lawyer asked the question: At any time were you and Monica Lewinsky alone together in the Oval Office?

The President's answer: I don't recall. And then he goes on.

Now, corroborating evidence in Ms. Lewinsky's evidence indicates that there were eight occasions when the President and Monica Lewinsky had sex in the Oval Office.

I ask you again now: Did the President lie when he said, I don't recall?

Mr. CRAIG. Congressman, he goes on in that same passage to testify that it *was* possible, in fact, that he was alone. So the characterization of the testimony that he never was alone or he didn't recall is not accurate. The characterization that you just gave to it, and that Mr. Starr gave to it, and that the referral gave to it is not an accurate characterization of the President's testimony in that deposition.

Mr. INGLIS. You know, I am reading the whole thing, and I don't see what you are talking about. It seems to me that you are relying on these technicalities.

Now, Mr. Craig, did he lie to the American people when he said, I never had sex with that woman? Did he lie?

Mr. CRAIG. He certainly misled and deceived.

Mr. INGLIS. Wait a minute now. Did he lie?

Mr. CRAIG. To the American people, he misled them and did not tell the truth at that moment.

Mr. INGLIS. So you are not going to rely—the President has personally assisted you, I understand, instructed—has assisted and personally instructed you, I suppose, that no legalities or technicalities should be allowed to obscure the simple moral truth.

Did he lie to the American people when he said, I never had sex with that woman?

Mr. CRAIG. You know, he doesn't believe he did, and because of the—may I explain, Congressman?

Mr. INGLIS. He doesn't believe that he lied?

Mr. CRAIG. No, he does not believe that he lied because his notion of what sex is is what the dictionary definition is. It is, in fact, something you may not agree with, but in his own mind his definition was not——

Mr. INGLIS. Okay. I understand that argument.

Mr. CRAIG. Okay.

Mr. INGLIS. This is an amazing thing, that you now sit before us and you are taking back all of his apologies.

Mr. CRAIG. No.

Mr. INGLIS. You are taking them all back, aren't you?

Mr. CRAIG. No, I am not.

Mr. INGLIS. Because now you are back to the argument—there are many arguments you can make here. One of them is he didn't have sex with her; it was oral sex, it wasn't real sex. Now, is that what you are here to say to us today, that he did not have sex with Monica Lewinsky?

Mr. CRAIG. What he said, to the American people was that he did not have sexual relations. And I understand you are not going to like this, Congressman, because you will see it as a technical defense or a hairsplitting, evasive answer, but sexual relations is defined in every dictionary in a certain way, and he did not have that kind of sexual contact with Monica Lewinsky.

Mr. SENSENBRENNER. The gentleman's time has expired.

Mr. CRAIG. Let me just finish. So did he deceive the American people? Yes. Was it wrong? Yes. Was it blameworthy? Yes.

Mr. SENSENBRENNER. The gentleman's time has again expired.

The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

My colleagues, the last three Republican colleagues on the committee, Mr. Gallegly, Mr. Canady and Mr. Inglis, have asked a series of questions about whether the President lied or misled or didn't lie or mislead.

What I would like to find out from Mr. Katzenbach, Professor Ackerman, Professor Wilentz and Professor Beer is even if you assume that everything that they said was correct, that the President did, in fact, lie on those occasions, would it be an impeachable offense?

Mr. KATZENBACH. Congressman, my answer would be that it clearly would not because of the nature of that lie. That seems to me to be the view that the American people take, and it is the view that I would take.

Mr. WATT. Professor Ackerman.

Mr. ACKERMAN. Impeachment is the ultimate weapon of the people's representatives against an executive out of control. I do not believe that this evidence is evidence of an executive out of control, assaulting our basic liberties.

Mr. WATT. Professor Wilentz.

Mr. WILENTZ. We have answered this question on various occasions. I am happy to answer it again. Even if President Clinton did all of the things that have been alleged, the worst of them, they do not rise to the level of impeachment. They may rise to the level of crimes for which our court system is set aside to prosecute.

This procedure has other meanings, other purposes, and to confuse the two is to violate, I believe, the spirit of the Constitution.

Mr. WATT. Professor Beer.

Mr. BEER. That was my point also. I think the legal case is terribly weak, but even if it were true, it would have to be taken in consideration—in the context. I think that is what we have tried to call attention to, that impeachment means remove; it means eliminate this administration. It means holding the record and the promise of this Presidency at naught, and I think that in that context, if you balance the pluses and the minuses there, overwhelmingly there is no reason to remove this President from office. That's the point to keep. And to do so, it would severely damage the democratic process.

Mr. WATT. Professor Beer, I think you have hit on something in your testimony that is not very exciting in the public context to talk about, but I think is extremely important. And that is the difference between a parliamentary form of government and a democratic form of government, which we have, or a constitutional form of government, which we have.

I wonder if you could elaborate on that distinction and the implications that that distinction has in this context.

Mr. BEER. I am so glad you asked me that, because it does need to be said. The crucial thing in the separation of powers is that each of the offices, the legislature and the executive, is directly responsible to the voter. That's the point. In a parliamentary system, there is an intermediate body, namely the Parliament, and that makes it quite different.

I mean, therefore, when the legislature acts against the executive in our system, it is, so to speak, taking the place of the basic relationship, which is one directly between the President and the people. And it has to, therefore, act with a special caution and look at the whole record, and put itself in the place of the people, and try to judge as they would judge.

Mr. WATT. Thank you, Mr. Chairman. I yield back the balance of my time.

Chairman HYDE [presiding]. I thank the gentleman.

The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Professor Wilentz, last week, Harvard Professor Alan Dershowitz testified under questioning before this committee that perjury before a Federal grand jury, if proven, would be an impeachable offense. Do you agree with Professor Dershowitz that perjury before a Federal grand jury, if proven, would be an impeachable offense?

Mr. WILENTZ. I am not sure that I would, actually.

Mr. GOODLATTE. Let me ask you this: I think the prevailing opinion is——

Mr. WILENTZ. May I add, though, that I am not sure that it wouldn't be, either. It depends on the character of the offense, et cetera.

Mr. GOODLATTE. All right. Let's accept that.

What about perjury that would, if the President were subject to prosecution and imprisonment while President, result in his imprisonment?

Mr. WILENTZ. You mean, an offense—well, any offense might involve imprisonment.

Mr. GOODLATTE. Yes. And if the President of the United States, like an ordinary citizen, could be prosecuted and, if convicted, incarcerated, would you then think it appropriate for the Congress to remove the President from office while he is in prison, to use the impeachment power for that purpose?

Mr. WILENTZ. I think it would be an improper use of the impeachment power.

Mr. GOODLATTE. You would leave him in prison as the President of the United States?

Mr. WILENTZ. The President of the United States would be tried for—by my understanding, would be tried for that crime after he left office. That's the point of that.

Mr. GOODLATTE. Now, there is also a prevailing opinion that a President of the United States can exercise the power of pardon on himself.

Mr. WILENTZ. I would defer to a lawyer on that one.

Mr. GOODLATTE. All right. Well, if the President can indeed exercise that power, and I think the language in the Constitution would support that argument because with regard to pardons, Article II says, have the power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. Therefore, if the President has the power to pardon himself, and the prevailing opinion is that he cannot be prosecuted until after he leaves office, your position regarding the responsibility of this committee, with regard to use of the impeachment power, when the President commits a serious offense that could result in his incarceration if he could be incarcerated, is to say that the President of the United States is above the law?

Mr. WILENTZ. No. There has to be a distinction, which I have been trying to get across to the committee and to everyone else, between impeachment and crimes and being tried for crimes. There are two distinct processes.

Mr. GOODLATTE. Certainly they are, but the Constitution contemplates that with the power of pardoning, that obviously the President could be removed for crimes, because it says that he can't exercise that power in cases of impeachment.

Mr. WILENTZ. Well, I am going to defer to my lawyer friend over here.

Mr. GOODLATTE. Before we go on to Mr. Ackerman, let me just say to you, sir, that you have made this novel argument that the Senate cannot continue with this action unless the 106th Congress votes out additional articles of impeachment; that while I appreciate your making the argument, and while you have acknowledged that it is a moot argument because this committee can act, and we don't know what action the 106th Congress will take or what the Senate will take, that your statement is based on absolutely no historical precedent, because every single precedent available to this committee is exactly to the contrary, both—not only in the 19th century, but you cite as a basis for changing that precedent the 20th amendment to the Constitution.

I have the 20th amendment here before me, and there is absolutely nothing in the 20th amendment which indicates that the precedents of the 19th century would be changed. And in fact, after that amendment was adopted, the Congress in the late 1980s in the Alcee Hastings case, the Senate, receiving the articles of impeachment in one Congress, conducted the trial in the next Congress, without the House of Representatives enacting or adopting or sending to the Senate new articles of impeachment.

So there is absolutely no constitutional foundation for your argument.

Mr. ACKERMAN. May I answer that question, Mr. Chairman?

Mr. GOODLATTE. Yes, please.

Mr. ACKERMAN. In the last 65 years, since the passage of the 20th amendment, there have been no lame duck impeachments. Of course, there are no precedents because Congress has acted with restraint for the last 65 years.

Mr. GOODLATTE. Reclaiming my time, that is absolutely incorrect with regard to the Judge Hastings impeachment——

Mr. ACKERMAN. Because he is impeached by a normal Congress.

Mr. GOODLATTE. Because articles of impeachment were passed in one Congress and tried in the second Congress.

Mr. ACKERMAN. Hastings was impeached by a normal Congress in the month, I think, of August or something of this kind; not after an election. This is the first time since the 20th amendment——

Mr. GOODLATTE. It was still a new Congress,

Mr. ACKERMAN.

Chairman HYDE. The gentleman's time has expired.

Mr. GOODLATTE. Overturned the results of the previous Congress.

Chairman HYDE. The gentleman's time has expired.

The gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. I appreciate the panel's report today, and I am mindful, once again, of the severe gravity of this matter. And although some of the questions today have been about details of sexual activity that I think we all find embarrassing, underlying that kind of embarrassing discussion is the very real prospect, I would say the likelihood, that this committee may vote for articles of impeachment and that the House of Representatives may also vote articles of impeachment. And I think many in the country are not aware of that.

I just came in from California last night, and people at home, many of them, were asking, "well, when is this going to be wound up?" They thought it was over, and people are busy getting ready for the holidays. So I think this hearing today is very important in terms of informing not just the committee and the House, but the American public that something is actually happening.

Now, I think your report matches what the Founding Fathers had in mind, what Mason and Madison meant, that impeachment is a remedy for the Nation. For the well-being of the Nation is, in fact, what we need to be considering.

And I am also mindful that impeachment trials take a long time. The trial of Andrew Johnson took 3 months, and that was before television. It would take even longer today. The Chief Justice must preside, and I have been thinking that if we proceed with this trial, will that mean that the Supreme Court wait to hear any cases for a period of 6 months or more? Will all of government be gridlocked?

So as we measure the threat of this alleged conduct to the country and whether it meets the constitutional standard for impeachment, is it appropriate to also measure the impact of a trial on the well-being of our Nation?

Now, I have a question for Mr. Katzenbach. I am from Silicon Valley, and the venture capitalists who spoke to me last week when they found out that this was proceeding were extremely concerned and alarmed about the potentially severe economic impact, in their view.

You were the senior vice president for IBM, I think their senior legal advisor, for many years. I have the IBM research division in my district, and the disk drive division. Can you give us some insight for what the implications for an impeachment trial might be

for the economy? I am of course especially concerned about high tech, but not just that.

Mr. KATZENBACH. Let me say two things, Congresswoman Lofgren. I think your point——

Chairman HYDE. Would you move the microphone over.

Mr. KATZENBACH. Sorry, Mr. Chairman.

Chairman HYDE. Thank you.

Mr. KATZENBACH. I think your point about what kind of agony and disruption that you put the country through, if there is an impeachment process, simply underlines what I think members of this panel have been saying with respect to the importance of the definition; not whether or not the President had sex or lied about it, but what it does as far as the government is concerned.

On your second question, the people involved in business and the stock markets and so forth want certainty, and I can think of nothing much worse than pushing them into an uncertainty that would go on for some period of time while we rehearsed what has been rehearsed a dozen times already, and I would think that that would be a consideration, as the first points were that you made, in terms of how serious, in terms of the public will, is the conduct of the President? Is it so serious that he must be removed from office and we go through the long process of a potential conviction, a trial and a conviction in those circumstances?

It was set up that way because of the importance that was attached to the idea in our system of removing the President.

Ms. LOFGREN. So if I may, would you then say it is not inappropriate to weigh that there may be implications for the stock market? Should we consider that our economy, especially high tech, is oriented towards exports, and that might fall apart, in the balancing of whether to move forward?

Chairman HYDE. The gentlelady's time has expired.

Ms. LOFGREN. Could the witness answer yes or no?

Chairman HYDE. The gentleman from Indiana, Mr. Buyer.

Mr. BUYER. Thank you, Mr. Chairman.

I have several questions. Let me ask each of the witnesses, how much notice did you have that you would be here testifying today?

Mr. KATZENBACH. I had about 48 hours, something of that kind.

Mr. ACKERMAN. Saturday morning.

Mr. WILENTZ. Saturday.

Mr. BUYER. And Saturday?

Mr. BEER. Monday, I think yesterday.

Mr. BUYER. Yesterday you received notice that you would be a defense witness for the President?

Mr. BEER. Yes.

Mr. BUYER. And who contacted each of you?

Mr. KATZENBACH. I was contacted by the gentleman to my right.

Mr. ACKERMAN. Mr. Craig.

Mr. WILENTZ. Mr. Craig.

Mr. BEER. I am sorry. It was Sunday afternoon, but I was at such a huge cocktail party that I had to—that I had to call Mr. Craig back Monday morning to find out what it was about.

Mr. BUYER. Were you invited to the cocktail party?

Mr. BEER. I would have loved to have had you there.

Mr. WILENTZ. He gave the party.

Mr. BUYER. Oh, you gave it.

All of you are here, it appears, hastily called, to defend the President. When the President spoke to the American people on August 17th, some of the President's comments in his attacks of Judge Starr were not taken very well by the American people. So I view these witnesses as if the President were here speaking; this is his position; this is his defense in this case.

And one of them has come here and said that if there are Members of the 105th Congress who, based upon the reading of the law and the facts, believe that the President's conduct rises to the level of impeachment, then we are zealots, fanatics and cowards.

Now, that type of name-calling by the President's defense is disappointing and demeaning to this proceeding.

Earlier, Mr. Craig mentioned about the witness tampering, and said that at the time—there was some questioning by Mr. McCollum with regard to Betty Currie, and Mr. Craig said, well, she was not on a witness list, nor was there a proceeding at the time.

I have Title 18, section 1512 here, and I am sure that you also have read it. This criminal statute very clearly says that for the purpose of this section, an official proceeding need not be pending or even about to be instituted at the time of an offense; very clear. So I would just disagree with your reading of the law here.

I would also note, and I would like for you to comment on this, I believe that in my reading of the facts here, Mr. Craig, that the President endeavored to influence testimony of subordinates whom he knew to be potential witnesses in a Federal criminal investigation, systematically lying to them with the intent that they would relay these falsehoods to the Federal grand jury.

One was John Podesta, who testified before the grand jury on January 23rd, that the President volunteered information to him concerning Ms. Lewinsky, even though he had not asked for that information. Specifically, the President told him that he had not had sex with Miss Lewinsky. Mr. Podesta also said that the President told him when Miss Lewinsky came to the White House, after she left her employment there, she came to see Miss Currie; that Ms. Currie had always been present or nearby. Mr. Podesta testified that he believed the President.

Mr. Podesta testified also to the grand jury that he was present in the Oval Office on January 21st, together with Erskine Bowles and Sylvia Matthews, when the President told the three of them, quote, I want you to know that I did not have sexual relationships with this woman, Monica Lewinsky. I did not ask anybody to lie, and when the truth comes out, you will understand, end quote.

Mr. Bowles testified to the grand jury the President made these statements and that he believed the President.

Sidney Blumenthal testified before the grand jury that on January 21st, the President relayed a conversation that Mr. Clinton had with Dick Morris in which Mr. Morris speculated that President Nixon could have survived——

Chairman HYDE. The gentleman's time has expired.

The gentlelady from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Welcome back, Mr. Chairman. Thank you very much.

Let me state on the record that I am sure my time will expire before I have had the opportunity to fully address the panel and to determine information that I think is vital.

However, might I just simply say and raise my continuing objection to the limited time that the President has had to present his case, and say as well to the panel that I appreciate, I think it might have been the esteemed Mr. Katzenbach or Mr. Ackerman, who have noted that this is a process of completeness, this is a process in which we have the ultimate act, the removal of a President. So there is a, in quotes, prosecutorial process of which we in the House sit, and there is then the trial process. So it is as a whole. And you cannot bifurcate and separate one process from the other.

Let me just note that under the Rodino committee, there were 17 days of hearings, some in executive session. Mr. St. Clair had 2 days for an opening statement. And likewise, let me also note that he was able to examine and cross-examine the witnesses.

As Professor Beer has indicated, I hope that we do not fall to the idea that impeachment is a suitable activity for party politics.

With that, let me ask a series of questions that I will apologize for their brevity, asking you to be brief because of the nature of the time.

It is important for me, Mr. Craig, and I realize that I will have an opportunity to query Mr. Ruff—if you would just give me a yes or no answer, I would appreciate it simply because I realize that I will be more pointed with Mr. Ruff. First of all, I think we can acknowledge that the President has misled the American people. He said it. It has been said, and it has been noted.

Do you so note today?

Mr. CRAIG. Yes. Yes, ma'am.

Ms. JACKSON LEE. Do you also note as well that you have an understanding, when we talk about fact witnesses—and let me also say that as we sit as a prosecutorial body, as the Rodino committee sat, they called witnesses, in essence, to present their case. Since the movers in that instance were Democrats who moved for the impeachment of the President, they presented fact witnesses. In this instance, I would assume the movers of this action, the Republicans, would have likewise presented fact witnesses, and tragically they are redundant in their accusations of who has called fact witnesses, but yet they have called none, and I don't understand that. But I will ask you the question: Do you have knowledge that Ms. Lewinsky had a diary?

Mr. CRAIG. I understand that she did.

Ms. JACKSON LEE. Do you have any knowledge of whether the President maintained a personal diary with his reflections, impressions and comments?

Mr. CRAIG. I am unaware of any such document.

Ms. JACKSON LEE. Is it your understanding that a diary that Ms. Lewinsky had may have her reflections, impressions and comments?

Mr. CRAIG. I would suppose that, yes.

Ms. JACKSON LEE. In the grand jury proceedings, as I understand, Ms. Lewinsky had such documents, and the American people who have not viewed the grand jury proceedings as they are now

viewing this really have never been inside of grand jury proceedings. It is interesting that the grand jurors today have been silent on any indictments, but as we know the information there was questioning and determination of credibility of the witnesses. It is also my understanding that in that instance, Miss Lewinsky could refer to her impressions and announcements and characterizations in that particular proceeding.

You can just simply answer, in the grand jury I assume a witness can refer to documents that they might have?

Mr. CRAIG. I think she testified twice in front of the grand jury and was interviewed by agents of the Office of Special—of the Independent Counsel many, many times—perhaps 19 times.

Ms. JACKSON LEE. And may have had the opportunity to refer to her documents?

Mr. CRAIG. Yes.

Ms. JACKSON LEE. With that in mind, Mr. Chairman, I would simply say you have here a question of the ability to determine credibility of witnesses, where one has been able to refer to written, line-by-line definitions and characterizations; where another witness such as the President may have had to rely upon his recollection. Again, we go to the point of the whole question of credibility of witnesses.

Ms. Tripp, are you familiar with a Linda Tripp, Mr. Craig?

Mr. CRAIG. Yes, Congresswoman.

Ms. JACKSON LEE. Do you have any knowledge of a personal vendetta against Ms. Tripp that might have caused any actions on that person's part to protect herself?

Can I hear you more loudly, sir?

Mr. CRAIG. I know of no such vendetta, Congresswoman.

Chairman HYDE. The gentlelady's time has expired.

Ms. JACKSON LEE. As I noted, and I hope that one day——

Chairman HYDE. The gentleman from Tennessee, Mr. Bryant.

Mr. BRYANT. Thank you, Mr. Chairman.

As a reminder to all who might be watching this, we have had a number of other professors from the history area, as well as law professors, who have disagreed with you gentlemen and your opinions that these types of conduct are impeachable offenses. As a matter of fact, Mr. Dershowitz last week said that lying before a grand jury, in his opinion, was an impeachable offense.

I might also bring up this 400-signature letter that has been alluded to earlier, and in fact one of you gentlemen had written the introduction to that, saying this was about historians speaking as historians. Well, one of your colleagues, in fact two of your colleagues have the opposite view of that, and they say that this 400-signature statement is nothing of the kind; rather, it is an impostor. It places the stamp of professional scholarship on what is, at best, a purely partisan political tract. The only interesting question it raises is whether those responsible should be merely censured or impeached and removed from their professional chairs.

One of you mentioned that were we to, quote, "lower the standard for impeachment for such minor things as obstruction of justice and perjury, that the landscape would be littered over the last two centuries with impeached Presidents." But I don't recall any President ever being charged with perjury, lying under oath to a grand

jury. I don't recall any President ever being charged with obstruction of justice, tampering with witnesses and these kinds of things, such as this President has.

And in reference to the two professors I mentioned a moment ago, they make, I think, a very strong statement that is contrary to the fact that we seem to be lowering the standards for impeachment according to some of your opinions. They say that we would set precedent. That we would establish that Presidents who commit these crimes—let's talk about the President now—against the system of law that they are sworn to faithfully execute, will not be permitted to continue in office.

If we don't impeach, in other words, do we really want to be at the mercy of future Presidents who believe otherwise? So I think there is definitely a two-sided coin here.

And I want to ask Mr. Craig a couple of questions, I guess, while I have got some time.

You are an attorney?

Mr. CRAIG. Yes.

Mr. BRYANT. You represent the President?

Mr. CRAIG. Yes, sir.

Mr. BRYANT. And as an attorney, you are bound by the applicable codes of professional ethics, and as an officer of the court you would be called on to preserve the court's integrity, would you not?

Mr. CRAIG. That is correct, your Honor.

Mr. BRYANT. With that in mind, I want to ask you, what do you believe is the difference between willful lying to a Federal judge or grand jury and willfully misleading a judge or Federal grand jury?

Mr. CRAIG. I think the criminal justice system is special. I think a grand jury investigation, there is a gravity——

Mr. BRYANT. Okay. Could you be specific, though?

Mr. CRAIG. You asked me about the difference between a civil deposition where a Federal judge is presiding over a civil deposition? I may not understand the question, but I thought you asked me the difference between——

Mr. BRYANT. What is the difference between willfully lying and willfully misleading? You seem to make a distinction there.

Mr. CRAIG. I am making a distinction between the grand jury as opposed to the civil case. Is that not the question you are asking?

Mr. BRYANT. No.

Let me be as simple as I can. I am asking you what is your difference between willfully lying, which I understand to be perjury, and willfully misleading?

Mr. CRAIG. I think that perjury is a word of art. It has definitions in the statute. It has elements of an offense that must be proven before a crime has been established, that includes a specific intent, knowingly to present false——

Mr. BRYANT. You notice I used the adjective "willfully" and—the adverb "willfully" in front of each of those, so the intent is there.

I understood the President intended to mislead, evade, and give incomplete answers. He has said that. He was not going to volunteer information at that deposition because he felt their case was wrong.

Mr. CRAIG. Let me just give you one example of a distinction.

A perjury defense is complete if you can show that the answer was specifically accurate, even narrowly accurate. And absolute accuracy, even if you disagree with the interpretation, if the question is ambiguous and there is a possible answer that can be accepted as truthful, that is a complete defense to a perjury prosecution.

Chairman HYDE. The gentleman's time has expired.

The gentlelady from California, Ms. Waters.

Mr. ROTHMAN. Mr. Chairman, parliamentary inquiry.

Chairman HYDE. Yes, sir?

Mr. ROTHMAN. I seem to recall when the Chair last presided over the previous panel, and the question was——

Chairman HYDE. You are absolutely right. I was much more liberal, and I made the announcement regarding the 5-minute rule today because, frankly, people at your end of the table and at this end of the table never get to ask questions. It consumes over 3 hours under the strict 5-minute rule to complete the members' questioning.

We have a large panel considering, the entire day; and I would like members to get a chance to ask questions.

Mr. ROTHMAN. Mr. Chairman, we ought to let the witness finish his answer, especially, coincidentally when it is the President's counsel bringing his defense. It strikes me as inherently unfair since this process started months ago, and this is a new practice for the Chair.

May I respectfully ask that the Chair adopt its previous practice, when the Republican majority called witnesses, to let the experts finish their answers?

Chairman HYDE. Mr. Rothman, that is unfair. I was as liberal for witnesses, Republican or Democrat.

Mr. ROTHMAN. Yes, you were. But why not today, sir?

Chairman HYDE. Because we have a plethora, a swarm of witnesses. We have a lot of members who would like the opportunity to ask questions. And that is my way of doing it. Everyone treated alike. You, Ms. Jackson Lee, Mr. Bryant, Mr. Barr. I am trying to get through the day without going past midnight. So I would appreciate the gentleman's cooperation.

Mr. SCOTT. Mr. Chairman, parliamentary inquiry.

Chairman HYDE. Yes, Mr. Scott?

Mr. SCOTT. Mr. Chairman, will the witnesses, at the end of the questions, be given an opportunity to give the answers——

Chairman HYDE. Yes, I am trying to use my judgment. I thought I was——

Mr. SCOTT. Mr. Chairman?

Chairman HYDE. Please, let me respond to your remark.

Mr. SCOTT. I haven't made the remark.

Chairman HYDE. Okay. Who is next?

Mr. SCOTT. Could I make the remark?

Chairman HYDE. Well, if you have a remark to make, yes.

Mr. SCOTT. Very brief.

At the end of all of the questioning, could they have an opportunity to answer some of the questions they—answers that they might not have given because of the strict way that it is being handled, so that they are given 2 or 3 minutes to go through all the

answers they might have given after everyone has had the opportunity?

Chairman HYDE. I thank the gentleman.

Ms. Waters?

Ms. WATERS. Do you want to start my time over?

Chairman HYDE. Yes, we will start your time over.

Ms. WATERS. Mr. Hyde, you are not going to like this, but since there is so much talk about lying, I am going to read what you said about it in 1997 when President Reagan and his top national security advisors were accused of lying to Congress and the public about their secret arms sales to a terrorist state, it was Hyde who argued forcefully for a more nuanced view of lies and deception. "Lying is wrong," he said, "but context counts."

So I agree with Mr. Hyde on that.

Let me just say that I think the most important thing that will come out of this hearing today is that time that this Congress is going to be tied up in dealing with this impeachment. I have long since decided that the pettiness that we are dealing with does not deserve this kind of attention. It doesn't make really a difference whether or not it was a little bit shaded when the President talked about being alone or the hat pin or the tee shirt. I think this Congress needs to get on with the business of this country.

Mr. Hyde and members of the Republican Party told the Nation they were going to speed this thing up. They were going to do it quickly. They were going to hand the Nation, in essence, a Christmas present and get it behind us. November 3rd elections, even today, the polls show the American people are saying they do not want to impeach the President.

I think the most important point that has been made here today by Professor Ackerman is, first of all, this should not spill over into the 106th Congress, and that the President probably, if it does, can have a motion to quash. I am thinking about all of the new members who will be coming on to this committee, and thank God, some of the members of this committee will be gone. It seems to me they will have a cause of action themselves, because it is not just a matter of what is on the floor. It is a matter of starting all over again. Everything in the 105th Congress will be dead.

Members who will serve on the Judiciary Committee, who have not been involved in these hearings, have a right to be involved and to have their say; and new members should certainly make an issue of that. So if we envision going back again in the 106th Congress through the committee process, back to the floor, even to try and get to the Senate, with a different makeup of Congress, where some members even on the other side of the aisle will not be so inclined, what are we talking about in terms of a time frame?

Even if it goes on to the Senate, and they hold a trial, and the Supreme Court will have to stop in the middle of them on a motion to squash, and there will be motions perhaps by the members. What are we talking about?

And what do we do, God forbid, if in fact we have to take an action against Saddam Hussein, if in fact we have to take actions against nations who are poised to use nuclear power?

Mr. Ackerman, let's talk about this time frame. Can we be tied up for another year in this mess?

Mr. ACKERMAN. Definitely. The constitutional process is complex—but it is for a reason. The reason is that this is a tremendously important thing. It is very rare. It is only when things are really serious that impeachment is justified. And if a lame duck Congress wants to impeach, it cannot expect that its judgment will simply be accepted by the Chief Justice of the United States or the next House of Representatives who have——

Ms. WATERS. So possibly even before they would sit in action on the Senate, you would have a Supreme Court matter that would have to be dealt with on a motion to quash.

Mr. Craig, do you think that is reasonable, that the President may want to challenge that if in fact this continues? Maybe that is an unfair question, but I am trying to get the American public to understand this quick down-and-dirty hearing that we are supposed to be doing. These articles of impeachment are not going to be so quick.

Mr. CRAIG. Congresswoman, I would only point out that the argument has meaning only in the context of the 105th actually voting articles of impeachment out. And I would just hope that wisdom would prevail and such articles of impeachment would not be voted out of the House.

Chairman HYDE. Mr. Chabot of Ohio.

Mr. CHABOT. Professor Wilentz, I want to quote from your opening statement. You stated that any Representative who votes in favor of impeachment, but was not absolutely convinced that the President may have committed inpeachable offenses—not merely crimes and misdemeanors, but high crimes and misdemeanors—will be fairly accused of gross dereliction of duty and earn the condemnation of history. You stated that, and I agree with you.

Wouldn't it be fair, however, to also indicate that any Representative who votes against impeachment, but who is convinced that the President may have committed impeachable offenses—not merely crimes and misdemeanors, but high crimes and misdemeanors—will be fairly accused of gross dereliction of duty and also earn the condemnation of history?

Mr. WILENTZ. Absolutely.

Mr. CHABOT. Thank you.

Over the last several weeks we have heard from many witnesses discussing what constitutes an impeachable offense. The one thing they all seem to agree on is that reasonable people can reach different conclusions. So the testimony before us today does not represent all thought on this important issue; it represents merely the thought of this particular panel.

For example, I strongly believe that perjury is a crime against the state and can constitute an impeachable offense. In fact, we know that perjury was directly described as a high misdemeanor at its inception. This has been supported by many constitutional scholars that have testified before this very committee.

Now, because most of the witnesses before us today did not address the facts of this case, I will turn my questions at this time to Mr. Craig.

Mr. Craig, you have stated that you do not dispute the testimony of Ms. Currie; is that correct?

Mr. CRAIG. That is correct.

Mr. CHABOT. Now, the President has admitted that following his deposition in the Jones case, he contacted Betty Currie and asked to meet with her the following morning. According to Ms. Currie's grand jury testimony, the President wanted her to agree with a series of statements that he made during the meeting. Currie said that they were more like statements than questions.

According to Ms. Currie, the President made statements like: You were always there when she was there—meaning Monica Lewinsky—right? We were never really alone. And you could see and hear everything, right?

Now, Mr. Craig, isn't it true that the President was trying to influence the testimony of Betty Currie because he knew that she might be called to give testimony in a Federal judicial proceeding; isn't that correct?

Mr. CRAIG. Congressman, I have actually, I think, responded to this question earlier before, and I disagree respectfully with your interpretation of those events.

Let me just say that I hope you will read the document that we are going to be submitting to you today.

Mr. CHABOT. I certainly will read that, but don't you think that the President, by his statement to Ms. Currie, was trying to influence her testimony; and wasn't that illegal?

Mr. CRAIG. I do not. I do not believe that he was trying to influence her testimony. She was not going to testify.

Mr. CHABOT. Doesn't that constitute witness tampering?

Mr. CRAIG. There was no witness tampering that was going on there, Congressman. There was no proceeding that could contemplate that she was going to be called. There was no reason for him to believe that either the OIC or the Jones people would be calling her as a witness.

Mr. CHABOT. Don't you think it would have been relevant, whether or not she and Lewinsky—or the President and Lewinsky, together or alone, wouldn't that be relevant to the ongoing testimony and investigation?

Mr. CRAIG. Yes, but the question is whether he was tampering with the witness, Congressman. I would urge to you raise this again——

Mr. CHABOT. Let me just ask you one final question——

Chairman HYDE. Mr. Chabot, let him answer the question.

Mr. CHABOT. I did, Mr. Chairman.

Mr. CRAIG. I am trying to be constructive, and I am trying to be helpful and in fact deal with the facts.

I would urge you to raise this, Congressman, with Mr. Ruff again after you have had a chance to see all the evidence that we present to you, that we try to explain what happened, how it happened and how it fits into the law. I think you might well be convinced that there could not have been any tampering of a witness here with respect to Betty Currie.

Mr. CHABOT. We will look at that with great interest, and I appreciate your testimony here this morning.

I yield back.

Chairman HYDE. I thank the gentleman.

The distinguished gentleman from Massachusetts, Mr. Meehan.

Mr. MEEHAN. Thank you, Mr. Chairman. And I would like to thank each member for coming before the committee and providing your testimony. I can imagine that given your perspective on this matter, it can be frustrating to testify before this committee because it is a foregone conclusion that the majority of the members of this committee on Saturday will take the incredibly historic step of voting articles of impeachment to impeach this President. And there is not a constitutional case that any of you can provide before this committee that would change that. There isn't a historical precedent that any member of this distinguished body testifying before the committee could present that could change that.

Mr. Craig, I don't think that there is a fact that is in other parts of the testimony before the grand jury that you could present to this committee that would change that fact. In fact, there is nothing that any of the witnesses here today could say to this committee that would prevent the majority of this committee from voting to impeach the President of the United States on Saturday afternoon.

But your testimony is important. It is important that the American public understand the gravity of what we face. It is important that the 20 to 30 Republican Members of Congress who truly have an open mind and are weighing the gravity of what is before our country, that they hear your testimony and see your testimony. Because the will of the American people is about to be ignored in the hope that the people won't care enough to say anything about it.

Now, Attorney General Katzenbach, you have spoken about the will of the American people. As of today, 65 to 70 percent of the American people oppose impeachment, so it is hardly a surprise that the Members of Congress who are going to vote to impeach on Saturday have been telling us that public opinion and public consensus—indeed, the public interest—play no part whatsoever in this critically important impeachment process. Do you agree with this perspective on the role of public consensus in the impeachment process?

Mr. KATZENBACH. No, I do not, Congressman. In fact, it seems to me unusual and very important that the American people feel the way they feel about the office of the presidency. It is a vital fact. And it would seem to me those who wish to ignore it might recall a quote from Berthold Brecht, which I will paraphrase, saying, Maybe we should elect a new public.

Mr. MEEHAN. Well, I would hope—and one of the reasons I think your testimony is important is because I don't think—as my colleague from California mentioned, I don't think Americans have been focused on this. They think the election ended all of this, and they think we are just going through the motions to finish this up by the end of the year, and then we will go on with governing the country in January. But that is not the case at all.

Mr. KATZENBACH. And indeed it should happen.

Mr. MEEHAN. And it should happen. But the reality is, this committee will vote to impeach the President on Saturday. I am struck not by the cases where this committee or the House has a whole decided to impeach, that is, Watergate and the Andrew Johnson case, but also I am struck by the cases where we failed to even commence an impeachment inquiry.

I am talking about such examples as the Iran-Contra scandal, or to put it in a bipartisan perspective, President Johnson's deception about the Gulf of Tonkin incident in 1964, both of which went to the very core of the exercise of presidential power and at least threatened serious consequences for the country.

Now, what does a failure to impeach in those instances tell us about whether we should impeach this President?

Professor Ackerman.

Mr. ACKERMAN. This is a central concern, because if your committee goes forward and impeaches President Clinton, the next time the political wheel turns and we have a Democratic Congress and a Republican President, will the Democratic Congress show the kind of restraint that it showed in the case of Iran-Contra?

Well, I myself will be here saying, you should, but will they? Will they?

This cycle of incivility, once it begins, will very, very quickly run out of control. That is why this is a tremendously important precedent.

And, Congressman Meehan, what you were saying before is another way of saying, this is a lame duck Congress out of touch with popular opinion; and if there is a reasonable disagreement, as to the standards for impeachment, all the more reason that a lame duck Congress should not be making this decision.

Chairman HYDE. The gentleman's time has expired.

The gentleman from Georgia, Mr. Barr. Mr. Barr, would you be generous enough to yield me 30 seconds?

Mr. BARR. Certainly.

Chairman HYDE. I would just like to comment to Mr. Katzenbach, your great line from Berthold Brecht about maybe we need to elect a new or better public, I was reminded by counsel of Lester Maddox's statement about what is wrong with the prisons, we need a better class of prisoners. Anyway, thank you.

Thank you, Mr. Barr, for letting me indulge myself.

Mr. BARR. Yes, sir.

Mr. Craig, one of the faults of the White House, I think, is that they have a tendency, maybe this President personally, perhaps to break out the champagne or light up the victory cigar a little bit early sometimes, and I was hoping that that wouldn't be the case. But your remarks today in one particular area, among perhaps others, leads me to believe that you all still need to be a little bit careful.

You keep saying—and you said it in your remarks today—and others who are defending the President keep saying that Mr. Starr has cleared the President on Whitewater. That is not the case. And if you will read his testimony before the Congress, I think you will readily see that that is not the case. He says very clearly, with regard to his exposition on Whitewater and his remarks before this committee and, in particular, regarding Mr. Hubbell, that that case remains open, that there remain very troubling questions about it.

So I understand that in your zeal to defend the President, you would like it to become the reality that Whitewater has gone away, but it really hasn't; that remains an open case.

When you have talked several times today both in your remarks, as well as in responses to questions by members of the panel today,

you kept using the words "evasive and misleading." Somewhere in the recesses of my memory as a prosecutor those rang a bell, and I went back to the Criminal Code, and indeed, I found why those rang a bell. They are the words that are used in both section 1512 of Title 18 of the Criminal Code, and that is tampering with witnesses that my colleague from Ohio was talking about, as well as in the definitions that relate to prosecutions under Title 18, section 1512; and they talk specifically in terms of misleading conduct.

I think if you will—in the same way that you urged Mr. Chabot to read the material that you are going to present later, I would urge you to go back and read the material that is already there, and that is Title 18 of the United States Code. I believe, in fact, the President very clearly has met both the definitional standards for misleading conduct, as well as the other elements of tampering with witnesses. And we don't need go into those over and over again. At least we don't here today. We will in the articles of impeachment, I suspect.

But it may be satisfactory to your defense of the President, in your mind, that evasive and misleading answers regarding possible tampering with witnesses, tampering with evidence and so forth exonerates the President, perhaps in the same way that you think he has been exonerated on Whitewater. But the law is quite different. The law is very specific, and misleading conduct which includes misleading statements and so forth are very much contrary to the law and, I believe, would provide a proper basis for an article of impeachment.

I would like to read to you on another matter, or refer you to the grand jury testimony or grand jury statements of Mr. Blumenthal. Sidney Blumenthal testified before the Federal grand jury the final time on June 25th of this year. The foreperson of the grand jury took the very unusual step of chastising Mr. Blumenthal because after an earlier appearance before that same grand jury, he deliberately misrepresented what had gone on in that grand jury. And then when he was subsequently called back before the grand jury, he was chastised directly on page 69 of that grand jury transcript by the foreperson of the grand jury.

We all know, because it was also testified to under oath, that Mr. Blumenthal was hired by the President. Has the President fired Sidney Blumenthal? And why hasn't he, particularly in light of the fact that he has deliberately misrepresented the work of the grand jury?

Mr. CRAIG. Congressman, I came here to testify about issues involving——

Mr. BARR. Has Mr. Blumenthal been fired or is he still on the public payroll?

Mr. CRAIG. Of course, he has not. Of course, he has not. I understand that Mr. Blumenthal and his lawyer have disagreed with the interpretation and the statements of the forelady as——

Mr. BARR. Apparently you and the President do not?

Mr. CRAIG. This is a matter that I think should be resolved between Mr. Blumenthal and his attorney and those——

Mr. BARR. Well, it might be nice in your mind to compartmentalize these things, but I think it also indicated that you are not

here today to provide complete and truthful—without any trivialization context—answers today.

Chairman HYDE. The gentleman's time has expired.

The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman.

You know, earlier my friend and colleague from North Carolina, Mr. Coble, raised the issue of censure. And the response—I think he framed it in terms of a censure, rebuke, reprimand, condemnation, whatever, plus a fine; and I don't want to leave that particular issue in terms of—I know, or I think it is well known that I and other members of this committee, Democrats, intend to raise that issue during the markup. And I would just simply—and I am going to direct this question to everyone but Mr. Craig, and maybe one of you will take it.

There is historical precedent for censure, and I suggest it would not be meaningless. I suggest it would be constitutional; I suggest that we did have a hearing on this matter. It was raised during a subcommittee chaired by the gentleman from Florida, Mr. Canady.

I want you to know that I surveyed those 19 scholars by way of a questionnaire. The majority of those scholars indicated that it was constitutional and would be appropriate for this committee to consider.

I would like to hear disagreement or agreement from any member of the panel as to those statements I just made.

Mr. ACKERMAN. I agree that there is no constitutional problem with censure.

Censure is not a meaningless thing. For example, the Senate's censure of Senator McCarthy in the 1950s was a very significant act that crystallized the moral sentiment of the Nation. I do believe, however, that a fine is a bill of attainder.

Mr. DELAHUNT. Professor?

Mr. WILENTZ. I am not crazy about censuring a President as opposed to a Senator. I am not crazy about it for the reasons that Andrew Jackson stated in 1834, that it raises a possibility of a kind of danger to the separation of powers. However, that is a principle above and beyond the Constitution.

There is no constitutional bar to censure. Anyone who proposes that has simply not read the Constitution clearly enough, because there is simply no bar to it anywhere there. You may censure by resolution anyone you care to, just as you can pass a resolution on virtually anything under the sun.

Mr. DELAHUNT. I am going to direct this to Mr. Craig.

There has been, in response to the question by the gentleman from South Carolina, Mr. Inglis, and he was suggesting that when the American—when the President appeared on TV and spoke to the American people that he misled and, in fact, he did lie to the American people.

Let me just state that we have had previous American Presidents—I think my colleague to my right referred to Lyndon Johnson in terms of the Gulf of Tonkin resolution. During the course of our history, we have seen President Eisenhower lie to the American people about the U2 incident. President Franklin Roosevelt lied regarding lend-lease. It has been suggested very strongly that

both Presidents Reagan and Bush lied to the American people regarding Iran-Contra.

I would suggest, and I can understand in legal proceedings such as civil depositions or grand jury hearings, proceedings, that legalisms and legalistic language are absolutely important when one feels that they are being unfairly treated or improperly prosecuted. At the same time, Mr. Craig, I would suggest that the American people do believe that the President of the United States on that occasion lied to them, and I would suggest that he should be censured for that particular occasion, and I would urge you to go and discuss that matter with the President.

Chairman HYDE. I thank the gentleman. The gentleman's time has expired.

The gentleman from Tennessee, Mr. Jenkins.

Mr. JENKINS. Thank you, Mr. Chairman.

Professor Wilentz, I have listened to the entire panel, and I have listened carefully to your testimony. Now, not one panelist, save perhaps the President's counsel, has refuted any facts that are before this committee in this case. And in your case and in your testimony you did not refute one fact about the allegations of perjury that are before us, about the allegations of obstruction of justice that are before us, or about the allegation of abuse of power.

So we need to remember, at least here this morning, that what we are dealing in and what you came armed with is a bunch of opinions. And like they say back in Tennessee, everybody's got those.

But you will agree with all those statements, will you not?

Mr. WILENTZ. Except for the last one. There is a difference between opinion and scholarship. Anybody can have an opinion. What I reported here has to do with scholarship, which goes beyond that.

Mr. JENKINS. Well, if there are learned opinions to the contrary, then they would balance one another out as far as this committee is concerned; is that correct?

Mr. WILENTZ. I should hope not. I don't think they balance themselves out at all. I think that the opinions expressed here by a far greater number of historians, for example, than any number that have come up to stand for the opposite view, is absolutely clear. There is not an equal division among historians about whether these charges rise to an impeachable offense. It is absolutely clear that the majority of American historians believe that they do not, on the grounds of their understanding of the Constitution. There are disagreements.

Mr. JENKINS. Well, at any rate, you have voiced your opinions here this morning.

Mr. WILENTZ. I have voiced my scholarly conclusions.

Mr. JENKINS. And you also voiced the opinion that anybody who voted for impeachment was going to be guilty of gross dereliction of duty and condemned by history.

Mr. WILENTZ. I did not. I said nothing of the kind.

Mr. JENKINS. You did not? Well, what did you say?

Mr. WILENTZ. I said anyone who voted for impeachment, who was not absolutely clear in his or her mind that the President may have committed an impeachable offense, that would be gross dereliction of duty. Mr. Chabot agreed with me.

Mr. JENKINS. And if one holds that sincere belief, then, he would not be guilty?

Mr. WILENTZ. Absolutely. Absolutely. If they sincerely believe—as I said, there are many members of this committee who sincerely believe that the President has committed impeachable offenses—you would be derelict if you didn't vote for impeachment.

Mr. JENKINS. And I believe that you told Mr. Chabot that anybody who voted no, who held those sincere beliefs, would be similarly guilty of gross dereliction.

Mr. WILENTZ. Anyone who believes the President has committed an impeachable offense and votes against impeachment is similarly derelict. Absolutely.

Mr. JENKINS. Now, you testified that at least some perjury can be an impeachable offense; is that correct?

Mr. WILENTZ. Yes, I did.

Mr. JENKINS. And you made some effort to distinguish those types of perjury and distinguish one type of perjury from another.

Mr. WILENTZ. Uh-huh.

Mr. JENKINS. And my question is where can you show us in the statutes, where can you show us in the law of this land, that there are degrees or classes of perjury? Where can you show us from the statutes?

Mr. WILENTZ. I am not an expert or a lawyer. I cannot point to the statutes with the clarity that you can.

Mr. JENKINS. Well, you had a opinion.

Mr. WILENTZ. Yes, absolutely, but it has nothing to do with the character of the statutes. It has to do with an understanding of how the framers of the Constitution understood what were impeachable offenses or not. Under that—under the Constitution, it is clear that there are crimes that are impeachable offenses and those that aren't, and perjury in every instance is not. Only those examples of perjury which actually attack the vitals of the state, the vitals of our political system, are impeachable offenses. And I base that on my reading of the Constitutional Convention of 1787, the writings of the framers, and the Constitution itself. That's the point.

Mr. JENKINS. Can you provide this committee with those distinctions made in that Constitutional Convention?

Mr. WILENTZ. Sure. George Mason made it very clear. When he proposed high crimes and misdemeanors following bribery and treason, the wording he proposed was crimes against the state.

Chairman HYDE. Gentleman's time has expired.

Mr. JENKINS. Thank you, Mr. Chairman.

Chairman HYDE. The gentleman from Florida, Mr. Wexler.

Mr. WEXLER. Thank you, Mr. Chairman. I am struck by each committee hearing that we have, how more and more this committee becomes out of touch with the American people and with what the American people care about, and even with what the American people see as the offense by the President in regard to this whole national trauma.

And I think the questions today that best illustrate how out of touch this committee is with the American people are the two kinds of questions that are often put and have been put to Mr. Craig today. And that is: Why, Mr. Craig, as the President's law-

yer, haven't you put forth evidence, put forth testimony, as to why the President didn't perjure himself regarding his testimony with respect to Monica Lewinsky?

And a corollary issue, and that is: Why, Mr. Craig, or do you, Mr. Craig, believe the President or do you believe Monica Lewinsky when they both said the characteristics of their relationship? And I believe Mr. Craig's answers today basically said, respectfully, I believe the President.

But I think what the American people are saying, which I think is much more pertinent to this hearing is: Who cares? Who cares where the President did or did not touch Ms. Lewinsky. Not because they don't care about lying, but they understand that an impeachment inquiry should not be determined by whether or not Ms. Lewinsky lied or the President lied or whether they both lied about where the President may or may not have touched her.

So in that regard, I think Congressman Meehan's comments couldn't be more pertinent. This committee's conclusion is a foregone conclusion. This committee will vote out at least one count of impeachment. That is a done deal. But for those Republicans—and if there are some, and I hope and believe and pray that there are—that still have an open mind, would Professor Wilentz or Professor Ackerman talk to them, talk to them about what a Senate trial is going to look like?

I have this vision of Senator Hatch asking Monica Lewinsky or our esteemed Chairman asking Monica Lewinsky about the specifics of their relationship or her relationship with the President and that being determinative of a perjury count.

Would you speak to the American people about what that Senate trial is going to look like, please? Either gentleman.

Mr. ACKERMAN. Well, one should first know that at the trial of Andrew Johnson, no Senator asked any questions. All questions were asked by the managers of the House. And the Senate was mute, mum, in a very solemn situation here, which I would expect would go on for many, many months.

One of the more interesting phenomena would be to see how the Senators managed this burden of silence. But this is nothing like we have ever seen. Someone asked me before when I was asked to testify. The answer is Saturday. But I have been studying impeachments for many, many years. And I literally tell the American people, you have no idea of what the Senate trial is going to look like. It will disrupt the Nation's business, I would expect, for a year.

Mr. WEXLER. Disrupt the Nation's business for a year? Would you agree with that Professor Wilentz.

Mr. WILENTZ. I would. And also look around. In the 1868, there were not the photographers and the film crews and the TV cameras and media circus that surrounds—that has been surrounding this proceeding from the beginning. It has gone beyond a question of simply what is going to happen in the room. It is what goes on throughout the country. And that to me is almost as dangerous as what is going on here in this Chamber. And that is a vast difference from 1868. If 1868 was like a pebble in the pond, this is going to be like a boulder thrown into the pond.

Chairman HYDE. The gentleman from Arkansas, Mr. Hutchinson.

Mr. HUTCHINSON. Thank you, Mr. Chairman. First of all, Mr. Craig, you mentioned the concern about specificity with regard to the perjury charges. I just want to let you know what is in my mind with regard to the perjury allegations. Most of those are set forth in the Starr referral—allegations of perjury in, both the grand jury and the civil deposition. But in addition, I wanted to alert you to an area that I do not believe is mentioned in the Starr referral and that is in the deposition testimony of the President in the Paula Jones case. I can't give you the page citation, but the following statement is made by the President: "Because, Mr. Bennett, in my lifetime I have never sexually harassed a woman."

I just wanted to alert you and put you on notice that that statement is of concern to me in terms of a perjury allegation, and that is something that should be addressed.

Mr. CRAIG. Could I make one comment, a helpful comment I would hope? I would hope, Congressman, that when you bring forward these questions tomorrow afternoon that you don't rely on the characterizations in the Starr referral as to the President's testimony, and that you can talk with some specificity as to what the President actually testified.

Mr. HUTCHINSON. I've done my own independent review and I have concerns and I wanted to alert you that this is a new area that was not mentioned in the Starr referral and I wanted to give you the courtesy of that notice.

In response to questions by Mr. Chabot, you indicated that the President had no reason to believe that the OIC or the Jones attorney would call Betty Currie as a witness; therefore, she was not in a position to be tampered with.

But I just wanted to alert you to the deposition testimony of the President in which the name Betty Currie was mentioned over 20 times. And, in fact, there was a statement by the President at that time in reference to Betty Currie that "those are questions you'd have to ask her."

And so, was not the gauntlet set down by the President that Betty Currie is a relevant witness? He even said that the Jones lawyers need to question her. And then subsequent to that suggestion, he goes back to Betty Currie and goes through that series of questions that every lawyer and every layperson would have some concern that is tampering or coaching, particularly when you are talking about a President of the United States with a subordinate employee.

So that is a concern of mine. And I think there is a notice there, would you agree, that the President fully was aware that she would likely be a witness to the OIC lawyers?

Mr. CRAIG. Well, I disagree with the premise that she was likely to be a witness. In the President's mind, he had no idea that the OIC at that point was conducting an investigation that might include Betty Currie as a witness. And if you are talking, Congressman, about his state of mind, which is an important element in the category of crime that you are talking about, that element was certainly not there at that time. And I would hope you would raise this issue with Mr. Roff after you have had a chance to take a look at our presentation.

Mr. HUTCHINSON. That is of great concern to me. A third area that I wanted to ask you about is the response of the President to the Starr referral. And in that response in conclusion number 8 at the very beginning of the executive summary it states: "The President has admitted he had an improper sexual relationship with Ms. Lewinsky."

Can you point to any testimony of the President under oath in which he admitted to an improper sexual relationship with Ms. Lewinsky?

Mr. CRAIG. I think it is clear in—his testimony in front of the grand jury, Congressman, is tantamount to admitting that he had an inappropriate, intimate, sexual relationship with Ms. Lewinsky.

Mr. HUTCHINSON. The language that he used in the grand jury was that he had an inappropriate intimate relationship with Ms. Lewinsky. Is that the correct language that the President used?

Mr. CRAIG. I think it was clear what he was testifying about.

Mr. HUTCHINSON. Come on, don't give me word games.

Mr. CRAIG. That is the language. The record speaks for itself.

Mr. HUTCHINSON. Is that not the precise language that was used? The President was very careful in his words that it was an inappropriate intimate relationship.

Mr. CRAIG. Yes, you are right.

Mr. HUTCHINSON. He was careful to stay away from the term "sexual relationship," because if he had said "sexual relationship," it would be totally inconsistent with his previous testimony. And yet the lawyers come out and say the President has admitted he had an inappropriate sexual relationship with Ms. Lewinsky and there is no evidence in the record to support what the lawyers are saying; is that correct?

Chairman HYDE. The gentleman's time has expired. The distinguished gentleman from New Jersey, Mr. Rothman.

Mr. ROTHMAN. Thank you, Mr. Chairman. I would like to make two brief comments and then ask a question. With regards to the rule of law which we all care about, isn't it a fact that if the President—President Clinton has violated the law, that not even he, the President, can get away with it? President Clinton can be sued civilly and criminally for any conduct at issue. He is not above the rule of law. We can hold him to the law.

Therefore, no matter what decision this committee or this Congress makes about impeaching President Clinton, the world will know and our children will know that the rule of law does exist and does apply in America to every American, even the President, because the President can always be sued civilly and criminally for his conduct.

But what we are talking about here is whether additionally as another punishment, the President should be impeached and removed from office. And on that the Constitution provides us the standard of treason, bribery, or other high crimes and misdemeanors.

We will be faced with impeaching the President for only the second time in our history and removing a President for the first time in our more than 200-year history.

I want to address the business about the 81 questions and about contrition, because everyone says how evasive the answers to the

81 questions were. Let me read to you, because not all of my constituents had a chance to read the President's answers, a little bit of what he said. This is what the President said: The fact that there is a legal defense to the various allegations cannot obscure the hard truth, as I—the President says—as I have said repeatedly, my conduct was wrong. It was also wrong to mislead people about what happened and I deeply regret it.

That is what President Clinton said in his answers to the 81 questions. He used the word "admitted" and "misleading" four times. He apologized in the 81 answers three times. He said he regretted what he had done once more in the 81 answers. So if you are looking for contrition in the 81 answers, my friends, it was there if you only looked for it.

Now, here is my question, the question for Professor Ackerman. If, in fact, despite your belief as to what should happen, the lame duck Congress' actions are accepted by the new Congress, can the Speaker of the new House alone, without a vote of the Congress, appoint the managers, the impeachment managers?

Mr. ACKERMAN. No.

Mr. ROTHMAN. And why do you say that?

Mr. ACKERMAN. This is a most solemn decision to allow the House to proceed with this inquiry. It would be an extraordinary abuse of the House for a single person to take upon himself this responsibility. Especially when, if he did it by himself, this would indicate that he didn't have the support of a majority of members. Because, obviously, anyone who did have a majority vote would put this matter up to the House.

Mr. ROTHMAN. Do you or any other member of the panel have any precedents or constitutional basis for that answer?

Mr. ACKERMAN. Yes.

Mr. ROTHMAN. Please provide it.

Mr. ACKERMAN. That is to say that in the impeachment of Andrew Johnson, the managers were selected by the House.

Mr. ROTHMAN. By a vote of the House of Representatives?

Mr. ACKERMAN. Yes, yes.

Mr. ROTHMAN. Thank you. I yield back.

Chairman HYDE. I thank the gentleman. The gentleman from Indiana, Mr. Pease.

Mr. PEASE. Thank you, Mr. Chairman, I have a couple of questions and a brief thought. Professor Ackerman, when presentation was made this morning on standards for impeachment and there was some discussion about whether perjury or related crimes of truthfulness under oath were considered, that even if we accept—if we accepted that standard as a standard for impeachment, that the history of the last 60 years since the adoption of the 20th amendment would be littered with bills of impeachment. Your words.

Can you, either today or at some point, provide us those examples of Presidents or judges or Vice Presidents who lied under oath and were not subject to consideration for articles of impeachment?

Mr. ACKERMAN. One should remember that lying under oath is not the only high crime and misdemeanor. There are many other activities of the Presidents of the United States. For example, to

choose a very striking example, Franklin Roosevelt's abuse of his authority in the lend-lease matter.

Mr. PEASE. I understand the point, but my question——

Mr. ACKERMAN. Which could also be a high crime and misdemeanor. What I said is it would be littered with impeachments. If we have a relatively low standard of impeachment, there are many questionable things that people in good faith would think rise to the level of high crime and misdemeanor, and it is an act which would be this engine of continuing bills of impeachment.

Mr. PEASE. I appreciate your clarification, because I understood you to say that if lying under oath was the standard, that our history would be littered; and that was not your intention.

Mr. ACKERMAN. Thank you.

Mr. PEASE. Thank you. Mr. Katzenbach, you discussed particularly with regard to the Andrew Johnson impeachment, your understanding that high crimes and misdemeanors were at least in part determined by the public's understanding that the official was no longer able to continue effectively in office. Did I understand you correctly in that?

Mr. KATZENBACH. Let me rephrase it so that we are at least on the same wavelength.

Mr. PEASE. Please.

Mr. KATZENBACH. I believe that when you have an unpopular President, there is a question when the public believes that he ought to be impeached as well as the House believes he ought to be impeached, that it is very difficult to separate out the conduct for which he is being impeached from the fact that he is very unpopular.

What you have in this situation today is an absolutely unprecedented thing as far as I know, and any historian can correct me, but here you have a President acknowledged by the public of all of the facts that you have been raising, most which I think are totally irrelevant, and the question as to whether or not those amount to a high crime and misdemeanor. And the public is saying no, it doesn't. We have confidence in this man as President.

I think that is an absolutely unique situation. You can take a different view, sir, but if you do, you should have a reason for it. You should have a reason that—evidence that says the public has lost confidence in this man despite what they say, despite the elections, despite the polls.

Mr. PEASE. I understand, and I appreciate your clarification as well.

One closing thought, Mr. Chairman. Last week one of the witnesses impugned both the perceived collective motive of the House and of individual Members. Today another witness did the same in his accusations of a cavalier attitude among Members on this difficult subject, or a disregard for the letter and spirit of the Constitution and more.

There are Members of this committee of this House who have been scrupulously careful, often at the expense of attack from across the political spectrum, to reserve judgment in this matter, to listen carefully and respectfully, to avoid partisan attacks, and to do their duty as they see it.

I still believe there are Members, despite the attacks, who will try to do the right thing in an atmosphere of civility and respect, and words like those heard today make it more difficult for us to do so.

Chairman HYDE. I thank the gentleman.

The gentleman from Wisconsin, Mr. Barrett.

Mr. BARRETT. Thank you, Mr. Chairman.

First, I would like to associate myself with Mr. Pease's final comments. I think that we would all be well advised if we could stick with the issues here. Obviously there are very explosive issues at play here, and to the extent to which we can have civility here, I think that is important.

The President's actions were wrong. Everybody knows that. The question is how he should be held accountable. And I believe that censuring the President is an appropriate sanction, because I think it reflects the gravity of what he did. At the same time, it does not, I think, divide this country in a way that it need not be divided.

I long ago gave up any notion that this chapter of our history would have a happy ending; I long ago gave up any notion that people would be pleased by my actions or our collective actions; and I long ago gave up any hope that people would look at the process in this committee and view it in a favorable light.

So what do we have left? All we have left and all we can really salvage out of this is, what is the best thing for this country? And it is not good for this country to go through a trial where we will call Monica Lewinsky and have her talk about her intimate relationship with the President of the United States. It is not good for this country to call Linda Tripp forward. It simply will not do anything positive, in my mind, for this country. It will further divide this country and make people more suspicious of government. And if that is what people want, that is what they are going to get.

Now, today we have had a fine panel here, and I would agree with Mr. Canady that we don't have a lot of new news, other than, frankly, Mr. Ackerman's statement which I consider something of a blockbuster in terms of where we are going to go. I see now for the first time the possibility that the House of Representatives could pass articles of impeachment and, 3 weeks later, refuse to reappoint managers to prosecute that case. The question is whether there is precedent for that. In both the Judge Louderback case and in the Judge Hastings case, Congress, not by the action of the Speaker of the House, but by action of the full House, reappointed those managers.

Mr. Ackerman, my question for you is, from a constitutional standpoint, if on December 17th or 18th we pass an article or articles of impeachment; and on January 3rd, 1999, this House refuses to reappoint those managers, what is our procedural setting?

Mr. ACKERMAN. Well, I am afraid it will be a terrible precedent for the impeachment process, because one day there will be a President who deserves to be impeached, and a public demonstration, unique in our history, of to'ing and fro'ing. Rushing to judgment in a lame duck session and then refusing to go forward will—or may, I hope not—discredit the weapon when it may be needed.

Mr. BARRETT. But we have a situation now—and all of us in this room now understand it—that the claims were, prior to the elec-

tion, that the Democrats wanted to have this done by the end of the year because we thought we were going to lose seats, and that the Republicans wanted to drag it out beyond the beginning of the next Congress because they would gain seats.

Obviously, reality dealt a severe blow to both of those theories, and now they are turned on their head.

But we do have a real possibility that we could have this Congress impeach this President, and 3 weeks later the case could completely fall apart. And I would argue to you and to my fellow members on the committee that that would be even more of a disservice to this country and that we should move towards censure, we should resolve this in this committee, and we should get back to doing the people's business, because that is what the people want.

Mr. ACKERMAN. I am not here as a witness for the President. My teacher, Alex Bickel, once said, "A scholar is like a bus. He goes from place to place, and people get on and get off whenever they want to."

My mission here was to alert you to real and serious constitutional questions. I would hope that if——

Mr. BARRETT. Excuse me, I don't mean to interrupt you.

Could the Senate—because obviously we would have to reauthorize payment for this—could the Senate pay for the House managers to act, or could the Senate pay for the House to proceed if the House refuses to pay, as was the case for the two judges where the House authorized——

Chairman HYDE. The gentleman's time has expired. We will have to hold that in dire suspense.

Mr. BARRETT. Mr. Chairman, if I could make one unanimous consent request. I have a document that I am going to present to the committee that writes to the CRS and asks them to clarify this issue of what would happen if the managers were not reappointed. And I would ask unanimous consent that that be made part of the record.

Chairman HYDE. Without objection, so ordered.

[Information not available at time of printing].

Chairman HYDE. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman.

First of all, I would like to associate myself with the comments by Mr. Pease, and Mr. Barrett to the degree that he was dealing with the issue of demeanor.

And let me say, Mr. Craig, staff has informed me that they thought you have come across very well on television, and I frankly appreciate that. I think that the tone with which we approach this problem, which is a very important problem, is more than just a little bit significant.

Now, especially because some of the issues are frankly quite difficult. For instance, Mr. Craig, you said today that the President did not violate his oath, by which I think you are saying that he didn't commit perjury, because he didn't intend to lie in either the grand jury or the Paula Jones case. Of course, no one personally or through counsel ever admits to felonious activity outside the context of plea bargaining. So we, as the Judiciary Committee, are sort of left to figure out what the truth is here; and we are looking

for corroborating evidence or evidence that undermines this problem of what the President intended. And ultimately, that is a criminal standard, I agree. But in informing our consciences, I think it is important that we have corroborating evidence.

Mr. Coble referred to the intimate touching, and you characterize this as a "he said, she said," sort of back-and-forth conflict. But you today have also characterized the President's position as having acknowledged an intimate relationship, and used a lot of other words—"sinful," "wrong." You use the term "wrong" in a different case—"inappropriate," "improper"—and you went on to say that the President has misled family, friends, colleagues and the Nation, et cetera.

It seems to me that, as we have to struggle with this rather sordid question of whether or not what the President's activities were in the context of what he said, that that statement of intimacy, the statement about wrongness has to lead me to believe that he is not telling the truth about these very fine distinctions that he is making; that, in fact, he committed perjury.

Would you speak to that? And in particular, does the President believe, or has he said to you, and I recognize the problem of being his counsel, and you should speak from your own knowledge, either that she touched the President intimately or that he touched her intimately in the sense of the definition of sex in the Paula Jones case?

Mr. CRAIG. I think the issue that was identified in Mr. Schippers' report, which adopts only one of the three allegations in the Starr referral and identifies that as the key question in the grand jury testimony, is that it has to do with whether or not the President, when he was having contact with Monica Lewinsky, whether—the President engaged in certain intimate touching with clothing or without clothing.

And at that point, I think I say and I think I say correctly, Congressman, that she said he did, and he says he did not with respect to that one aspect of their activity. That is key to the perjury issue which I think would be tried on the floor of the United States Senate if this were referred over to the Senate.

Mr. CANNON. Mr. Craig, someone testified before this committee, particularly Professor Saltzburg last week, that the proper method of dealing with any particular untruth by the President in the Jones lawsuit is to leave that issue for Judge Wright. Do you agree with that?

Mr. CRAIG. I'm sorry, I didn't understand everything you said.

Mr. CANNON. A lot of background noise here.

Do you recall that some have testified previously, particularly Professor Saltzburg last week, that the proper method of dealing with any particular lying by the President in the Jones lawsuit is to leave that issue to Judge Wright? Do you concur with that?

Mr. CRAIG. That is traditionally the way allegations of lying in civil depositions have been taken care of. In fact, the practice in the U.S. Attorney's Office, much to my regret, because I've been a civil practitioner where the other side has offered false testimony. I have referred such cases to the U.S. Attorney's Office, and routine by matters they don't take them up such cases and prosecute them. It's left up to the civil judge to handle.

Mr. CANNON. Thank you, Mr. Chairman.

Chairman HYDE. Thank you, sir.

The gentleman from California, Mr. Rogan.

Mr. ROGAN. Thank you, Mr. Chairman. And I thank all of the witnesses for their patient and able presentations this morning.

First I want to note the comments of my dear friend from New Jersey, Mr. Rothman, a few minutes ago where he made the very correct point that a President is not above the law, because he can be sued in civil court. And that's exactly what this whole case is about.

Let me dispel the myth that is out there among some people that a bunch of lawyers just showed up one day and began to inquire into the President's personal life. That was not the case. The President of the United States was a defendant in a Federal civil rights sexual harassment lawsuit filed by Paula Jones. And despite his objections to answering questions about potential conduct he may have engaged in with female subordinate employees, the judge ordered him to answer certain questions under oath because the judge found that it might show a pattern of conduct if his answers were in the affirmative. The judge found that Paula Jones was entitled to that information in pursuing her sexual harassment lawsuit.

Mr. Craig, you are in a somewhat unenviable position, because I understand you have to be the President's representative. I promise not to shoot the messenger, but I want to know. Within that framework, does the President of the United States support Federal sexual harassment laws that are on the books today?

Mr. CRAIG. Of course he does.

Mr. ROGAN. Does the President believe those laws should be vigorously enforced?

Mr. CRAIG. Yes, he does.

Mr. ROGAN. Does he also believe that these laws properly rise to the level of a civil rights action in Federal court?

Mr. CRAIG. Well, I have to tell you, at this point I am moving beyond my conversations with the President, so I can't tell you with any authority what his views are on that. I would just be speculating, Congressman, at this point.

Mr. ROGAN. Do you think the President believes that the law is correct in allowing women who have been victimized in the workplace to obtain discovery about patterns of conduct from employers who are victimizing women?

Mr. CRAIG. I think he would have no dispute with that proposition.

Mr. ROGAN. I am assuming the President also believes that women in the workplace ought to be able fully to prosecute their claims against harassing employers.

Mr. CRAIG. I think he would take that position as well.

Let me explain one thing that happened that I'm sure you're familiar with. When he walked into that deposition, he was handed a three-part definition of sexual relations which then got debated between counsel, and then got changed by the court—by the judge—and then got applied by the President as he was asked questions.

Mr. ROGAN. I am aware of the President's contention in that regard.

General Katzenbach, let me turn to you for a moment. You are the distinguished former Attorney General of the United States who has prosecuted a number of cases on behalf of our country. What do you think the impact is to women who have been victimized in the workplace if Congress accepts the notion that lies in court are acceptable, if the lie is about sex in a civil rights action because somebody might be embarrassed by telling the truth. Does that have a negative impact or a positive impact on women in the workplace?

Mr. KATZENBACH. If you were talking in the context of impeachment, I don't think it has any relevancy at all or any impact at all.

Mr. ROGAN. Let's just talk about it in terms of the rule of law. What impact do you think that has?

Mr. KATZENBACH. If all we were talking about was the rule of law, we are talking about cases in civil or even criminal courts, then I think it would have a very negative impact if this committee in that context were to ignore the actions by anybody in the government, including the President.

Mr. ROGAN. And——

Mr. KATZENBACH. If you're talking in an impeachment proceeding——

Mr. ROGAN. I have to interrupt because my time is very limited.

Mr. KATZENBACH. Well, it's my time, too.

Mr. ROGAN. Well, actually it's my time, and I'm sharing it with you.

Mr. KATZENBACH. It's your time, and am I permitted to ask questions? How——

Chairman HYDE. It sounds like Rudy Vallee starting his theme song.

Mr. ROGAN. General Katzenbach, under the law, if somebody responds under oath in court to a material or relevant question, "I don't remember," and in fact they do remember, that would be lying under oath or perjury, wouldn't it?

Mr. KATZENBACH. I would think if, in fact, they did remember, and it was a material matter in it, that would be lying, would be perjury, yes.

Mr. ROGAN. The President was asked this question, "So I understand your testimony, it was possibly that you were alone with her, but you have no specific recollection of that happening?" He gave this answer: "Yes, that's correct." If a court found that to be material and relevant, that would be perjury?

Mr. KATZENBACH. It would be perjury. I can't imagine anybody ever prosecuting, but it has nothing to do with impeachment.

Chairman HYDE. The gentleman's time has expired.

Mr. ROGAN. Thank you, Mr. Chairman.

Chairman HYDE. The gentleman from South Carolina, Mr. Graham.

Mr. GRAHAM. Thank you, Mr. Chairman.

My understanding is that Mr. Ruff is going to handle most of the factual disputes.

Mr. CRAIG. I've tried to handle those questions that have been asked of me, Congressman, but, yes, you're correct.

Mr. GRAHAM. Well, we've had a conversation before, and I want to say, as a lawyer, I think you're a fine lawyer, and the President's lawyers have done a very good job.

And the comment about being a potted plant Congress, I don't think that any of us here have taken this too lightly. I don't know about the other folks, but I think I have aged a little bit.

I am not a potted plant. I have looked at the President's deposition testimony. I have read his grand jury testimony. Well, I guess I have looked at him testifying before the Paula Jones deposition because it's videotaped. I have read all the relevant witnesses' testimony at least once or twice, and to be honest with you, I think if you had an open-minded potted plant, I could convince him that he's committed perjury, but that's just where I am at on this thing.

Now having said that, one thing that bothers me the most about what we're doing here is that there's people listening that may get confused about what they should do. If we can't agree on anything else as Republicans and Democrats, let's agree on this: If you are ever called in to testify, and you promise to tell the truth, the whole truth, and nothing but the truth, don't do what the President did, because some people may not understand what you're trying to do.

Don't ever get yourself in this position. It's just simply not worth it, because some people may believe that there is really no difference between willful misleading than just flat out lying, and you're going to get yourself and the law in trouble.

And that's what worries me the most, that we are sending a terrible message to young people and anybody else that is going to associate themselves with the law.

Let me ask one question, Mr. Craig. When the President left his deposition on January the 17th, I believe, he did mention, you need to ask Betty at least once. And I believe that he knew that Betty Currie was likely to be a witness because he suggested that she be asked questions at least by the Paula Jones lawyers. She tells us a series of statements made by the President. One of them was supposedly, according to her testimony, this is the President to Betty Currie, "She wanted to have sex with me, and I couldn't do that." What did he mean there?

Mr. CRAIG. I don't know how to answer that question.

Mr. GRAHAM. Would you go ask him, because that's important to me, and I'm going to tell everybody here at the end of this hearing what I think was going to happen without this blue dress and the stain on it to this young lady, and it was not going to be pretty.

I yield back the balance of my time.

Chairman HYDE. The gentlelady from California, Mrs. Bono.

Mrs. BONO. Thank you, Mr. Chairman. I, first of all, want to thank the panelists for their patience. It seems I always have to thank everybody, being the last person here.

I have to tell you that, as you know, I'm one of the few nonlawyers on this committee. What my colleagues enjoy about me is that I am a nonlawyer. I sit there and I've watched the tapes with them. They actually watch my reactions to it.

As I watched the President's videotaped deposition in the *Paula Jones* case, which I saw after watching his testimony before the

grand jury, it hit me very, very hard. I know that no Americans have seen that tape, except for a very select few.

Whether I reacted perhaps to perjury or just watching my President lie to me personally, I didn't know at that point. And over time, I have come to the conclusion that it was perjury, and it bothered me a great deal. I won't be labeled a zealot because I do believe it was perjury. I do believe it is wrong. And I will not have a problem supporting that article of impeachment.

My question really is for Mr. Craig. As the last person here, I have to sit here and listen to 36 other Members and come up with a question that nobody else has asked, which is very difficult. It's a very simple one, yet I think it's very complex, and it's one that most of America is asking. That is, Mr. Craig, do you have small children at home?

Mr. CRAIG. I do.

Mrs. BONO. What do you tell them? How do you explain to them that your President has lied and that it's okay?

Mr. CRAIG. Oh, I tell them it's not okay to lie, Congresswoman. I say that it's the most important thing in the world to tell the truth all the time.

Mrs. BONO. The whole truth and nothing but the truth?

Mr. CRAIG. The whole truth. And I tell them that one of the reasons that the President is in such trouble is that he did not. He misled the American people, he misled his family, he misled his colleagues, and that was wrong. And the President should have admitted that it was wrong much earlier than he did. He should have made full disclosure earlier, and he did not, and that was wrong.

Mrs. BONO. But——

Mr. CRAIG. That's a very important lesson for the children of this country, I think.

Mrs. BONO. All right. Let me jump in here, if you will. I don't understand. There's also a difference perhaps between that and then again under oath before a court. Did he mislead the court?

Mr. CRAIG. If he did mislead a court under oath, that would be wrong. It would be unlawful. That is for a court of law, a criminal court of law, to resolve with all the protections that a court provides to a defendant, and most people that are working with the President in the defense believe that such an outcome is a very likely possibility in the future.

Mrs. BONO. Thank you. I understand that. I think this is the hardest thing for me, for any parent, that we have looked at, we have seen. I thank you for your honest answer. I yield back the balance of my time with that.

Chairman HYDE. I thank the gentlelady.

And we have reached the end of the questioning. And before I dismiss the panel, I will indulge myself, because I have not availed myself of the opportunity.

And if I might, in the vast literature of impeachment to which many of you have made a significant contribution, occasionally you run into something that strikes you as particularly salient, a gem, so to speak. And I would like to read from a gem that I discovered in the literature of impeachment.

"What is unique in the history of the Presidency about this scandal is the long list of potential criminal charges it involves. Even

before the various investigations were concluded, it appeared likely that the President and his allies had engaged in a multitude of indictable activities, among others: in perjury and subornation of perjury, and obstruction of justice, and destruction of evidence, and tampering with witnesses, and misprision of felony, and in conspiracy to involve government agencies in a subsequent cover-up, all of which now prove beyond doubt means that the President himself has conspired against the basic processes of democracy."

Here's the interesting part. That was interesting; this is really interesting. "Such transgressions must not be forgiven and forgotten for the sake of the Presidency, but rather exposed and punished for the sake of the Presidency. Excessive respect for the office should not deter us from pursuing justice this way. I would argue that what the country needs today is a little serious disrespect for the office. Nor should we be satisfied with watered-down, slap-on-the-wrist alternatives. Censuring the President for the crimes in question is not enough, since the continuation of a lawbreaker as chief magistrate would be a strange way to exemplify law and order at home or to demonstrate American probity abroad. No, in the end only the decisive engine of impeachment is appropriate."

Those words have a resonance for me, especially since they are written by Arthur Schlesinger, Jr. in 1973 in his book The Imperial Presidency, discussing the men who had the unfortunate characteristic of being a Republican. But, nonetheless, I thought that was very interesting, and I share it with you because he's one of those 400 eminent historians whose view today has modulated somewhat.

In any event, we are all in your debt. Thank you very much.

Mr. KATZENBACH. But he is not a lawyer.

Chairman HYDE. But he's a historian. That's better, isn't it, Mr. Katzenbach?

Mr. KATZENBACH. Only in some views. I don't share that view myself.

Chairman HYDE. I don't either. That's all right.

Mr. WILENTZ. Watch it.

Chairman HYDE. Thank you very much.

Ms. JACKSON LEE. Mr. Chairman.

Chairman HYDE. Oh, yes, the gentlelady asked me if I would mention to the viewing audience not in the room that occasionally, because we are going straight through lunch and we're going straight through dinner, Members find it incumbent to leave the room for one of several reasons, and that they are watching the proceedings on closed circuit television and not missing a beat. So please don't think the worst if a chair is vacant for a little period of time.

Ms. JACKSON LEE. Thank you, Mr. Chairman. I also have an inquiry about questions that remained unanswered for this panel. I'm wondering if the same rules are in play that these individuals might provide answers to questions in writing for a period of time.

Chairman HYDE. I would say it's up to the panel. If you write them, I am sure they would be happy enough to answer them.

Ms. JACKSON LEE. Would those answers be able to be submitted in the record?

Chairman HYDE. If the record is still open and we get them in time, yes. And if not, we'll find some way to put them in the Congressional Record.

Ms. JACKSON LEE. Thank you, Mr. Chairman. I thank the panel.

Chairman HYDE. I thank the panel for a great contribution, all of you. Thank you.

Mr. CANADY. Mr. Chairman, I have a unanimous consent request.

Chairman HYDE. Yes, sir.

Mr. CANADY. I ask unanimous consent to place in the record a statement by Professor Walter Berns, Professor Harvey Mansfield, and Professor Doug Kmiec concerning the subject of the testimony today.

Chairman HYDE. Without objection. So ordered.

[The information follows:]

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December 7, 1998

Representative Henry J. Hyde, Chairman
House Judiciary Committee
2110 Rayburn House Office Building
Washington, D. C., 20515

Dear Chairman Hyde:

I am writing to register my strong belief that President Clinton should be impeached. By his conduct he has disgraced himself, his family, his office, and his country. To conceal his conduct he lied to a federal court in a civil proceeding and to a federal grand jury. This was perjury and he did it deliberately and repeatedly. How can the chief executive officer of the United States carry out his constitutional duty to execute his office when he lies in this fashion?

Even more serious, in my opinion, than lying to the courts, he lied to the American people with a grandiose gesture and he kept on lying over a period of months. Instead of disposing of the matter with a quick confession, the President made lying a part of his governance and carried on his Administration with a view to escaping from the consequences of his lying. He lied to his friends, to his close associates, to his cabinet, and to his party, most of whom now feel compelled, against their will and their better judgment, to defend him.

Some say that his conduct does not reach the level of impeachability because a low, sordid act like his does not qualify as a high crime and misdemeanor. But sordidness is no defense! It is, on the contrary, almost an aggravation to the offense. If the President had had a high state purpose, lying might have been excusable, even praiseworthy. But lying to defend a deed of exploitation, done not in the bedroom but in the oval office that deserves the highest respect, is a kind of desecration. It is also an act of recklessness, totally gratuitous and even frivolous, that opened the President to blackmail and has deeply hurt the reputation of his country.

Since impeachment is both legal and political, the standard for impeachment ought likewise to be both one and the other. I find the standard to be met in the combination of illegality in the President's perjury and of disgrace in his sordid conduct.

Yours truly,

Harvey C Mansfield

Harvey C. Mansfield

Impeachable Offenses

The Constitution (Art. II, sec. 4) provides that "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."

The charges against the President now being considered by the House Judiciary Committee are three in number: (1) "providing false and misleading testimony under oath in a civil deposition and before a grand jury," (2) "withholding evidence and causing evidence to be withheld and concealed," and (3) "tampering with prospective witnesses in a civil lawsuit and before a federal grand jury." Since these charges have nothing to do with treason or bribery, the issue is whether they belong in the category of "high Crimes and Misdemeanors." On the face of it, these would seem to be serious offenses, and the first of them especially is amenable to proof or disproof.

Some of the President's defenders insist that, by high crimes or misdemeanors, the Framers of the Constitution meant only those offenses that affect the political or constitutional order; but the record makes it absolutely clear that impeachable offenses, in addition to those of a political or constitution character, were understood to include ordinary crimes, crimes that might well be committed by private as well as by public persons and would be tried in the regular courts.

We know this from Alexander Hamilton who, in Federalist 65, said that an official, impeached and convicted, and removed from office, "will still be liable to prosecution and punishment in the ordinary course of law"; and from Luther Martin (see his statement in the impeachment trial of Justice Samuel Chase); and from James Wilson (see his celebrated lectures on law); and from Joseph Story in his authoritative "Commentaries on the Constitution." (These, and other sources, are collected in Philip B. Kurland and Ralph Lerner, The Founders' Constitution, vol. 2, pp. 148-181.) As Story put it, "Crimes of a strictly legal character fall within the scope of the [impeachment] power." (Kurland and Lerner, p, 171.)

This is clear from the Constitution itself. Art. I, sec. 3, after providing that the person convicted on an impeachment charge shall be removed from office, etc., goes on to say that "the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to law." Story points out (Sec. 780 of his Commentaries, Kurland and Lerner, p. 175) that if the Senate were authorized to "pronounce a full and complete sentence of punishment," then, in the case of an acquittal, there could not be "another trial of the party for the same offense in the common tribunals of justice, because it is repugnant to the whole theory of the common law, that a man should be brought into jeopardy of life or limb more than once for the same offense." His conclusion is compelling: "If the court of impeachments is merely to pronounce a sentence of

removal from office and the other disabilities; then it is indispensable, that provision should be made, that the common tribunals of justice should be at liberty to entertain jurisdiction of the offence, for the purpose of inflicting, the common punishment applicable to unofficial offenders." (Emphasis added.) In a word, "the President, Vice President and all Civil Officers of the United States" may be impeached, not only for offenses affecting the political or constitutional order, but for crimes that might be committed by private persons. Lying before a grand jury is such a crime--see Title 18, sec. 1623, which provides that anyone who "knowingly makes any false material declaration [before a grand jury] shall be fined not more than $10,000 or imprisoned not more than five years, or both"--and so are withholding evidence and tampering with witnesses.

There is, then, no doubt that the felonies of which the President stands accused constitute impeachable offenses.

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December 7, 1998

The Honorable Henry J. Hyde
Chairman, Committee on the Judiciary
Congress of the United States
2138 Rayburn HOB
Washington, D.C. 20515-6216

Dear Congressman Hyde:

In response to the Committee's invitation, I am writing to address a number of subjects: the definition of the constitutional standard of "high crimes and misdemeanors" and its application to the Committee's work to date; whether the facts presented make the investigation of President Clinton equivalent to that considered by the House with respect to Presidents Nixon and Johnson; whether any constitutional problem is posed by the continuation of impeachment into a subsequent Congress; and finally, the relevance of the standards for prosecution in an Article III court to the present impeachment proceeding.

Having served in government as Assistant Attorney General for the Office of Legal Counsel during President Reagan's second term, I am much inclined by practice and experience to be a defender of the Office of the Presidency. In this regard, I believe it is incumbent upon all concerned with this proceeding to determine that the long-term effect of what is presently being concluded is not one that weakens the ability of this or subsequent Presidents to perform their Article II responsibilities.

"High Crimes and Misdemeanors"

The definition of an impeachable offense is ground that has already been well covered for the Committee by eminent historians and constitutional lawyers. As a matter of English history, the terminology of "high crimes and misdemeanors" originated in a 14th century proceeding about, among other things, a misrepresentation under oath. As a matter of constitutional framing, it was the intent of the framers to utilize this English phrasing to create a presidency not

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subservient to Congress as in a parliamentary system, but nevertheless entirely governed by law. It was pointed out multiple times by your earlier witnesses that George Mason made use of the "high crimes" language to *broaden* the grounds of impeachment beyond Treason and Bribery and to have the standard exceed mere maladministration. It is hard to argue that perjury and obstruction of justice is not well within this middle category of "other high crimes and misdemeanors."

The desirability of impeachment as constitutional remedy was raised only once in the 1787 constitutional convention. Rufus King of Massachusetts moved to delete the remedy on an argument that it contradicts the will of the voters, an argument that President Clinton's defenders have also employed. King argued that impeachment was unnecessary since the president "would periodically be tried for his behavior by his electors." The Convention roundly rejected this notion. As Madison responded, impeachment was "indispensable to defend the community against the incapacity, negligence or perfidy [betrayal or breach of trust] of the Chief Magistrate." This was so, notwithstanding the political check, because there may be misconduct occurring subsequent to election or that may only be discovered thereafter. For example, Richard Nixon in 1972 won every state but Massachusetts and the District of Columbia (520 electoral votes to 17); Watergate followed.

Watergate as a Parallel

The Watergate committee thoroughly reviewed the English precedents and our constitutional history and concluded:

> "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."

The Committee concluded that impeachable offenses, as established in American history, fell into three 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." The Starr report contains each element: (1) false testimony in derogation of the judicial branch; (2) behavior that is grossly incompatible with *any* conception of personal dignity or proper respect for presidential responsibility and reputation, the historic nature of the oval office, or even the standard commonly observed by the many professional men and women who dedicate their lives to public service; (3) using government time and personnel to assert groundless claims of immunity or privilege or the reward of government job to influence a possibly adverse witness.

Much has been made of the fact that the perjury and related charges that the Starr report details, and that are factually unrefuted by the President, relate to personal conduct. It is claimed

that this is less serious than Richard Nixon's misuse of investigatory agencies like the FBI to cover-up the Watergate wrongdoing. There is no denying that this dissimilarity exists. In particular, much of the second Article of impeachment brought against President Nixon involving the misuse of the IRS, FBI and other executive personnel in "disregard of the constitutional rights of citizens" are varieties of presidential abuse of office that thankfully do not appear to exist with respect to President Clinton. Yet, this difference does not mean that what has otherwise been alleged, and been left undisputed by the President, does not bear striking similarity to Watergate. It does.

First, on the issue of the "disregard of the constitutional rights of citizens," it would seem patent that the President's motivation for lying in deposition and before federal grand jury was to intentionally harm a private citizen who alleged a course of conduct that even the terminology "sexual harassment" fails to fully convey. Joseph Story, one of this Nation's wisest commentators on the law at its founding and a member of the Supreme Court, noted that impeachment is entirely appropriate where "political offenses grow[] out of personal misconduct. . . ." Mr. Clinton's unrefuted personal misbehavior was in pursuit of the denial of the civil rights of a private citizen. True, this case has apparently been settled, and this is a factor of mitigation. Yet, the mitigation is reduced in significance by the fact that the President has steadfastly refused to apologize for his grossly inappropriate behavior, took no steps to correct his false deposition, or its possible adverse effect on the citizen's case, even as federal law allows for recantation, and settled only after extended delay.

Beyond this, the similarity to Watergate is evident by a simple comparison of the principal elements of the first article of impeachment against President Nixon with the pending allegations against President Clinton:

"Making or causing to be made false or misleading statements to lawfully authorized investigative officers and employees of the United States." The seriousness of this practice is compounded by the President's failure to fully or faithfully answer most of the 81 questions put to him by your Committee.

"Withholding relevant and material evidence or information from lawfully authorized investigative officers and employees of the United States." President Clinton's repeated, unwarranted assertions of executive privilege and the distortions of government attorney-client privilege – all of which have been roundly rebuffed by the judiciary – are equivalent of Richard Nixon's absolutist claims that were turned away unanimously by the Supreme Court in *U.S. v. Nixon*.

And so it goes. Proceeding down through the list of impeachment charges: whether it is the "acquiescing in, and counseling [of] witnesses with respect to the giving of false or misleading statements" or the making of "false or misleading public statements for the purpose of deceiving the people of the United States," the similarities to Watergate abound. The words of the Watergate Committee could very well have been crafted for the unrefuted facts of the present

circumstance. Richard Nixon and William Clinton share the following misdeeds: misleading and lying to investigative agencies; encouraging through deception, the false statement of others; covering up crimes of oneself or others; condoning assistance to a witness that engaged in a corroborating falsehood.

So is there then any meaningful difference between Watergate and the present circumstance? Obviously, the first relates to a burglary and Mr. Clinton's to a civil rights violation. But other than context, this is no difference at all. Both are serious when condoned by (Nixon) or engaged in by (Clinton) a President. Nevertheless, we are told repeatedly that Mr. Clinton's actions are "just about sex." However, matters of sexual propriety have changed between 1974 and today. Sexual misbehavior and harassment in the work place once ignored is now federal violation. The President's defenders have never explained why exactly Mr. Clinton is to be held to a lower standard than those in the government civil service, the military, or indeed, in private offices around the Nation?

And President Clinton's wrongful claims of executive privilege are arguably a more insidious affront to the separation of powers than Richard Nixon's, asserted as Nixon's were, before the Supreme Court of the United States held that a President could not solely determine what evidence was or was not to be made available to the other branches in the performance of their constitutionally assigned duties. So too, Mr. Clinton's government attorney-client privilege claim was equally gratuitous. As the United States Court of Appeals for the DC Circuit observed in *In re* Bruce Lindsay, "The Office of the President cites no authority for the proposition that communications between White House Counsel and the President would be absolutely privileged in congressional (impeachment) proceedings, . . ." To the contrary, the duty of White House Counsel "is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure. The constitutional responsibility of the President, and all members of the Executive Branch [including White House Counsel] is to 'take Care that the Laws be faithfully executed.'"

There is one startling dissimilarity between the impeachment cases of Richard Nixon and William Clinton. Nixon mounted a factual defense. Mr. Clinton has supplied none, or at least, none that consists of anything other than strained and legalistic definitions of "sexual relations," or the concept that he was never "alone" in the White House, or that he has suffered massive memory loss. James St. Clair, Mr. Nixon's counsel, argued that the President was not trying to cover up his own wrongdoing, but that of his subordinates. Said St. Clair, it was "hard to be critical of a President who would stand by what he thought were faithful aides until such time as there was evidence developed that they should be released." Likewise, St. Clair posited that while presidential aides communicated improper intentions about the use of the IRS to their colleagues "no abuse of the IRS ever occurred resulting from Presidential action. No action by the IRS resulted." Does President Clinton's lack of factual defense stem from the simple fact that he was not covering up for his subordinate's wrongdoing, but wrongfully asking his subordinates to obscure or hide his own? And can the Congress truly say that no harm has befallen any private citizen, or all citizens in terms of the massive expense of the investigation

that has been aggravated by the President's non-cooperation?

The Impeachment of Andrew Johnson

Very little has been said about the impeachment of Andrew Johnson by the defenders of the President. If, indeed, as some of the President's defenders argue, the independent counsel investigation was premised upon merely partisan dislike and policy disagreement, one would think the Johnson experience would be of primary interest. Nine of eleven articles of impeachment brought against President Johnson related to his deliberate disregard of the Tenure of Office Act insofar as he failed to secure Senate approval for the removal of a cabinet officer. Johnson believed this encroached improperly upon the constitutional oversight of the President, a position that would be vindicated, in part, by his ultimate acquittal in the Senate and subsequently, in Supreme Court jurisprudence. The remaining impeachment articles against Johnson were even more partisan, relating to charges that he defamed Congress in speeches or failed to efficiently administer the reconstruction statutes. As William Evarts, Johnson's defender in the Senate summarized the essence of Johnson's defense: "What [Johnson] did was all public and official. What he did was communicated to all the authorities of the government having relation to the subject." The charges against him were "not of personal delinquency, not of immorality or turpitude. Not one that disparages in the judgment of mankind, not one that degrades or affects the position of the malefactor."

In the end, Andrew Johnson was not removed. His actions, while contrary to the will of Congress at the time, were – as Evarts said – "all public" and not involving of "immorality or turpitude." Therein, I suggest is why President Clinton's defenders have not likened their claim that the present proceeding is motivated by partisan disagreement to the best example of it. Johnson's own defense is a genuine condemnation of Mr. Clinton's actions which were not "all public," but covertly designed to secure personal exoneration from "immorality or turpitude."

The continuation of impeachment proceedings into a subsequent Congress

It has been publicly reported that Professor Bruce Ackerman will present the view to this Committee that "the constitutional force of any bill of impeachment approved by this House expires on January 3, 1999," when the 105th Congress adjourns *sine die*. This is an historically mistaken claim. "Impeachment proceedings in the United States have followed the parliamentary precedent that an impeachment is not terminated or legally interrupted by the dissolution of [the legislative body]." Edwin Firmage and R. Collin Mangrum, *Removal of the President*, 1974 Duke Law J. 1023, 1047, citing 3 A.C. Hinds, Hinds' Precedents of the House of Representatives Sections 2004-05 (1907). Similarly, Thomas Jefferson's venerable *Manual* of House Rules noted that "an impeachment is not discontinued by the dissolution of Parliament, but may be resumed by the new Parliament." *House Rules and Manual* Section 620 (1973).

This principle has been undisturbed in practice, and thus, coincides with the anticipated

work and schedule of this Committee. While it is true that in the midst of the Johnson investigation, the 39th Congress expired, and a subsequent Congress adopted a new resolution to continue the investigation, that circumstance has little relevance where as is presently anticipated, the Committee's investigative and deliberative work will be reported to and acted upon by the full House of Representatives prior to adjournment. In this regard, as Deschler's Precedents reveal, impeachment (that is, accusation) by the House has several times occurred in one Congress and the Senate trial in the Congress following. "Both Judge John Pickering and Judge Harold Louderback were impeached by the House in one Congress and tried by the Senate in the next." Deschler, section 4.1. Similarly, "the House voted the impeachment of Judge Delahay at the end of one Congress, intending to present articles of impeachment in the next." 3 Hinds' section 2375. True, a subsequent House may need to select managers by resolution in the new Congress, (as was done by the 73rd Congress to prosecute the impeachment articles against Judge Louderback approved by the 72d Congress), but this scarcely suggests that the actions of the 105th Congress are open to "a motion to quash" or are otherwise constitutionally irregular. Given the nonjusticiable nature of impeachment in an Article III proceeding, as confirmed by recent Court precedent (*Nixon v. United States*, 506 U.S. 224 (1992), and the textual language of the Constitution that confers upon the House "the sole Power of Impeachment" in Article I, section 2, clause 5, and "the sole Power to try all Impeachments" upon the Senate in Article I, section 3, clause 6, any other conclusion would be insupportable.

Standards for Prosecution

In a very real sense, the President's proposed panel on prosecutorial standards is misplaced. Either it is a veiled effort to again make *ad hominem* attack upon the independent counsel, or it fundamentally misunderstands that the standard of proof for impeachment is well-settled and it is far different than that applicable in an Article III court. "Despite some precedent to the contrary, the view that the House, acting analogously to a grand jury throughout, need only ascertain probable cause to warrant sending the case to trial at the bar of the Senate has generally been followed without debate." Firmage & Mangrum, supra at 1042, citing 3 Hinds' section 2004. The Nixon case, for no reason other than political compromise, allowed a somewhat higher burden of "clear and convincing" evidence. In either case, the standard is not that applied by federal prosecutors in Article III courts – namely, beyond a reasonable doubt. The reason the standard is different is that impeachment, as Alexander Hamilton outlined it in *Federalist No. 65*, is a remedial, not a punitive, measure.

It is important for the Committee and the Full House to keep the proper standard in mind because "[i]f the House advance[s] one step beyond the ascertainment of probable cause it [is] plunged into the trial." 3 Hinds' section 2498. In this respect, "the office of the House [is] not to ascertain whether [President Clinton is] guilty or innocent of the charges preferred against him, but whether the proof [is] sufficient to make the case worthy of further trial."

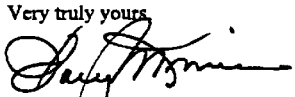
A Concluding Observation

There has been some discussion of censure as an alternative to the proper completion of the constitutional impeachment process. This has been driven largely by an understandable public sentiment that both deplores the President's unlawful conduct and desires an alternative short of removal. Insofar as impeachment is, as Hamilton writes in *Federalist No. 65*, for "the abuse or violation of some public trust," the condemnation (or more properly indictment) by the Full House is warranted. It would be a subversion of the constitutional system to leave these serious matters unpunished by lack of formal accusation in historical record, or to invent a non-constitutional remedy of censure, which if accompanied by legislatively imposed penalty would border on an unconstitutional bill of attainder, or if without penalty, would be meaningless.

As discussed above, the President Clinton's actions have threatened to destabilize the separation of powers by manipulating the judicial process for his personal gain or exoneration; by the assertion without warrant of important presidential and governmental privileges; and fundamentally, by disregarding the presidential oath to "take care that the laws be faithfully executed." These actions are sufficiently similar to those of President Nixon to merit political condemnation by the full House in the form of Articles of Impeachment. By constitutional design the House's impeachment (or indictment function) is necessarily separate either from the Senate's subsequent decision to try or defer the prosecution of the case or any decision by the independent counsel to pursue appropriate criminal counts in an Article III court.

I hope this letter is responsive to the Committee's request for information.

Very truly yours,



Douglas W. Kmiec
Distinguished Visiting Professor
University of Notre Dame (on leave)
Former Assistant Attorney General,
Office of Legal Counsel
U.S. Department of Justice

Mr. BARR. Mr. Chairman.

Chairman HYDE. The gentleman from Georgia.

Mr. BARR. I ask unanimous consent to submit a letter for the record to me by Judge Griffin Bell.

Chairman HYDE. Without objection, so ordered.

[The information follows:]

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December 7, 1998

VIA FAX

Congressman Bob Barr
Committee on the Judiciary
United States House of Representatives
1130 Longworth House Office Building
Washington, D.C. 20515-1007

Dear Congressman Barr:

I watched the televised Clinton hearings of the Judiciary Committee last Tuesday and happened to hear Congresswoman Walters say (as I heard it) that in the Iran-Contra investigation, both Presidents Reagan and Bush refused to be interviewed by Special Counsel Walsh.

I remember that President Reagan was interviewed by Judge Walsh. Further, I was the lawyer for President Bush after he was named as a subject of the investigation, and I personally offered President Bush for an interview by Judge Walsh. However, Judge Walsh declined the interview.

Please place this letter in the record, if you can, so as to correct what I heard to be an incorrect statement regarding these two Presidents.

With thanks.

Yours sincerely,

Griffin B. Bell -bk

Griffin B. Bell

GBB/bk

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Chairman HYDE. I hope our second panel is here and ready.

The committee will come to order, please. Ladies and gentlemen, our second panel is composed of three very distinguished former Members of Congress, the Honorable Elizabeth Holtzman, the Honorable Wayne Owens, and Father Robert Drinan.

Would the three of you please rise and take the oath.

[Witnesses sworn.]

Chairman HYDE. Let the record reflect the witnesses answered the question in the affirmative. And first we will hear from the Honorable Elizabeth Holtzman, a former Representative of New York and a member of the House Judiciary Committee during the 1974 impeachment proceedings and for some years thereafter. I had the great pleasure of serving with her as well as with Father Drinan.

The Honorable Robert J. Drinan, Society of Jesus, a professor of Georgetown University Law Center, former Representative from Massachusetts and member of the House Judiciary Committee from 1971 to 1981.

The Honorable Wayne Owens, a former Representative from Utah and a member of the House Judiciary Committee during the 1974 impeachment proceedings.

You're each recognized—we'll go from Ms. Holtzman, Father Drinan, to Mr. Owens—for a 10-minute statement, and then we will go into the 5-minute rule for questions.

So Ms. Holtzman.

TESTIMONY OF HON. ELIZABETH HOLTZMAN, FORMER MEMBER OF CONGRESS FROM NEW YORK; HON. ROBERT J. DRINAN, S.J., FORMER MEMBER OF CONGRESS FROM MASSACHUSETTS; AND HON. WAYNE OWENS, FORMER MEMBER OF CONGRESS FROM UTAH

TESTIMONY OF HON. ELIZABETH HOLTZMAN

Ms. HOLTZMAN. Mr. Chairman, members of the committee, I thank you for the privilege of appearing before you on this historic day and hope my experiences as a member of the House Judiciary Committee during Watergate will be of assistance to you and the Members of the House in your deliberations.

Let me begin by saying, Mr. Chairman, that I welcome the opportunity to appear before you. While we had our disagreements when we served together in the House, I always had tremendous regard for your ability to be thoughtful and open-minded. It was a pleasure to serve with you. These very qualities are what the committee sorely needs now.

Nearly a quarter of a century ago, sitting where you are now, I never imagined in my lifetime that we would see another impeachment proceeding. I am saddened to be here today. I love this committee, I love the Congress, and I love my country. But if this committee and the House vote along party lines for the impeachment of President William Jefferson Clinton on the information presently available, the credibility of the committee and the Congress will be severely damaged for a long time.

This impeachment will be viewed by the Nation and by history with as much disapproval of that as that of Andrew Johnson. I

know that many on this committee and many in the country believe the President's conduct to be reprehensible and unacceptable. I do not disagree, and I am not here to excuse that conduct. Let us remember, however, that the goal of impeachment is not to punish a President, but to protect the Nation. Impeachment now will punish the Nation, not protect it.

Consider how much the country will be harmed by an impeachment trial in the Senate if the House votes any articles of impeachment. The trial, which could last for months, will disrupt the workings of the Supreme Court. The Chief Justice will have to preside every day over the Senate trial. It will disrupt the workings of the Senate. It will disrupt the Presidency. That is one of the reasons that impeachment cannot be voted lightly.

The danger to the Nation of having a President remain in office must be greater than the danger caused by the wholesale disruption of our government that an impeachment trial will bring. The American people are not likely to look kindly on a government shutdown number two.

During Watergate, I spent many long hours poring over books and studies to understand the meaning of the term "high crimes and misdemeanors." The framers of the Constitution wrote the impeachment clause because they were fearful that the monarchy they had just overthrown in the Revolution would return, that a newly created Chief Executive, the President, would become a tyrant.

But Independent Counsel Kenneth Starr's referral makes out no case of abuse of power, a subject I have been asked to address by the White House. In Watergate, the article of impeachment that charged abuse of power was in a way the most serious, and it was the one that received the largest number of Republican votes.

Think of what Presidential abuses we saw then: Getting the CIA to stop an FBI investigation, getting the IRS to audit political enemies, illegally wiretapping members of the National Security Council staff and of the press, a special unit in the White House to break into the psychiatrist's office of a political enemy, and on and on.

By contrast, what does Mr. Starr point to as an abuse of power in his referral? Acts that do not in the furthest stretch of the imagination constitute any such abuse. Mr. Starr claims that the President did not voluntarily appear before a grand jury, but had to be subpoenaed before he appeared. That is surely not an abuse of power.

Mr. Starr attacks the fact that the President authorized executive privilege to be claimed for a handful of staff members and require the Independent Counsel to prove his need for their testimony in court. Of course, once the court ruled that the testimony was required, then the President withdrew the claim. That, too, is not an abuse.

Mr. Clinton's telling the American people that he did not have a sexual relationship with Monica Lewinsky is also not an abuse of power, although it was the wrong thing to do.

Parenthetically, I want to note that, as one of the authors of the Independent Counsel statute, I believe that Mr. Starr overstepped his jurisdiction by arguing for impeachment on this ground or any

ground. Both the referral and his appearance here go far beyond what the statute permits. We never intended to create a Grand Inquisitor for impeachment.

I want to make a few other brief points. I have heard it said that this committee views itself as a kind of grand jury and that it merely needs probable cause, not overwhelming evidence to impeach. Instead, it is the Senate that must have substantial evidence to act. But if you use the analogy of a grand jury, then you should not be impeaching at all. No indictment would be sought by a prosecutor where there is no chance for conviction. And it is almost universally conceded that there are not enough votes in the Senate to convict President Clinton and remove him from office. In fact, Federal prosecutors need to have a substantial likelihood of success before they can recommend indictment to the grand jury.

Why is this the case? Because prosecutions that go nowhere use up precious resources. And let us not forget how much money has already been spent on investigating President Clinton. It is almost an abuse of power to indict someone, seriously damage that person's representation, and force that person to the tremendous burden of putting up a defense when there is little or no likelihood of conviction.

The same analogy holds true here. Impeachment should not be voted by the House unless there is a strong likelihood of conviction in the Senate. Impeachment is not a kind of super censure designed simply to besmirch a President's reputation. Impeachment is a tool to remove a President from office. It is a last resort to preserve our democracy. It must not be perverted or trivialized.

Also, to use a different metaphor, this is not a football game where one player of the House simply hands off the ball to another player, the Senate. In Watergate, when we voted for impeachment, we did so because we believed President Richard Nixon should be and would be removed from office. We did not operate on some watered-down standard of evidence. We didn't think we were passing the buck to the Senate where the real action would take place.

We voted as if we were the Senate, as if we ourselves were deciding on his removal, as if the case had been proven to us beyond a reasonable doubt. That same standard should be followed here. You just don't casually overturn the majority vote of the American people.

And let me add, too, how difficult it was to cast the vote for impeachment. It was solemn, hard, and unpleasant. As much as I disliked Richard Nixon's policies, I did not relish for one moment voting for impeachment. He was my President, and I did not want to see my President engage in acts of that nature. I think the other members on the committee felt the same way.

Unless this committee and the House act on a bipartisan basis and reach out for the common ground as we did during Watergate, unless you have the full support of the American people for the enormous disruption of our government that an impeachment trial will entail, unless you have overwhelming evidence of the serious abuse of power that impeachment requires, none of which has been true so far, you should not, you must not vote to impeach. Thank you, Mr. Chairman.

Chairman HYDE. Thank you very much, Ms. Holtzman.

[The information follows:]

Testimony
of
Elizabeth Holtzman
before
The House Judiciary Committee
December 8, 1998

Mr. Chairman, Members of the Committee

I thank you for the privilege of appearing before you on this historic day and hope my experiences as a member of the House Judiciary Committee during Watergate will be of assistance to you and the members of the House in your deliberations.

Let me begin by saying Mr. Chairman, I welcome the opportunity to appear before you. While we had our disagreements when we served together in the House, I had tremendous regard for your ability to be thoughtful and open-minded. These very qualities are what the Committee sorely needs now.

Nearly a quarter of a century ago, sitting where you are now, I never imagined that in my lifetime we would see another impeachment. I am saddened to be here today. I love this Committee, I love the Congress and I love my country. But if this Committee and the House vote along party lines for the impeachment of President William Jefferson Clinton on the information presently available, the credibility of the Committee and the Congress will be severely damaged for a very long time. This impeachment will be viewed by the nation and by history with as much disapproval as that of Andrew Johnson.

I know that many on this Committee and many in the country believe the President's conduct to be reprehensible and unacceptable. I do not disagree--and I am not here to excuse that conduct. Let us remember, however, that the goal of impeachment is not to punish a president, but to protect the nation. Impeachment now will punish the nation, not protect it.

Consider how much the country will be harmed by an impeachment trial in the Senate if the House votes any articles of impeachment. A trial (which could last for months) will disrupt the workings of the Supreme Court -- the Chief Justice will have to preside every day over the Senate trial. It will disrupt the workings of the Senate. It will disrupt the Presidency.

That is one of the reasons that impeachment cannot be voted lightly. The danger to the nation of having a president remain in office must be greater than the danger caused by the wholesale disruption of our government that an impeachment trial will bring. The American people are not likely to look kindly on a government shutdown #2.

During Watergate, I spent many long hours pouring over books and studies to understand the meaning of the term "high crimes and misdemeanors." The framers of the constitution wrote the impeachment clause because they were fearful that the monarchy they had just overthrown in

the revolution would return -- that the newly created chief executive, the president, would become a tyrant.

But Independent Counsel Kenneth Starr's referral makes out no case of abuse of power, a subject I have been asked to address by the White House. In Watergate, the article of impeachment that charged abuse of power was, in a way, the most serious -- and it was the one that received the largest number of Republican votes. Think of what presidential abuses we saw then; getting the CIA to stop an FBI investigation; getting the IRS to audit political enemies; illegally wiretapping members of the National Security Council staff and of the press; a special unit in the White House to break into the psychiatrist's office of a political enemy -- and on and on.

By contrast what does Mr. Starr point to as an "abuse of power" in his referral? Acts that do not in the farthest stretch of the imagination constitute any such abuse. Mr. Starr claims that the President did not voluntarily appear before a grand jury but had to be subpoenaed to appear. That is surely not an abuse of power. Mr. Starr attacks the fact that the President authorize executive privilege to be claimed for a handful of staff members and required the Independent Counsel to prove his need for their testimony in court. Of course, once the court ruled that the testimony was required, then the President withdrew the claim. That too is not an abuse. Mr. Clinton's telling the American people that he did not have a sexual relationship with Monica Lewinsky is also not an abuse of power.

Parenthetically, I want to note that as one of the authors of the Independent Counsel statute, I believe that Mr. Starr overstepped his jurisdiction by arguing for impeachment on this ground or any ground. Both the referral and his appearance here go far beyond what the statute permits. We never intended to create a Grand Inquisitor for Impeachment.

I want to make a few other brief points.

I have heard it said that this Committee views itself as a kind of grand jury and that it merely needs probable cause -- not overwhelming evidence -- to impeach. Instead, it is the Senate that must have substantial evidence to act. But if you use the analogy of a grand jury then you should not be impeaching at all. No indictment would be sought by a prosecutor when there is no chance for conviction. And it is almost universally conceded that there are not enough votes in the Senate to convict President Clinton and remove him from office. In fact, federal prosecutors need to have a substantial likelihood of success before they can recommend indictment to the grand jury. Why is this the case? Because prosecutions that go nowhere use up precious resources (and let us not forget how much money has already ben spent on investigating President Clinton); it is almost an abuse of power to indict someone, seriously damage that person's reputation and force that person to the tremendous burden of putting up a defense when there is little or no likelihood of conviction. The same analogy holds true here -- impeachment should not be voted by the House unless there is a strong likelihood of conviction in the Senate.

Impeachment is not a kind of super-censure, designed simply to besmirch a President's reputation. Impeachment is a tool to remove a President from office; it is a last resort to preserve our democracy. It must not be perverted or trivialized.

Also, to use a different metaphor, this is not a football game where one player, the House, simply hands off the ball to another player, the Senate.

In Watergate, when we voted for impeachment, we did so because we believed that President Richard Nixon should be and would be removed from office. We didn't operate on some watered down standard of evidence; we didn't think we were passing the buck to the Senate, where the real action would take place; we voted as if we were in the Senate, as if we ourselves were deciding on his removal, as if the case had been proven to us beyond a reasonable doubt. The same standard should be followed here. You don't just casually overturn the majority vote of the American people.

Let me add how difficult it was to cast the vote for impeachment. It was solemn, hard and unpleasant. Much as I disliked Richard Nixon's policies, I did not relish for one moment voting. It was one of the most solemn and unpleasant duties I have ever had to perform. I think other members felt the same way.

Unless this Committee and the House act on a bipartisan basis and reach out for the common ground, as we did during Watergate, unless you have the full support of the American people for the enormous disruption of our government that an impeachment trial will entail, unless you have overwhelming evidence of the serious abuse of power that impeachment requires -- none of which have been true so far -- you should not, you must not vote to impeach.

Chairman HYDE. Father Drinan.

TESTIMONY OF HON. ROBERT J. DRINAN, S.J.

Father DRINAN. Mr. Chairman and members of this venerable committee, the situation before the House Judiciary Committee today is entirely different from the scene that I and my copartners here experienced in 1974. At that time, the country knew there was extensive lawlessness in the White House. The documentation of appalling crimes was known by everyone. Abuse of power and criminality were apparent to the American people. There is well-documented evidence put forth in the report of that committee in 1974 about the plumbers, the break-in of Dr. Ellsberg's office and the cover-up of the burglary at the Watergate Hotel.

The procedure followed by the House Judiciary Committee at that time was, however, evenhanded. Months of hearings took place with the President's lawyer Mr. Jim St. Clair always present in this room and free to make any comments and ask questions.

Today, the scene is startlingly different. No investigation has been made by the House Judiciary Committee, nor have any fact-finding hearings been held. The 21 Republicans have no support whatsoever from the 16 Democrats. And in addition, two-thirds of the Nation or more are opposed to impeachment.

In 1974, the Members of the Democratic Majority had constant conversation and dialogue with the Republican Members. And I remember going to the Republicans and sharing with them the destiny of this committee and the awesome task that had come to us.

The Democrats were aware of the intense problems that the Republicans had with the impeachment of a Republican President, but eventually through the sheer force of the evidence, six or seven of the Republicans voted for one or more articles of impeachment. That was not a happy day when we voted for impeachment, and I remember well that Chairman Rodino said to the press afterwards, when asked what was the first thing that he did, he said, "I went to my office and cried."

Another difference: the House Judiciary Committee in 1998, unlike its predecessor where we served, has allowed its agenda to be dictated by the calendar. Strategy has been determined not by the need for thoroughness and fairness, but by the convenience of ending this process by Christmas of this year.

The House Judiciary Committee in 1974 furthermore did not vote for all of the proposed articles of impeachment. A serious charge was made that Mr. Nixon had backdated his taxes in an effort to take advantage of an exemption that had been repealed, and only 12 Members of the body voted for the proposition that this was an impeachable offense. Twenty-four Members, including myself, voted that this misconduct, almost certainly a felony, was not impeachable.

The dignity and the majesty of the Rodino committee was not out to embarrass or humiliate President Nixon. What we were required to do was painful, but we worked, heard, listened, debated, and finally voted. And the people of America then and now saw that the process was deliberate, bipartisan and measured.

The only time in American history that has seen anything like the process this fall before the House Judiciary Committee occurred

in 1868 when President Andrew Johnson was impeached by the House. The consensus of history is that the Johnson impeachment was partisan and was a mistake. Its failure in the Senate did not prevent a weakening of the independence of the Presidency.

And I hope, ladies and gentlemen, that history will not decree that the House Judiciary Committee made a profound mistake in 1998 and that this body will go down in the history books as when it was dominated by vindictiveness and by vengeance and bipartisanship.

The American people who are so overwhelmingly opposed to impeachment may be coming aware of the dreadful consequences that would happen to America if the House approved of impeachment and sent articles to the Senate.

The entire Nation knows that there are under no consideration 67 votes for that proposition in the Senate. But what the Nation doesn't realize, yet, is that the country could be paralyzed for some 6 months. The workings of the Supreme Court would be harmed because the Chief Justice, under the Constitution, must preside each day at the trial. The Senate's program would be held up, and the whole country would be immobilized.

The House cannot pretend that it has only to act like a grand jury and send the articles to the Senate for trial. There is no historical or constitutional leave or justification for the proposal that you act as a grand jury.

The House has a unique role in impeachment. The votes cast by each Member will be the most important vote cast by that person as a Member of Congress. And history will discover and record and remember whether that vote was done for partisan reasons. A vote to impeach in this case would have dire consequences for years and even decades to come.

Almost 70 percent of the Nation and virtually every Democrat in the Congress are opposed to impeachment. These groups believe firmly that, even if all the allegations in the Starr report are true, there are no impeachable offenses.

And I would anticipate, members of the committee, an explosion of anger like that that occurred after the Saturday Night Massacre could happen in this country. When people realize what you people anticipate you will do this Saturday, and when it goes to the whole House, an explosion of anger just like happened 24 years ago when Mr. Richardson and Mr. Cox did some brave things.

Let me conclude, Mr. Chairman, by thanking you for the opportunity and urging you and the committee to recognize that the American people and the Democrats in Congress have a right to be listened to. They have not agreed with any reasons for impeachment set forth by the Starr report and the Republican leadership and the Congress. This Nation has a right to demand that impeachment efforts with no bipartisan support whatsoever should be reconsidered and postponed. Thank you very much.

Chairman HYDE. Thank you, Father.

[The information follows:]

TESTIMONY OF ROBERT F. DRINAN, S.J.

PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER

BEFORE THE HOUSE JUDICIARY COMMITTEE

ON DECEMBER 8, 1998

The situation before the House Judiciary Committee today is entirely different from the scene in 1974. At that time the country knew that there was lawlessness in the White House. Abuse of power and criminality were apparent to the American people.

The procedure followed by the House Judiciary Committee in 1974 was, however, even-handed; months of hearings took place with the President's lawyer, Mr. James St.Clair, always present and free to make comments and ask questions.

Today the scene is startlingly different. No investigation has been done by the House Judiciary Committee, nor have any fact-finding hearings been held. The 21 Republicans have no support whatsoever from the 16 Democrats. In addition, two-thirds of the nation continue to be opposed to impeachment.

In 1974 the members of the Democratic majority had constant conversation and dialogue with the Republican members. The Democrats were aware of the intense problem the Republicans had with the impeachment of a Republican President. But eventually six or seven of the Republicans voted for one or more articles of impeachment.

Another difference: the House Judiciary Committee in 1998, unlike its predecessor in 1974, has allowed its agenda to be dictated by the calendar. Strategy has been determined not by the need for thoroughness and fairness but by the convenience of ending the process before Christmas of this year.

The House Judiciary Committee in 1974, furthermore, did not vote for all of the proposed articles of impeachment. A serious charge was made that President Nixon had back-dated his taxes in an effort to take advantage of an exemption that had been repealed. Only 12 members

voted for the proposition that this was an impeachable offense. Twenty-four members, including this writer, voted that this misconduct, almost certainly a felony, was not impeachable.

The dignity of the majesty of the Rodino committee was not out to embarrass or humiliate President Nixon. What we were required to do was painful. But we worked, debated and finally voted. The people of America could see that the process was deliberate, bi-partisan and measured.

The only time in American history that has seen anything like the process this fall before the House Judiciary Committee occurred in 1868 when President Andrew Johnson was impeached by the House. The consensus of history is that the Johnson impeachment was partisan and was a mistake. Its failure in the Senate did not prevent a weakening of the independence of the presidency.

The American people who are so overwhelmingly opposed to impeachment may be becoming aware of the dreadful consequences that would happen to America if the House approved of impeachment and sent articles to the Senate. The entire nation knows that there are not 67 votes in that body to convict.

But the country could be paralyzed for some six months. The workings of the Supreme Court would be harmed because the Chief Justice would have the constitutional duty of presiding at the trial. The Senate's program would be held up and the whole country would be immobilized.

The House cannot pretend that it has only to act like a grand jury and send the articles to the Senate for trial. There is no historic or constitutional justification for that position.

The House has a unique role in impeachment. The vote cast by each member will be the most important vote cast by that person as a member of Congress. History will discover and record whether that vote was done for partisan reasons. A vote to impeach in this case would have dire consequences for years and even decades to come.

Almost 70 percent of the nation and virtually every Democrat in the Congress are opposed to impeachment. These groups believe firmly that even if all the allegations in the Starr Report are true there are no impeachable offenses.

The American people and the Democrats in Congress have a right to be listened to. They have not agreed with any reasons for impeachment set forth by the Republican leadership in the Congress. The nation has a right to demand that an impeachment effort with no bi-partisan support should be reconsidered.

Chairman HYDE. Mr. Owens.

TESTIMONY OF HON. WAYNE OWENS

Mr. OWENS. Mr. Chairman, ladies and gentlemen of the committee, I feel like we're appearing before you as three ghosts of impeachment past. With the exception of Ms. Holtzman, we are gray ghosts. We are grateful to be back in this hallowed Chamber. Thank you for giving us this opportunity.

I remember keenly this afternoon how I felt 25 years ago when I learned while deer-hunting in the mountains of southern Utah of the so-called Saturday Night Massacre, the forced resignation of Attorney General Elliot Richardson and of Deputy Attorney General William Ruckelshaus and then the firing of Special Prosecutor Archibald Cox.

I had been following the revelations of the Senate Watergate committee for 6 months. It was obvious that Sunday morning that the House would be required to pursue an impeachment investigation and that my committee, the Judiciary Committee, would be called to conduct that investigation.

I think that I was initially in awe of the assignment, almost intimidated. No President had been called to account by the Congress for 100 years. History would be looking over our shoulder. And we wanted from Chairman Rodino on down, Republicans and Democrats, to be sure that we were careful, judicial and bipartisan in all that we did.

While we recognized that impeachment was a political process, we were determined that it would not be a partisan process. And we reported unanimously our recommendations to the House that the investigation—that the investigation go forward, all 21 Democrats and 17 Republicans. And it was accepted by the full House by a vote of 410 to 4. So we are aware, I think, of your feelings as you approach the decisions you must make.

Chairman Hyde indicated early on that the precedents of the Nixon impeachment would be followed closely, and I wanted to argue to you that President Clinton's misdeeds do not reach the standard of impeachment which our committee established at that historic time.

What was that standard? We define impeachment in our final report as quote, "A constitutional remedy addressed to serious offenses against the system of government." Ten Republican members of the committee in a Minority report argued for a higher standard of judgment saying, quote, "The President should be removable by the legislative branch only for serious misconduct dangerous to the system of government established by the Constitution." The man who is now the Senate Majority Leader, then Congressman Trent Lott, a member of the committee, was one of the 10 arguing for that higher standard.

I want to recall for you briefly the circumstances surrounding the adoption of the so-called Abuse of Power article of impeachment in late July 1974. The committee had just passed the first article referred to as the Obstruction of Justice article by a solid vote of 21 Democrats and 6 of the 17 Republicans.

Proposed article of impeachment number two, after serious consideration and debate, was passed by an even larger majority. A

total of 7 Republicans joined 21 Democrats, finding that President Nixon had violated the constitutional rights of citizens in five specific categories of abuse of his powers and voted to report the article to the floor for a full House consideration.

I urge you to consider carefully the gravity of those charges in the Abuse of Power article, which an overwhelming and bipartisan majority of the committee found to be sustained by not only clear and convincing evidence. In fact, I believed the evidence to sustain a judgment beyond a reasonable doubt, the test for conviction in the Senate.

It was obvious to us that President Nixon would go to trial in the Senate and to many of us that we wanted to have a standard which would pass muster in the Senate. President Nixon, it was clear.

One, directed or authorized his subordinates to interfere with the impartial and nonpolitical administration of the internal revenue law for political purposes.

Two, he directed or authorized unlawful electronic surveillance and investigations of citizens and the use of information obtained from the surveillance for his own political advantage.

Three, he permitted a secret investigative unit within the Office of the President to engage in unlawful and covert activities for his political purposes, including abuse of the CIA.

Four, once these and other unlawful and improper activities on his behalf were suspected, and after he knew or had reason to know that his close subordinates were interfering with lawful investigations into them, he failed to perform his duty to see that the criminal laws were enforced against those subordinates.

And, five, he used his executive power to interfere with the lawful operations of agencies of the executive branch, including the Department of Justice and the Central Intelligence Agency, in order to assist in these activities as well as to conceal the truth about his misconduct and that of his subordinates and agents.

Today you are faced with a record of misdeeds by a President who carried on an illicit sexual affair then publicly and privately misled others to protect his wife and daughter and the public from finding out about his infidelity; personal, not official misconduct, akin to President Nixon cheating on his taxes. Improper and serious, but by nature personal misconduct, and, therefore, not impeachable.

Your obligation, may I be permitted to point it out to you, is to put those powerful differences into perspective and to render a judgment based solely on the gravity of the offense charged here because there is little disagreement on the facts.

I know that it is said that impeachment is a political, not a legal, decision. But if you vote to impeach a President because he had an improper sexual affair, then avoided full disclosure by using narrow, legal definitions, even then affirming that testimony before a grand jury, even if he lied if you impeach on that narrow basis of personal, not official, misconduct, you do untold damage to the Constitution and to the stability of future Presidents.

Our forefathers wisely intended that only abuses of official Presidential powers should be the premise—should be the premise for

impeachment. And, ladies and gentlemen, there is no evidence of such abuses before the committee, not at all.

In closing, may I quote again briefly from the Minority views of those 10 House Judiciary Committee Republicans who ultimately accepted and supported the articles of impeachment so that there was a unanimous—unanimity in the Judiciary Committee that President Nixon should be impeded, before the President resigned. From their Minority views, this: "Absent the element of danger to the State, we believe the delegates to the Federal Convention in 1787, in providing that the President should serve for a fixed elective term, rather than during good behavior or popularity, struck the balance in favor of stability in the executive branch." Thank you very much.

Chairman HYDE. Thank you very much, Mr. Owens.

[The information follows:]

Remarks of Wayne Owens
Before the House Committee on the Judiciary
Investigating the Impeachment of President William Clinton
December 8, 1998

Mr. Chairman, Ladies and Gentlemen of the Committee:

We appear before you this afternoon as three ghosts of impeachment past. Thank you for the privilege of addressing this distinguished Committee on this subject of utmost gravity and importance. I am among those who believe that, except for declaring war, Congress makes no more serious or far reaching decision than impeachment and removal of an American President. I do not envy you this responsibility.

I remember keenly this afternoon how I felt 25 years ago when I learned, while deer hunting in the mountains of Southern Utah, of the so-called Saturday night massacre, the firing by President Nixon of Attorney General Eliot Richardson, of Deputy Attorney General William Ruckelshaus, and then of Special Prosecutor Archibald Cox. I had been following the revelations of the Senate Watergate Committee for six months. It was obvious that Sunday morning that the House would be required to pursue an impeachment investigation, and that my Committee, the Judiciary Committee would be called to conduct that investigation.

I think that I was initially in awe of the assignment, almost intimidated. No President had been called to account before the Congress in 100 years. History would be looking over our shoulder, and we wanted, from Chairman Peter Rodino on down, to be sure that we were careful, judicial and bi-partisan in all that we did. While we recognized that impeachment is a political process, we were determined that it would not be [redacted] partisan, and we reported unanimously our recommendation to the House that the investigation go forward -- all 21 Democrats and 17 Republicans -- and it was accepted by the full House by a vote of 410 to 4.

So we are aware, I think, of your feelings as you approach the decisions you must make. Chairman Hyde indicated early on that the precedents of the Nixon Impeachment would be followed closely, and my

assigned task this afternoon is to argue to you that President Clinton's misdeeds do not reach the standard of impeachment which our Committee established.

What was that standard? We defined impeachment in our final report as: "...a constitutional remedy addressed to serious offenses against the system of government." Ten Republican members of the Committee, in a minority report, argued for a higher standard of judgment, saying: "...the President should be removable by the Legislative Branch only for serious misconduct dangerous to the system of government established by the Constitution." The man who is now the Senate Majority Leader, then Congressman Trent Lott, a member of the Committee, was one of the ten arguing for that higher standard.

I want to recall for you briefly the circumstances surrounding the adoption of the so-called "Abuse of Power" Article of Impeachment in late July, 1974. The Committee had just passed the first article, referred to as the Obstruction of Justice Article, by a solid vote of 21 Democrats and 6 of the 17 Republicans.

Proposed Article of Impeachment # 2, after serious consideration and debate, was passed by an even larger majority. A total of 7 Republicans joined 21 Democrats, finding that President Nixon had violated the constitutional rights of citizens, in five specific instances of abuse of his powers, and voted to report the Article to the floor for full House consideration.

I urge you to consider carefully the gravity of those charges, which an overwhelming and bi-partisan majority of the Committee found to be sustained by clear and convincing evidence. It was obvious to us that President Nixon had:

1. Directed or authorized his subordinates to interfere with the impartial and non-political administration of the internal revenue law for political purposes,
2. Directed or authorized unlawful electronic surveillance and investigations of citizens and the use of information obtained from the surveillance for his own political advantage,

3. Permitted a secret investigative unit within the office of the President to engage in unlawful and covert activities for his political purposes,

4. Once these and other unlawful and improper activities on his behalf were suspected, and after he knew or had reason to know that his close subordinates were interfering with lawful investigations into them, he failed to perform his duty to see that the criminal laws were enforced against those subordinates, and

5. He used his executive power to interfere with the lawful operations of agencies of the Executive branch, including the Department of Justice and the Central Intelligence Agency, in order to assist in these activities, as well as to conceal the truth about his misconduct and that of his subordinates and agents.

Today you are faced with the record of misdeeds by a President who carried on an illicit sexual affair, then publicly and privately misled others to protect his wife and daughter, and the public, from finding out about his infidelity. Personal, not official, misconduct, akin to President Nixon cheating on his taxes -- improper and serious, but by nature personal misconduct and therefore not impeachable.

Your obligation, may I be permitted to point it out, is to put those powerful differences into perspective and to render a judgment based solely on the gravity of the offense, because there is little disagreement on the facts.

I know that it is said that impeachment is a political, not a legal, decision. But if you vote to impeach a president because he had an improper sexual affair, then avoided full disclosure by using narrow legal definitions, even then affirming that testimony before a grand jury, if you impeach on that narrow base of personal -- not official misconduct -- you do untold damage to the Constitution and to the stability of future presidents.

Our forefathers wisely intended that only abuses of official presidential powers should be the premise for impeachment, and Ladies and Gentlemen, there is no evidence of such abuses before the Committee -- none.

In closing, may I quote again briefly from the Minority Views of those Ten House Judiciary Committee Republicans, already cited: "Absent the element of danger to the State, we believe the delegates to the Federal Convention of 1787, in providing that the President should serve for a fixed

elective term rather than during good behavior or popularity, struck the balance in favor of stability in the Executive Branch."

Thank you.

Chairman HYDE. Now we will have the questions from the Members, and the first questioner is Mr. Sensenbrenner.

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

Ms. Holtzman, I believe that after you left Congress, you spent some time as district attorney in Brooklyn. Am I correct in that?

Ms. HOLTZMAN. Yes, Mr. Sensenbrenner. I also had the pleasure of serving with you.

Mr. SENSENBRENNER. Yes, and I remember that very vividly.

Do you think that making a false statement before the grand jury is an impeachable offense?

Ms. HOLTZMAN. It could be, but it doesn't have to be.

Mr. SENSENBRENNER. What's the difference, in your mind?

Ms. HOLTZMAN. What Mr. Owens so eloquently spoke to, which is that, in my judgment, whether the conduct is reprehensible or not, whether we find it extremely distasteful or not, the standard of impeachment is the abuse of the power of office, one that creates a serious danger to the operations of our government and a threat to our democracy, which is what we saw in Watergate.

Mr. SENSENBRENNER. The last impeachment which was voted by the House of Representatives was 9 years ago in 1989, and there the House of Representatives unanimously, 417 to nothing, declared that Judge Walter Nixon's false statements to the grand jury about a private matter, which was a sweetheart oil and gas lease deal, were impeachable offenses. And the Senate agreed with the House's charge and kicked Judge Nixon out of office, I believe, by a 91 to 8 vote.

Can you tell me what you think the difference is between Judge Nixon's false statements to a grand jury about a private oil and gas lease that did not have anything to do with grievously defrauding the government or changing the constitutional balance of powers and Bill Clinton's false statements, if they indeed were false statements, to the grand jury about his relations with Monica Lewinsky?

Ms. HOLTZMAN. Mr. Sensenbrenner, I think that the members of this committee can see and the country can see that there is a huge difference between impeaching one Federal judge and removing—because there are hundreds of Federal judges—and removing the one President of the United States. And, obviously, the situation of removal of a President is so grave, because the President is voted upon. Judges, Federal judges, are not elected. You are undoing the majority vote of the American people that is central to our democratic system. It is central to the stability of this Nation. We have survived as a democracy very well. The Presidency has been a central part of it.

But the second answer to your question, sir, is that judges serve during good behavior, which is something that does not apply to Presidents. It's a constitutional standard. And so I think it's quite different.

Mr. SENSENBRENNER. Let me say that I am deeply concerned with that answer, because what you are saying is that the standard of truthfulness for a President of the United States when testifying before a grand jury is less than the standard of truthfulness for a Federal judge.

Now, you and I will disagree with that conclusion, but I have looked back in the record, as I am sure all of us have, and I pulled out your questioning of Gerald Ford when he was before this committee, having been nominated to be Vice President by President Nixon, who was still in office at the time.

And you talked to Mr. Ford about Nixon lying allegedly about the bombing of Cambodia. Mr. Ford responded that he didn't think that President Nixon had been 100 percent truthful on that matter and then insisted that all Presidents had given some false and deceptive statements.

You then said there was a difference between keeping a secret and falsifying information. And you said, "I think all of us understand that difference very well." Could you tell us then, is there not a major difference between historical falsehoods as opposed to lies before a Federal court proceeding or a grand jury?

Ms. HOLTZMAN. Mr. Sensenbrenner, I hate to answer a question with a question; but don't you think there's an enormous difference between keeping a dual set of books about bombing of a foreign country without the authorization of Congress and not telling the truth about private sexual misconduct?

Mr. SENSENBRENNER. I think there is—there should be no difference, because our perjury and false statement statutes, you know, do not have various levels of perjury. When you do make a false statement, you have to live by the consequences. And I think we all try to teach our kids that one of the things they always should do is always tell the truth.

Chairman HYDE. The gentleman's time has expired.

The gentleman from Michigan reserves his time, and we will then go to the gentleman from Massachusetts, Mr. Frank.

Mr. FRANK. Let me follow up. Mr. Sensenbrenner said that he would see no difference between lying about a private sexual affair and lying about bombing a country, and that there was no gradation at all. One of the three counts of grand jury perjury—and I think the grand jury perjury is the most serious set of issues—one of the three counts is, according to Mr. Starr, the President said that the intimate activity began in February of 1996, and Ms. Lewinsky said it began in November of 1995.

Here I would just express my difference with Mr. Sensenbrenner. I do think, even if the President was wrong and got it wrong by a couple of months, that making a false statement by too much—when nothing turned on it, since Ms. Lewinsky obtained no age of majority, nothing happened in the interim period that made any difference, but let me ask you—so I would think as between misstating by 2 months the date the affair began when you admitted it and bombing a country, I don't know, maybe you could bomb the wrong country, it would be analogous, and you cover it up by mistake, but my question would be as a former prosecutor, Ms. Holtzman, would you have a—would you think anyone would have brought in the prosectorial discretion a perjury case because someone 2½ years after an event admitted the event but got it wrong by 2 months when nothing turned on the 2 months?

Ms. HOLTZMAN. Well, I would be surprised by such a prosecution. Remember, perjury requires materiality, and this is a jury question.

Mr. FRANK. That's directly relevant, because there was no materiality here. But this is one of Mr. Starr's three counts of perjury.

But the way, on that subject, my colleague from Arkansas challenged Mr. Craig before. He said that the President never admitted to sexual contact with Ms. Lewinsky. He used the phrase "inappropriate intimate contact." I suppose he might have been having an inappropriately intimate conversation about which country they would like to bomb together.

But my sense is that almost everybody, except the gentleman from Arkansas, accepted that, and among the people who believed that Mr. Clinton did acknowledge that was Kenneth Starr, because on page 149 of the referral, at point 3, he says, "The President made a third false statement to the grand jury about his sexual relationship with Monica Lewinsky. He contended that the intimate contact did not begin until 1996. Ms. Lewinsky testified that it began November 15th, '95."

In other words, in the very accusation that Mr. Clinton got it wrong by 2 months, Mr. Starr uses "intimate" and "sexual" interchangeably, and, in fact, I think disagrees from the point of the gentleman of Arkansas and acknowledges in this report—in fact, he charges the President with inaccurately remembering when the sexual contact began.

It would seem to me my colleagues would have to decide here. They cannot impeach in the alternative. You cannot accuse the President of having not acknowledged the relationship and then impeach him for having acknowledged it on the wrong day.

Yes, Ms. Holtzman.

Ms. HOLTZMAN. Congressman Frank, I think you raised a very pivotal point, which is we are talking about impeaching a President of the United States. It doesn't matter if it's William Jefferson Clinton or somebody else. And you cannot trivialize the power of impeachment by talking about removal because we have got a date mistaken by 2 months or the President says——

Mr. FRANK. Thank you.

Ms. HOLTZMAN [continuing]. Intimate as opposed to sexual.

Mr. FRANK. Let me say——

Ms. HOLTZMAN. And I think that's critical.

Mr. FRANK. Ms. Holtzman, I want to get quickly to the two other perjuries. One of the other two counts of grand jury perjury is that the President, when he said that—he believed he said in August—this is even almost too complicated to state—Mr. Starr said he perjured himself because he said in August that he believed when he did the deposition that oral sex wasn't covered. And they say they knew he was lying. Again, how they would prove that, I don't know what witness they want.

And the third one, of course, was the one Mr. Wexler talked about before: What did the President touch, and why did he touch it? That's the central count of perjury.

But just in closing, I want to respond also to a comment made by the gentleman from Georgia who said, well, the President hasn't yet been exonerated on Whitewater. Whitewater has seniority around here. If Whitewater were a Member, it would be a subcommittee Chairman.

Whitewater has been investigated by three Republican Justice Department appointees, Jay Stevens, Robert Fiske, Kenneth Starr, three men who at one point had been Republican Justice Department appointees. They have been working on it for over 5 years. They have as yet come up with nothing.

I do not doubt by this record that they will never admit an exoneration, but keeping open something which three separate Republican Justice Department former prosecutors have investigated for 5 years and have been able to bring forward no charge against the President, it seems to me that's an abuse of power to continue to hold over someone's head something that has been so long investigated for so little purpose.

And I actually yield back, Mr. Chairman.

Chairman HYDE. I thank the gentleman.

The gentleman from Florida, Mr. McCollum.

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

Mr. Owens, I believe I'm reading your testimony correctly and hearing it that you do not believe anything is impeachable or should be impeachable that isn't directly related to some—in some way the President's power of executive authority. Do you think, then, that if the President of the United States went back home on vacation to Arkansas and murdered two of his best friends, having no connection whatsoever to his office in any official capacity, that we should ignore; would be derelict? Should we impeach him for that if we knew he committed murder while he's sitting as President.

Mr. OWENS. Given your hypothetical, and it is a farfetched one, Mr. McCollum, I would certainly agree that the President of the United States would not be fit to serve if he had committed murder. My assumption is that he would be replaced probably before it had to go to impeachment. But certainly murder is an offense in my mind, an impeachable offense, if it's a President or Vice President or Congressman from Florida.

Mr. MCCOLLUM. Let's hypothetically assume, then, that the President of the United States did not commit murder, but that we elect a President someday and find after we elected him that, indeed, prior to his election in office, he had committed several crimes of fraud and bilking of senior citizens out of millions and millions of dollars. Would that be an impeachable offense? That certainly wouldn't go to his official conduct.

Mr. OWENS. I think these issues are issues of gravity. I would think that the Judiciary Committee would have to look at that, a group of wise men and women like this one, and make a decision whether it rose to the impeachability. I think that's a subjective judgment based on who's before the committee and the level of evidence.

Mr. MCCOLLUM. Ms. Holtzman, I am sure you are aware, because it was in today's paper, that Henry Ruth wrote an article about Watergate and cited specifically the income tax fraud charge against President Nixon and cited your vote and Mr. Conyers as having voted to impeach on that article, although I think perhaps others on this panel voted against it.

Yet you have testified today, I can't imagine that was related to his official duties; that, indeed, you think that impeachment needs

to be related to the President's official duties. How do you square your vote back in 1974 with President Nixon on the income tax fraud question to your testimony today?

Ms. HOLTZMAN. I am sorry, I haven't had the pleasure of reading Mr. Ruth's article. I assume it would be a pleasure to read it.

Mr. MCCOLLUM. It's in today's Wall Street Journal.

Ms. HOLTZMAN. In any case, my answer to you is severalfold. One, I went back because I had remembered the article of impeachment with regard to taxes when this issue of Mr. Clinton came up. And I looked at what I had written at that point in support of that article. And in my writing, I said that I believe that there was a misuse of the power of his office. My views, unfortunately, don't provide the back up—don't provide the explanatory support. I didn't write those views. I signed those views. I haven't had time to—find the exact support in the record.

But I want to make one other point, sir, and that is that that article also contained a question of emoluments, which charged the President of the United States, as President, with enriching himself with a variety of additions that were made to his homes at taxpayers' expense. So you did have an abuse of governmental office.

I want to say a third thing in response to your question. That article was not the sole ground of impeachment. We had article 1 which had some 32 separate counts of obstruction of justice. We had article 2 which had five or six separate counts. So I don't know that anyone would have voted or that I would have voted—if that false tax return article were the only ground for the impeachment of the President of the United States, I cannot say that I would have voted for that.

Mr. MCCOLLUM. I think what my point of all of my questions I have done now with this panel is simply to point out the fact that what may be considered to be official conduct or not is not really the ultimate criteria we should be judging impeachment on, even though, with great respect, that's what some of you are advocating.

The fact is even in this case, the President, if he committed perjury or obstruction of justice, witness tampering and so forth, is something very closely related to his job as the chief law enforcement officer. He set an example which is something that none of us should want to have out there. And it's very difficult to see how the court system can function and the justice system can function if the chief executive officer of the Nation is permitted to get away with not being impeached, to have that kind of conduct tolerated.

So I would suggest that really the charges of perjury and obstruction of justice, while he's sitting in office as President, are very integral to his duties as President. So it occurs to me that—also many other charges that are out there. But saying it's not connected with his office is not in and of itself a reason not to vote for impeachment.

Chairman HYDE. The gentleman's time is expired.

The gentleman from New York, Mr. Schumer. The gentleman from New York. I wanted to say Shuster, and I fought against it very hard. Mr. Schumer.

Mr. SCHUMER. Thank you, Mr.——

Chairman HYDE. All right.

Mr. SCHUMER. Anyway, I thank the witnesses, all three people I know, and particularly my predecessor Liz Holtzman. I guess, starting in January, this will be the first time in a very long time our congressional district is not represented by a Member in the House Judiciary Committee, Manny Celler before you and then me. And I am sorry this is the way we are going out, our district is going out of the Judiciary Committee.

My first question relating to a question—to all three of the witnesses, which relates to a question that I had asked the previous panel, and that is this: I am still sort of—more than sort of. I am still very perplexed by the view of some of the more moderate Republicans. I guess none of them on this committee, but a good number of the swing votes have expressed a view that, well, if only the President would make a fulsome apology—the President believes he has apologized already, but one, I guess, that is fuller or more direct or whatever, or reiterate it again, that then maybe they would vote against impeachment and for a lesser penalty.

And it seems to me that that is a specious standard. I mean, here we are dealing with impeachment, one of the most serious things this committee, this Congress, can do, and it should be related to the actions of the President and whether they rise to the level of high crimes and misdemeanors, whether they rise to the high level that we have heard so many witnesses talk about; not about either an apology or about whether the President answered the questions to the liking of the members of this committee or to the Members of Congress.

So I would just wonder, each of you having gone through this, having thought about this in a historic sense, do you think, did it ever cross your mind, let's say if Richard Nixon offered a full apology late in the day, that you would then—I mean, should that have influenced your decision as to whether he deserved impeachment? Mr. Owens?

Mr. OWENS. If impeachment is a political decision, and it is, my sense is that if Richard Nixon, right up to the point of when the Judiciary Committee undertook its debate at the end of July of 1974, had he gone public and said, "I apologize, I committed serious offenses, I thought I was acting in the public's interest," my sense is the public would probably have forgiven him and the Judiciary Committee would not have voted articles of impeachment, but certainly even if the House passed them, the Senate would not have convicted.

When the three smoking guns turned up, the recordings, in which Mr. Nixon was found to have directed the CIA to tell the FBI to back off the Watergate investigation, within as I recall, 30 hours of the break-in at Watergate, until those came out I think perhaps he might have escaped because I think the public at that time did not want to impeach even that unpopular President.

It is a wrenching decision on the public, very painful, to impeach a President.

Mr. SCHUMER. You're saying what turned the public's mind was——

Mr. OWENS. And I think Richard Nixon could have turned that around.

Mr. SCHUMER. But you are saying what turned people's mind were the actions of the President, not an apology or something like that? Aren't I correct in assuming that?

Mr. OWENS. If the President had come clean, I think it would have made a big difference then.

Mr. SCHUMER. Okay.

Father DRINAN. Well, Senator, I think the crimes then were so appalling. As I reread our report here, it was just unbelievable the things in which they were involved with Tony Lasowitz. And the memory, it is appalling. So I don't think that anybody mentioned censure at that time and that it was just proceeding. Furthermore, censure is not in the Constitution; the Congress has the one decision to make: Impeach or not impeach.

People say, well, the Constitution does not forbid censure, which is true; and I think the people would accept censure in this country now if we would get a Christmas present that this would all go away. But I don't think that the concept of censure ever really came up. If he could have apologized again—but he never apologized, really. He made more revelations when he was required to do them, but he never really said that he was sorry.

Mr. SCHUMER. Ms. Holtzman.

Ms. HOLTZMAN. Well, Senator—I like the way that sounds.

Mr. SCHUMER. Thank you.

Ms. HOLTZMAN. I think it is very hard to speculate about what would have happened.

The fact of the matter is, we had those facts. None of us sought, or I think few of us sought the responsibility of sitting in judgment on the President. It was extremely difficult. It was very sad. It was one of the most difficult tasks actually to cast that vote. All of us searched our conscience and all of us felt that a very high standard of evidence had been met.

Remember, what we were confronted with——

Mr. MCCOLLUM [presiding]. The gentleman's time has expired, unfortunately. I let you answer as much as I can, Ms. Holtzman.

Mr. Gekas, you are recognized for 5 minutes.

Mr. GEKAS. I thank the Chairman.

Congressman Owens, you stated in the recitation of the provisions in the Watergate report, or the committee language, that what was being considered there was an attack on the system of government, and that's what gave pause to many of you as you deliberated in that era. So you felt all of these offenses that were lined up were attacks on the system of government.

You further stated, in answer to some of the hypotheticals posed to you by the gentleman from Florida, like fraud and murder and so forth, that really that's up to the Judiciary Committee of the time and of the circumstance on what they then have to deliberate to determine whether or not an offense was an attack on the system of government. Am I paraphrasing you fairly correctly?

Mr. OWENS. If I had the right to revise and extend, I would have said that I think the 25th amendment would have taken care of his first hypothetical before it ever came to the Judiciary Committee.

Mr. GEKAS. The murder, I am not——

Mr. OWENS. But the decisions on impeachment and the evaluation of the evidence are first given to the Judiciary Committee.

Mr. GEKAS. And if this committee or the majority of this committee felt so strongly that the commission of perjury by the President of the United States, if proved, in front of a grand jury, and/or in front of a deposition in front of a Federal judge, if we felt so strongly that they were committed and constituted an attack on the system of government in that this was perpetrated in order to destroy the rights of a fellow American citizen who had instituted a legal case against the President in those courts, and where a Federal judge was sitting, or Federal officers in the case of a grand jury, is this not, I say to you, within the realm of our possibility of adjudging that as an attack on the system of government? Would you second-guess us on that?

Mr. OWENS. If I as a member of the committee felt that strongly and intellectually believed, as you suggest in your hypothetical, then I would vote to impeach.

Mr. GEKAS. Thank you, Mr. Owens.

Ms. Holtzman.

Ms. HOLTZMAN. Yes, sir.

Mr. GEKAS. In your written statement, you said that you felt that Mr. Starr overstepped his jurisdiction by arguing for impeachment—arguing for impeachment on this ground or any ground.

Are you referring to his referral as being an argument of impeachment?

Ms. HOLTZMAN. Yes. I believe, Congressman, that when we wrote that statute, and I was one of the authors, we had in mind the experience of what happened during Watergate with Mr. Jaworski, in which we received no brief for impeachment, we received no argument for impeachment; we simply received a factual submission with what is called a road map on top of it, and that was it. We had to draw our own conclusions.

Mr. GEKAS. I recite from the statute itself that says that the Independent Counsel—in carrying out the Independent Counsel's responsibility under this chapter that may constitute grounds for an impeachment; that is, that the mandate is that the Independent Counsel shall advise the House, and all of these, that may constitute grounds for an impeachment.

So when—he has one of two choices: to do nothing or to report that there is nothing impeachable and therefore we close the case; or he refers something that may constitute grounds for an impeachment. Isn't that following the mandate of the statute?

Ms. HOLTZMAN. With all due respect, sir, no.

Mr. GEKAS. No?

Ms. HOLTZMAN. Because there is a third choice, which is what we had in mind. What we had in mind was what Mr. Jaworski did. What Mr. Starr did was, he said these are 13 grounds for impeachment. That is not what Mr. Jaworski gave us. What Mr. Jaworski gave us were backup documents and factual statements. It was not—it was not an argument——

Mr. GEKAS. Thank you. I have to ask Father Drinan one question. Father Drinan, in your written statement, regretfully I cannot find the word "vengeance," but I think you intoned it in your direct testimony; that some of us, or people who are considering the impeachment of the President or considering the articles of impeachment are driven by vengeance. Did you mean that? Did you say the

word "vengeance" or am I—did I mishear you? Because it is not in your written statement.

Father DRINAN. No, that term is not in the document.

Mr. GEKAS. Pardon me?

Father DRINAN. That term is not in the document, no.

Mr. GEKAS. You used it, though? You used it in your oral statement?

Father DRINAN. Yes.

Mr. GEKAS. Do you seriously believe that any member of this committee or any Member of the House, in the final judgment that he or she will render on impeachment proceedings or articles of impeachment, will be driven by vengeance?

Father DRINAN. I will leave God to judge that.

Mr. GEKAS. Thank you. And then maybe God's messengers should not prejudge the God that would make the judgment.

Mr. MCCOLLUM. Mr. Gekas, your time has expired.

Mr. Berman, you are recognized for 5 minutes.

Mr. BERMAN. Thank you, Mr. Chairman. I thank the former members for their excellent testimony.

I listened to what Mr. McCollum and some of the others on the Majority side are saying as to this issue of lying under oath. And they seem to be taking the view that in and of itself, when it involves the President of the United States, lying has ripple effects in terms of our system of justice, in terms of the message it sends to the American people, that raises it to a level that perhaps is different than in other situations.

I would like to hear your thoughts about that argument, the implications of lying under oath and the extent to which it should be treated in the fashion that they are treating it.

Father DRINAN. Well, Congressman, there are a thousand hypotheticals but we have only one case.

Mr. BERMAN. Yes.

Father DRINAN. The House Judiciary Committee has never really heard evidence on that one case. The President has never had an opportunity to cross-examine those who said things against him. That's one of my fundamental difficulties and the difficulties of the whole country with this whole proceeding. We can speculate about the impeachment. All I know is that when the framers put it into the Constitution, they said and affirmed this should be very rare. This is only for the occasion, as Benjamin Franklin says, when we want to anticipate and prevent assassination.

Mr. BERMAN. Well, I don't want to speak for anybody else, but I have to say that that argument doesn't do that much for me. Yes, I think questions of burden of proof are important.

There is a ream of grand jury transcripts, and while the process I would have liked would have brought that before us in an orderly fashion, we the minority, and the President's lawyers, had the opportunity to call those same people and subject them to cross-examination. I don't consider this process defective in and of itself because of that. The question here that I would like answered is dealing with this issue of statements under oath and the broader context of that.

Father DRINAN. I will defer to my colleagues.

Ms. HOLTZMAN. Mr. Berman, if I might just give you history in terms of an answer to your question. We had two efforts to impeach a President. One was Andrew Johnson, because people didn't like his policy with regard to reconstruction and they picked on one act, the removal of a Cabinet member. One act. That impeachment went down in history as a scandal.

Mr. BERMAN. Yes.

Ms. HOLTZMAN. Watergate, the President lied to the American people on numerous occasions. That was not the basis on which we removed him. We had 32 separate counts under obstruction of justice, including offering presidential pardons to burglars. We had several counts under abuse of power, including the misuse of the CIA to get the FBI to stop an investigation; including the use of the IRS to audit people's tax returns improperly; including the creation of a plumber's unit to break into a psychiatrist's office.

You had such a spectrum of abuse and illegality and misconduct that there was no question that his actions constituted an impeachable offense, and that the President needed to be removed. Here you are talking about, in essence, the theme and variation is the President engaged in sexual misconduct. He wanted to conceal it, and that is what we are talking about in all of its variations and guises. It certainly doesn't rise to what we saw in Watergate.

And in my remarks to this committee, I urged you to think about how history will look at you. If you act on a single act of misconduct which does not involve the powers of the presidency, how will history judge you if you try to remove a President of the United States?

Chairman HYDE. The gentleman's time has expired.

The gentleman from North Carolina, Mr. Coble.

Mr. Coble, will you yield to me briefly?

Mr. COBLE. I will indeed.

Chairman HYDE. Thank you.

Father Drinan, you made the statement that one flaw with this process is that the White House, the President, hasn't had an opportunity to cross-examine his accusers. Is that correct? Is that your position?

Father DRINAN. I object to the use of the grand jury testimony in toto. I don't think that's what the Constitution intended. The Constitution gives the sole power of impeachment to the House.

Chairman HYDE. Well, let's get back to my question. Do you object to the fact that the President's lawyers haven't had a chance to cross-examine witnesses, their accusers? Is that an objection of yours? Yes or no?

Father DRINAN. We gave that to Mr. St. Clair in 1974, and I think that should be made clear——

Mr. WATT. Mr. Chairman, is the lighting system working down there or are we operating without it?

Chairman HYDE. Thank you for reminding me of that. I appreciate that.

Mr. WATT. Thank you, Mr. Chairman.

Chairman HYDE. I am going to try a third time. Is it a complaint of yours that the President has not had an opportunity to cross-examine his accusers? Is that one of your complaints?

Father DRINAN. I think the people have the right, the people of this country have a right, as well as the accused.

Chairman HYDE. Okay. I will take that as a yes.

What witnesses would the President like to cross-examine and why haven't the Democrats invited them to be here and testify?

Father DRINAN. I can't answer that, Mr. Chairman.

Chairman HYDE. I didn't think so. Mr. Coble.

Mr. COBLE. I hope I have better luck than you did, Mr. Chairman.

Let me ask a question to the panel. How many Presidents have been accused of lying to a grand jury while in office, A; and B, how many Presidents have been accused of lying to a court of law under oath while in office, if you know? Does anyone know the answer to that?

Well, I take it silence indicates that you do not.

Let me move along then.

Mr. OWENS. Mr. Coble.

Mr. COBLE. Yes, sir, Mr. Owens.

Mr. OWENS. I would only point out to you that the lies which President Nixon made were not under oath, but they were material and they were devastating because he was assuring the American people that he was enforcing the law; that investigators were getting to the bottom of the break-in.

Mr. COBLE. Let me move along.

Mr. OWENS. They were not under oath, but they were devastating because of what they dealt with.

Mr. COBLE. My time is running. The reason I asked you is because much has been made about the historical significance and connection to impeachment. I wanted to get that historical fact in, if anyone knew.

Now, many people have compared this crisis to Watergate. There are similarities and there are distinctions. I recall during the days of Watergate, those who opposed impeachment simply said, my gosh, it is only a second-rate burglary; what is the big deal?

Well, it was indeed a big deal because it involved cover-up, it involved obstruction of justice, it involved abuse of power, it involved the use of government employees—paid by the taxpayers—to lie, to evade, to deceive. So it extended far beyond a second-rate burglary.

Now, nearly a quarter of a century later, we hear people who are opposed to impeachment in this instance: Well, my gosh, it only involves consensual sex among consenting adults; what's the big deal?

Well, the big deal may be a duplication of Watergate problems: cover-up, evasion, lying, deception, using government employees—paid for by the taxpayers, I might add again—to cover up. It may go beyond that. And I resent the fact that some accuse us of vengeance.

I don't mean to speak for anyone but I suspect very few in the Watergate era, who sat on that House Judiciary Committee, were gleeful about that exercise. Now, there may have been one or two firebrands. There may be one or two firebrands here today who are gleeful about it, but I dare say that the great majority of Democrats and Republicans alike on this Judiciary Committee are not

gleeful at all about this. But I don't think we can afford to dismiss the facts that have been laid at our feet.

The Constitution requires us to respond, and if we vote in favor of impeachment, then we are accused of being partisan firebrands, and I resent it and I think most Americans will probably resent it.

I am getting a little carried away, Mr. Chairman, but I think I need to say this. Many people have made a big point, a salient point about the partisanship of this committee. Well, this is an energized, spirited, polarized group, I will admit, and when the television lights are illuminated, that energy seems to intensify. But for the benefit of our viewers, we get along pretty well with one another once those TV lights are extinguished; a pretty good group, pretty good men and women, I might add. Most folks don't know that because they see the other side of it, but we are going about our business. And if anybody thinks that vengeance is involved, I will meet them in the parking lot later on tonight.

I yield back the balance of my time, Mr. Chairman.

Chairman HYDE. Thank you very much.

On that high note, the gentleman from Virginia, Mr. Boucher.

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

I was pleased to note in the statements made by our distinguished former colleagues who are here with us this afternoon, references to the concern that we all should have about Members of the House who might apply a lower standard to determining whether or not articles of impeachment should be approved in this matter.

Several of our witnesses suggested that Members might consider themselves to be a grand jury and apply a standard on the order of probable cause to making that determination.

The committee on which you served, in its 1974 report in the Watergate matter, established a standard that I think is far more appropriate, and the standard that was adopted by your committee on a bipartisan basis would make impeachment available only for conduct that is, and I will quote the language, seriously incompatible with our constitutional form of government or the performance of the constitutional duties of the presidential office. And that is a standard which I think is much more appropriate for the House of Representatives to employ, as well as for the Senate to employ.

It occurs to me that the reason that some Members of the House may be considering applying this lesser standard of probable cause is because there has not been a sufficient focus so far on the kinds of harms that can occur to the country just by virtue of the House itself voting for articles of impeachment. And those harms would be first of all a polarization of the Nation well beyond what it is today; secondly, a diversion of the Congress and the President from their basic responsibilities of tending to our urgent needs; a possible immobilization of the Supreme Court while the Chief Justice presides at a Senate trial; the lowering of the standard for future impeachment inquiries, and there probably is a longer list.

Today is an opportunity for us to begin, in a serious manner, the dialogue about what these harms really are. And so I want to welcome our former colleagues who have much to say on that subject. You have broached that in your testimony, and I would like to provide you with the balance of this time to talk, if you are inclined

to do so, about what you see those harms being and why the House of Representatives ought to apply the higher standard well beyond probable cause, the standard announced by your committee in 1974, as we consider whether or not to vote articles of impeachment.

Mr. Owens.

Mr. OWENS. I think that the increased polarization which incidentally already exists—more than two-thirds of the people in every poll that I have seen recently do not want this President impeached—the polarization would increase dramatically if the House passes articles of impeachment and sends them to the Senate to be tried.

Father Drinan mentioned slowing down, the stoppage of much of the government, taking time of the Chief Justice of the Supreme Court, the terrible feelings and passion that depriving a President of his elected time in office, which the people have bestowed upon him would cause. I think it would have a terrible impact upon the public; I don't think there is any question about it.

Hence, some of us we tried to apply in 1974 the for test for whether we would pass articles, not by the "clear and convincing" that one thinks of as typical evidence for an indictment but, rather, "beyond a reasonable doubt" so that the Senate would, in fact, have the evidence on which to convict. And it was clear that Richard Nixon would be convicted by the Senate and removed from office, and only under those circumstances should you put the country to this kind of a test.

Mr. BOUCHER. Ms. Holtzman.

Ms. HOLTZMAN. I think I addressed that in my arguments. I think all of us felt—well, I can't speak for everybody. I know I felt that way. I think many of my colleagues felt that we had to vote as if we were on the Senate, that we couldn't just simply say, look, guys and gals in the Senate, this is your job, we are just going to hand this ball over to you, hot potato, and you handle it; because we are talking about the United States of America and all of its people, all of the huge tasks that have to be dealt with now, the huge disruption that will take place if articles are voted. The Senate will be tied up. How can we pass legislation to protect Social Security, to improve education, or to deal with agricultural problems or the environment? The Senate is going to be sitting there, day after day after day, hearing testimony about where the President did or did not touch Monica Lewinsky and what she said about it, and what anybody else might have said about it.

Chairman HYDE. The gentleman's time has expired.

Ms. HOLTZMAN. It seems to me not exactly what we want.

Mr. BOUCHER. Thank you, Mr. Chairman.

Chairman HYDE. You bet.

The gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Ms. Holtzman, I would like to point out a couple of passages in your statement. The first passage is this—you point out that a trial in the Senate would disrupt the workings of the Senate and it would disrupt the presidency as well. Certainly to a large extent, I am sure that that is true. You didn't mention an alternative

which is pretty obvious and which has been recommended by over 100 major newspapers, and that's the possibility of resignation.

The other passage I want to refer to, and it sort of follows up a little bit on what Mr. Boucher was discussing, too—you say, in Watergate when we voted for impeachment, we did so because we believed that President Nixon should be and would be removed from office. We didn't operate on a watered-down standard of evidence. We weren't passing the buck to the Senate where the real action was and would take place. We voted as if we were in the Senate.

Let me read to you from another expert. She, like all of you, was a Democrat. She was a very distinguished member of this Judiciary Committee when you all served on it. She also happens to be a former member, Congresswoman from Texas, and you all know who I am talking about, and that's Barbara Jordan. But here is what she said: It is wrong, I suggest, it is a misreading of the Constitution for any Member here to assert that for a Member to vote for an article of impeachment means that that Member must be convinced that the President should be removed from office. The Constitution doesn't say that. The powers relating to impeachment are an essential check in the hands of this body, the legislature, against and upon the encroachment of the executive. In establishing the division between the two branches of the legislature, the House and the Senate, assigning to the one the right to accuse and to the other the right to judge, the framers of this Constitution were very astute. They did not make the accusers and the judges the same person.

That seems to me to directly refute what you said in your statement about the members of the committee voting as if they were in the Senate.

Ms. HOLTZMAN. I am not sure that it necessarily—your conclusion necessarily follows. I do think that——

Mr. SMITH. Okay. I really wasn't asking you a question there.

Ms. HOLTZMAN. Okay.

Mr. SMITH. I want to read another passage and then give you a chance to respond to both. I was voicing my opinion that the plain meaning of the word seems to me to contradict what you have said.

But here is another statement by Barbara Jordan in that same delivery. "Beginning shortly after the Watergate break-in and continuing to the present time, the President engaged in a series of public statements and actions designed to thwart the lawful investigation by government prosecutors. Moreover, the President has made public announcements and assertions bearing on the Watergate case, which the evidence will show he knew to be false."

She said, "these assertions, false assertions," were "impeachable."

Now, a couple of follow-ups real quickly. One, the Independent Counsel pointed out, I think accurately, that the President over a 7-month period of time had a half-dozen occasions where, if he had chosen to do so, he could have made a crossroads decision. He had a decision whether to continue a pattern of deception or whether to tell the truth. The Independent Counsel found that he chose, unfortunately, to continue that pattern of deception.

And then let me also read a statement that Mr. Stephanopoulos, who was a senior adviser of the President, said—this is a quote:

"This was no impulsive act of passion. It was a coldly calculated political decision. He spoke publicly from the Roosevelt Room. He assembled his Cabinet and staff and assured them that he was telling the truth. Then he sat back silently and watched his official spokespeople, employees of the U.S. Government, mislead the country again and again and again."

Now, my final question is this: Don't you think that the President, in Barbara Jordan's words, has engaged in a series of public statements and actions designed to thwart the lawful investigation of government prosecutors?

Ms. HOLTZMAN. I think that the President's statements were designed to cover up sexual infidelity, a relationship with Monica Lewinsky, a very embarrassing and wrongful relationship.

Mr. SMITH. Wasn't he, though, trying to thwart the lawful investigation by government prosecutors?

Ms. HOLTZMAN. It depends—well, I think I answered your question. But I also want to make the point here that if you want to compare this to Watergate, it is a very false comparison because, in Watergate, we had not simply false statements. We had false statements about criminal conduct.

Mr. SMITH. I very specifically——

Ms. HOLTZMAN. Here you have false statements about—

Mr. SMITH. I would like to reclaim my time.

Ms. HOLTZMAN [continuing]. Inaccurate statements about sexual infidelity.

Mr. SMITH. Ms. Holtzman, what I read that Barbara Jordan said was very specific, very applicable and impeachable conduct.

Chairman HYDE. The gentleman's time has expired.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Father Drinan, you were asked about what witnesses ought to be called. We have asked for the list of allegations. We have known that Mr. Starr started off with 10—started off with 11, ended up with 10. There have been other variations of the allegations. The scope changes from week to week. It is Kathleen Willey one week; it is campaign finance another week; it is not campaign finance the next.

According to the National Law Journal's hotline, quoting ABC's Douglas, quote, "ABC News has learned that the Republicans may accuse the President of different grand jury lies than Kenneth Starr did in his report to Congress. Sources say they will shy away from Starr's most sexually explicit allegations that Mr. Clinton lied about which parts of Monica Lewinsky's body he touched. Instead, GOP committee lawyers cite new charges."

Now, the gentleman from Arkansas, Mr. Hutchinson, alerted Mr. Craig that there may be some other charges that he might want to look into without a clear definition of what the allegations are. Is it fair to ask which witnesses ought to be called?

Father DRINAN. Well, Mr. Congressman, that's not up to me to decide. I think that many people, maybe the majority, feel that the House Judiciary Committee is on the wrong path, that it has been unfair, it has been erratic, but that's not up to us to decide.

All I know is that we were called here today to come and tell about 1974. As I recall, there was no criticism of the committee. At

first, people said this is necessary, but as the evidence came out, they applauded the committee. And we are here to compare it, and I think that the sense of the public in the country is that the something bad has happened in the Judiciary Committee.

Mr. SCOTT. And is the—would you have taken the prosecutor's testimony as evidence?

Father DRINAN. No, I think that that is basically wrong, and I agree with Sam Dash who resigned over this very point. He said that this goes beyond the Constitution, and as Ms. Holtzman said, the statute makes it very clear that he is to give this evidence to this body.

Mr. SCOTT. Did you presume guilt unless the President came forth with evidence in his defense?

Father DRINAN. No. You went to Boston College Law School; you know that's bad law.

The President, like all of us, is entitled to the presumption of innocence.

Mr. SCOTT. Mr. Owens, can you tell me what proof there was that President Nixon had committed tax fraud? Was there any question about whether or not that allegation was true?

Mr. OWENS. I don't think that anybody questioned the back-dating of the deed, which saved him hundreds of thousands of dollars, was supervised by him, and probably signed by him after the fact, and back-dated. The evidence was overwhelming as to tax fraud and the supplementing of his income by many gratuities by agencies of the Federal Government.

The evidence was very clear, and it is listed, of course, in our report in some detail.

Mr. SCOTT. Well, income tax is a crime and it is a very serious crime. Why was it not adopted as an impeachable offense?

Mr. OWENS. There was a great deal of disagreement. Father Drinan and I wrote an op-ed piece in the Times about a month ago pointing out that we believed—and the majority of the committee believed basically because we found it to be personal misconduct, as opposed to abuse of presidential powers, We felt that it did not rise to impeachability.

There were civil opportunities to redress those wrongs. A President can be sued civilly as well as criminally, prosecuted criminally, of course, while he is President or after, and I thought there were other, better remedies. It did not rise to impeachability in my view.

Mr. SCOTT. Thank you, Mr. Chairman.

Chairman HYDE. The gentleman from California, Mr. Gallegly.

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

Thank you all, Panel, for being here today. As former Democrat members of this House, I didn't have the honor of serving with you, Father Drinan, or Ms. Holtzman, but I did have the opportunity to serve with Wayne Owens.

Ms. Holtzman, do you agree with Father Drinan and with Wayne Owens that income tax evasion and perjury are pretty much on the same level?

Ms. HOLTZMAN. They may or they may not be.

Mr. GALLEGLY. Okay.

Ms. HOLTZMAN. It depends on the circumstances.

Mr. GALLEGLY. One question I have for you, Ms. Holtzman, the records from the Watergate era show that you voted in favor of an article of impeachment dealing with the allegations that President Nixon lied on his personal income tax return. Does that square with your position on perjury?

Ms. HOLTZMAN. I think I was just previously asked that, but if you would like me to go into it again, I would be happy to do that.

Mr. GALLEGLY. That's fine.

Prior to January of 1998, Mr. Owens, have you ever gone on record publicly as stating that lying before a Federal grand jury is not an impeachable offense?

Mr. OWENS. I feel a little like Henry Hyde must feel about his own testimony during Iran-Contra. I could be surprised by something that I may have said in the past. At age 61, I can tell you what the reflection of the last 24 years has brought me to.

Mr. GALLEGLY. I would love to chat with you after the meeting, but we have a very limited amount of time. Do you remember any specific——

Mr. OWENS. I don't know.

Mr. GALLEGLY. Father Drinan, do you remember, prior to 1998, ever taking a formal position that perjury does not reach the level of an impeachable offense?

Father DRINAN. I am not certain what the—what the question is, Congressman. Would you put it in——

Mr. GALLEGLY. Prior to January of 1998 when this story broke, had you ever taken a position, that you remember, that perjury did not meet a level consistent with an impeachable offense?

Father DRINAN. Well, we didn't have to write about impeachment during those years, and I have no recollection that I talked about perjury as an impeachable offense.

Mr. GALLEGLY. Thank you, Father.

Ms. Holtzman.

Ms. HOLTZMAN. Well, perjury may or may not be an impeachable offense.

Mr. GALLEGLY. Do you remember ever having taken a position prior to January 1998?

Ms. HOLTZMAN. On false statements, yes, in the Nixon impeachment hearings.

Mr. GALLEGLY. Okay.

Wayne, you have stated—and correct me if I am wrong—that the President should not be impeached because the underlying lies, or perjury by the President, are not serious enough to warrant impeachment. At the same time, we have long lists of persons in Federal jails across this country for perjury. In fact, in my own home State of California last year we had 4,000 individuals prosecuted for perjury, last year alone.

If the President is not impeached, do you think the President should pardon these folks?

Mr. OWENS. Elton, using the standard you set here for our communications, my own sense is that you can't trivialize an impeachment of the President by trying to make it comparable to any other offense charged against any other person; and I don't think you can hypothesize and make it similar, as you suggest in your hypothetical.

I don't think that I can give you a very good answer to that.

Mr. GALLEGLY. Well, I certainly don't mean to

trivialize.

Mr. OWENS. This President's offenses, in my view, do not rise to impeachability.

Mr. GALLEGLY. Reclaiming my time, certainly it was not my intent to trivialize this, in fact, quite the contrary.

In your testimony that the President's lies are not serious because—and I think you said—they involved lying about sex, and many have said, oh, everybody lies about sex. If this is the case——

Mr. OWENS. Oh, that isn't what I meant, Elton. I think they are very serious and should be punished. I don't think it should be capital punishment. I think they are lesser offenses.

I think censure is appropriate. I join with Gerald Ford on that.

Mr. GALLEGLY. I think lying under oath is serious, period.

Mr. OWENS. Of course.

Mr. GALLEGLY. I think that that is the real issue before us here. It is not about sex.

Mr. OWENS. It is very important, and I did not mean to trivialize that either, Elton.

Mr. GALLEGLY. The issue here is perjury, lying under oath. Telling the truth is the basic foundation of our entire judicial system, and I think that that is the issue and we have been getting, I think, a little bit astray here when people try to make sex the issue here.

I firmly believe the cornerstone of our whole judicial system is predicated on telling the truth, and I certainly would be the last one to trivialize lying.

Mr. OWENS. And I hope the House of Representatives—if I may say, in response to that, Mr. Gallegly, I hope the House of Representatives will not miss its opportunity to censure and condemn this President's actions. I think it is highly unlikely that the Senate would ever convict the President based on an article you send over. If you send it over to see whether they will or not, I think you create a great constitutional conundrum.

Mr. GALLEGLY. Thank you, Mr. Chairman.

Chairman HYDE. Thank you.

The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. And I want to thank these witnesses for being here.

I don't profess to be a great student of the Nixon impeachment process, and this has been very educational to me to see some of the interworkings.

One thing in particular that I am struck by is, we have this public perception that the Nixon impeachment vote was a very bipartisan vote, and I guess by the standards under which we are operating today, it was a very bipartisan vote in the committee. But notwithstanding the overwhelming number of charges and the magnitude of what I think everybody recognizes now was going on, apparently there were still people who were not convinced that the Nixon offenses rose to the level of impeachable offenses.

Am I correct in that on the committee, or—

Mr. OWENS. There were 10 members of the House Judiciary Committee, including the current majority leader of the other body,

who did not vote for any of the three articles of impeachment which passed. But as I recall the chronology, something like 6 days after we passed and completed our activities here, the President's—the three "smoking guns," these three recordings, were released which showed that the President, among other—proved beyond a reasonable doubt that he had instructed the CIA to instruct the FBI to get out of Watergate and so forth, directly contradicting direct testimony that he had given.

Then even Trent Lott and his nine colleagues on the Judiciary Committee abandoned the President and said they would vote to impeach on the House floor. Barry Goldwater and John Rhodes and Hugh Scott went down to the White House and said, "Mr. President, it is over. You will be removed from office. You will lose your pension and every perk of a former President. The jig is up; it is time to leave." And the President, former President at that point, had the dignity to accept their judgment.

But right up to release of the "smoking guns," there was a significant portion of the Members of the House and of the committee who did not accept that the offenses reached the impeachability level.

Mr. WATT. And were all 10 of those members Republican members of the committee?

Mr. OWENS. Yes, they were, yes. Yes, sir. You had 21 Democrats and seven Republicans who voted for impeachment before the "smoking guns."

Mr. WATT. I guess I raise that because my colleague, Mr. Scott, and I had an interesting discussion one day when the proceedings were going on. I leaned over to him and I said to Mr. Scott, what if President Clinton were a Republican President? Do you think we would be taking the same position?

How did you rise above the—how did your committee rise above the partisanship? Can you talk to me a little bit about how— I mean, because one of the things that I have been really troubled about is that this process has become so partisan and viewed by the public as being so partisan that I think that has colored the public's perception of even the credibility of the arguments on the other side.

Mr. OWENS. It was an exceedingly painful decision, for me especially. I was running for the Senate in the most Republican state in the Nation, a Democrat, where Richard Nixon had gotten 72 percent of the vote 2 years earlier, and I was confident that that would be a serious political problem for me.

And the only refuge, Mr. Congressman, is in, your realistic view of what the evidence requires. Given the serious constitutional obligations that are imposed upon members of the committee, you just have to say, consequences be damned; I will do what my conscience tells me I have to do under the Constitution.

It was a very heavy responsibility, and I, honest to God, had no second thoughts about voting for impeachment.

Chairman HYDE. The gentleman's time has expired.

The gentleman from Florida, Mr. Canady.

Mr. CANADY. Thank you, Mr. Chairman.

I want to thank the members of this panel for being here. Your perspective on these issues is very important to us.

Father Drinan, welcome back. We appreciated your earlier testimony to the subcommittee.

I want to address the issue about the tax fraud article that has been discussed at some length here and begin by quoting Charles Black, who in his handbook on impeachment wrote, "A large-scale tax cheat is not a viable chief magistrate." That's on page 42, if you have the book there.

Now, I think I understand Ms. Holtzman has kind of a nuanced view about that; it would depend on the circumstances. But if I understand Father Drinan and Mr. Owens correctly, it is your—your position is to disagree with Charles Black. Is that correct?

And please give a short answer. I am limited on time.

Father DRINAN. What precisely did Professor Black say on this?

Mr. CANADY. Pardon?

Father DRINAN. What precisely did Professor Black say?

Mr. CANADY. What I just read, quote, "A large-scale tax cheat is not a viable chief magistrate." Do you disagree with that view?

Mr. OWENS. Yes, sir, I do, absolutely.

Mr. CANADY. Okay.

Father Drinan.

Father DRINAN. I will concur with Mr. Owens.

Mr. CANADY. So you both disagree. That's consistent——

Mr. OWENS. We wrote an article in the New York Times, so we have to agree with each other.

Mr. CANADY. Okay. Well, that's consistent with what you have been saying today.

Mr. Owens, let me ask you a question. Were you the only person named Owens on the committee during the time of the Nixon impeachment?

Mr. OWENS. Yes, sir. I hope I am not going to regret making that admission.

Mr. CANADY. Well, because I am looking at the transcript of the debate of the tax article with respect to President Nixon, and I would like to read your closing remarks in the debate to the committee.

You said, "And so we are here having to decide this issue without having any hard evidence that will sustain tying the President to the fraudulent deed but which will support, in my opinion, the closing and inferential gap that has to be closed in order to charge the President."

You then go on to conclude, "I urge my colleagues to"—"based on that lack of evidence, I urge my colleagues to reject this article."

Now, Mr. Owens, I candidly will have to say to you, I don't think that what you have said here is consistent with what you have been saying today.

Mr. OWENS. I think under the Rules of the House you can do that, Mr. Congressman.

Mr. CANADY. Well, I think the facts speak for themselves. I have read the whole debate, and it is my judgment that although there were clearly some members who believed that tax fraud by the President was not an impeachable offense, the majority, the vast majority of the members of the committee who expressed an opinion on that subject, said that they were either for the article, as Ms. Holtzman was, or they felt that there was insufficient evidence

of fraud by President Nixon to proceed, as you said in your comments.

So I find it a little disturbing that you would come before this committee today and make an assertion that is contrary to your own statement in the debate.

Now, let me just say that I think that Charles Black was right, a large-scale tax cheat is not a viable chief magistrate. I agree with that.

Mr. OWENS. So you would have voted to impeach President Nixon?

Mr. CANADY. If there had been adequate evidence, if there was an evidentiary question there, which I think has to be settled as a separate matter. Just as there is an evidentiary question before this committee, we have got to make certain that we have an adequate basis for the conclusions we reach with respect to the allegations of perjury and obstruction of justice.

But I will also say that just as a large-scale tax cheat is not a viable chief executive, I believe that a large-scale perjurer is not a viable chief executive.

Furthermore, I believe that the evidence before the committee points to the conclusion that the President of the United States has committed multiple acts of making false statements under oath, and that's a serious matter that we are having to grapple with here.

I hope everyone understands we are not enjoying grappling with this, but the facts cry out. We have to deal with this. We cannot turn away from it simply because it may be politically not expedient to deal with it, because the system of justice in this country is affected by what we do here today and what we will do as these proceedings move forward.

Again, I thank all of you for being here. I yield back the balance of my time.

Chairman HYDE. The gentlelady from California, Ms. Lofgren.

Mrs. LOFGREN. I would like to thank the panel for being here and sharing your experiences and recollection.

I remember also back in 1974, and at that time, I had just finished my first year of law school, and I was working for Congressman Don Edwards and looking up at all of you sitting where I am sitting today, never dreaming that I would be here in these circumstances.

I remember watching you as you all struggled, on both sides of the aisle, to cope with what faced you and the really grave subversions of government you faced and which you have recited today that were presented by the situation of then-President Nixon; and I remember in the '73 Judiciary Committee report the discussion of the abuse of power that would be necessary to meet the standard for "other high Crimes and Misdemeanors." I don't have it in front of me, but something to the effect that it would be "abusing powers that only a President possesses" is one of the phrases in that report. And I thought that really kind of summarized the subversion of the government necessary, and that was a standard accepted by both Republicans and Democrats at that time.

As you can see, today the standard has apparently changed, and I accept that people have legitimate good-faith beliefs that a false

statement alone is sufficient to impeach. I just don't think that is the historical standard.

And as I think about what we are doing here today, I think our constituency is not just today's voters. My children are 13 and 16, the constituency for what we do today will be my children's grandchildren, because what we need to do is to make sure that we nurture and protect our system of government. This is the greatest country in the world, with the best system of government. We need to make sure that we do not impair our wonderful constitutional system, and what concerns me is that what we are doing now may have an impact on our system of government.

I really think that we have been phenomenally successful in many ways because we have an executive who serves for a set 4-year term, and if you don't like the guy, you know that in 4 years he can be voted out. And that definitive term allows the President to deal successfully with other countries.

And what I am wondering—and maybe, Father Drinan, you could answer this—if we are going to have this type of situation in which we will have the election and now with the Jones case as precedent in which you can sue a sitting President, we may have a litigation phase after the election, and then we will have an impeachment phase following the litigation phase. I am worried and concerned about what kind of stature and certainty the President will have in the future if we have got that kind of scenario instead of the certainty of 4-year terms. And what will the implications be for this Nation? Do you have thoughts on that?

Father DRINAN. I think the implications are horrendous, and you are quite right, that if we weaken the independence of the presidency, who knows? The next President may want to change the rules on Cuba, and they say, we will indict you for that or impeach you for that, and he has been intimidated. And all history shows that the presidency was severely weakened for 30 or 40 years after the attempted impeachment of Andrew Johnson.

This has never happened in 220 years. I think that we should look at that.

Furthermore—and I think the underlying thing is that the President is being charged, not with anything that relates to public policy or to the political function of the government, but for something personal for which he has apologized for his misstatements.

Mrs. LOFGREN. I know that in all likelihood the vote that we will take in this committee will be on partisan lines, which was different than '74. I am not making this allegation, but I have had constituents say that this is a Republican coup d'etat to take out a Democratic President they could not defeat.

Whether you agree with that or not, should we be concerned that, in the future, impeachment will be used as a partisan tool?

Father DRINAN. Well, that's the great danger. I keep wondering why the arguments that the Republican majority use, why haven't they persuaded any Democrats? Why haven't they changed public opinion?

There is something very fundamental in the American psyche that we don't want this process and that I tried to be—tried to listen to. What is that argument? And the people are very troubled.

And to repeat what I have said before, I think there is going to be a big popular uprising against this process.

Mrs. LOFGREN. I will just close and say, usually the American people get it right.

I yield back.

Chairman HYDE. The gentleman from South Carolina, Mr. Inglis.

Mr. INGLIS. Thank you, Mr. Chairman.

I am glad that Mr. Craig is still here with us, Mr. Chairman, because it is very important to note his testimony earlier in the day that, and I will quote, "Let me assure"—this is again the Special Counsel to the President. "Let me assure the members of this committee, the Members of the House of Representatives and the American public of one thing. In the course of our presentation today and tomorrow, we will address the factual"—and factual is underlined—"and evidentiary issues directly."

Ms. Holtzman, do you have any facts or evidence relating to this case involving the President?

Ms. HOLTZMAN. What does that question mean?

Mr. INGLIS. Do you have any facts relating to the things of which the President is accused here today? Obviously not, right?

Ms. HOLTZMAN. No. That is not my answer, sir. That may be your answer to your question. It is certainly not my answer to your question.

Mr. INGLIS. What facts do you have?

Ms. HOLTZMAN. If you will let me, I will be happy to tell you.

Mr. INGLIS. Go right ahead and tell me what facts you have.

Ms. HOLTZMAN. One fact is the perspective of Watergate, the historical fact, what that means and how you place impeachment in a historical context.

Mr. INGLIS. Good.

Ms. HOLTZMAN. The other fact is, the questions that were raised with respect to how the public will deal——

Mr. INGLIS. Reclaiming my time, you have no evidentiary matters to present, either, do you?

Ms. HOLTZMAN. Okay, reclaim your time.

Mr. INGLIS. How about Father Drinan? Do you have any evidentiary matters to present?

Father DRINAN. Do you want new facts or reflections on old facts?

Mr. INGLIS. Generally in a legal case there are things called facts and evidence, and then there is the law. It seems to me what you are arguing here is the law, is it not?

Father DRINAN. We came, sir, to explain what we tried to do in 1974.

Mr. INGLIS. That is precedent, correct, Father Drinan? That is precedent, which is generally law, is that correct?

Father DRINAN. I think so.

Mr. INGLIS. Mr. Owens, do you have any facts or evidence to present in this case?

Mr. OWENS. That is our function today, to interpret for you what happened in 1974. It is full of facts. The contrast between what that President did and what this one did is, of course, where we are supposed to——

Mr. INGLIS. You would agree that——

Mr. OWENS [continuing]. Spend our time.

Mr. INGLIS. That is precedent, which is in the nature of law rather than facts or evidence.

Mr. OWENS. We are here to explain what happened and to interpret it as best we can, that is correct.

Mr. INGLIS. I am just trying to point out—and I don't know why Ms. Holtzman became so defensive about this—I am just trying to point out the great inconsistency in Mr. Craig's statement earlier today, that he—and this is not your fault, this is certainly not the fault of these three people before us. It is just that earlier today the Special Counsel to the President of the United States said that—today, before this committee——

Mr. OWENS. Excuse me, Mr. Congressman. Did he say that no witnesses would interpret old historical precedents for the committee?

Mr. INGLIS. The point I am interested in making is this is panel two, and Mr. Craig, we have yet to hear any facts or any evidence. There is nothing new here. In fact, we have already heard from Father Drinan once before. There is nothing new.

So the great high bar Mr. Craig earlier set for himself and for the President, that this day and tomorrow are going to be the day that we hear evidence and facts that contradict the evidence before the committee, for panel two the score is zero facts, zero evidence. There are more panels to come, but I look forward to, throughout the rest of the day and tomorrow, keeping track every time about whether we have got any new facts or any new evidence.

Again, I think it is very helpful, but we have heard it all before. It is very helpful, and I appreciate your time, but it is not what Mr. Craig said that he was going to deliver to this committee.

Father DRINAN. If I may ask, what do you mean by facts? We have been giving facts here since we started.

Mr. INGLIS. The facts, sir, that we want——

Father DRINAN. You want new facts about the so-called scandal? What do you want?

Mr. INGLIS. That is what I am interested in finding out. I want to know if there are any facts and evidence in this case that would tend to make us conclude that the President in fact did not lie to the American people, as he said he did. Maybe there are.

Father DRINAN. The White House gave you 185 pages of their case.

Mr. INGLIS. We are looking forward to it.

Mr. OWENS. Mr. Congressman, in dealing with facts, you taught 7-year-olds in this country what telephone sex is and oral sex, and what you can do with a cigar, and you had enough facts.

I think it is the interpretation of the facts, may I respectfully say, which is required by this committee.

Mr. INGLIS. Okay, you disagree with the Special Counsel and President. Mr. Craig says he wants to present facts and evidence today and tomorrow. Apparently you are all on a different sheet of music, because that is not what you are doing.

You are doing a very helpful thing, which is presenting the law and precedents. It is not facts. Facts would be evidence in this case.

The CHAIRMAN. The gentleman's time has expired.

The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. Let me make my continuing objection to the shortness of the time of which the President has been given to make his case.

Let me, for the record, note that Mr. St. Clair, in addition to bringing an enormous number of witnesses, participated, as I understand, with the 17 days executive and nonexecutive sessions. Mr. St. Clair, being the lawyer for Mr. Nixon, had the ability to examine and cross-examine witnesses. So I raise the concern that many of the esteemed and distinguished members of this panel have not been able to fully answer our questions.

Let me thank the panel most of all for being here and providing us with, if not a complete understanding of the Watergate proceedings, at least a sufficient bird's-eye-view that would warrant us to question the process that we are engaged in at this time.

One of our past Presidents said that one man with courage makes a majority. So I, too, want to offer this day and the next day to those Members of this body, this House, maybe this committee, who are thinking seriously about where we are, might I draw the committee to a dissenting view in the Iran-Contra that was signed on by seven Republicans, and the words are these:

"The President himself has already taken the hard step of acknowledging his mistakes and reacting precisely to correct what went wrong." "There was no constitutional crisis, no systematic disrespect for the rule of law, no grand conspiracy, and no administration-wide dishonesty or cover-up," by dissenting Republicans, signed by Mr. Hyde and Representative Bill McCollum of this committee in the Iran-Contra affair.

Let me say to the Members here, and as I cite these facts for you, would you also give us sort of an insight, if you will, as to what went on in your committee, short of those things that you are not able to discuss because maybe they were in executive session, in bringing out the fullness of the case?

Because over and over again I hear my dear colleagues, my Republican colleagues, saying, "Where are the fact witnesses?" It is my understanding that you were able to bring fact witnesses, and subsequently, as Father Drinan said, there was a smoking gun of the tape talking about Mr. Nixon asking the CIA then to stop the FBI from investigating Watergate.

But listen to this. Would you believe that alleged conversations by the President to a staff person, Mrs. Currie, about her recollections as to his whereabouts in the office or out of the office, at a time when she was not a witness to anything, or not a witness called for any proceeding, would be obstruction of justice; one question?

In the referral by Mr. Starr, these words: "Finally, the President made a third false statement to the grand jury about his sexual relationship with Monica Lewinsky. He contended that the intimate contact did not begin until 1996. Monica Lewinsky testified that it began on November 15th, 1995."

The conclusion of the Starr report: "For all of these reasons, there is substantial and credible evidence that the President lied to the grand jury about his sexual relationship with Monica Lewinsky."

Can you tell me whether or not we have a constitutional crisis? Can you tell me whether or not you had and others had, meaning Mr. St. Clair, the opportunity to judge the credibility of witnesses inside of the proceedings that you were able to deal with? And can you tell me whether or not, in this instance, Mr. Clinton has as well acknowledged that he has misled the American people?

And we could, if you will, not so much as a grand jury—but in that structure, determine not to proceed because we have found no reasonable basis upon which to impeach the President of the United States of America? Because we, though not in essence a grand jury, are the movers of this action and can decide that because of the frivolousness of it, we should not proceed.

I know that the answers will have to be brief. Ms. Holtzman, I would appreciate it.

Ms. HOLTZMAN. Our process was never started by a grand inquisitor, it was started when the American people demanded that the House act after the Saturday Night Massacre.

We had substantial actual evidence, including tapes of the President. When John Dean and the President disagreed about what happened, we did not start an impeachment inquiry. That was insufficient evidence.

I am concerned, and I think you have raised that, that the actual determination of who is telling the truth, Monica Lewinsky or the President, will be made without a basis of hearing from the actual witnesses. I also do think that the facts of what happened in the past—and history is fact, it is not law, it is fact—are important in the determination of what this committee should do.

We are not in a constitutional crisis now. The question is, will this committee and the House generate one for the country?

The CHAIRMAN. The gentlelady's time has expired.

The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. I would like to thank these former Members of Congress for their participation today. They have been through what the members of this committee are going through now, and must understand how arduous a task this is, how unpleasant a task this is, so I take exception to some of the suggestions of the political motivations of the members of this committee.

I once worked for a Republican member of this committee who served on the Watergate Committee on the Judiciary, former Congressman Caldwell Butler. He was one of those seven Republicans who voted for the articles of impeachment. I think it takes great courage and great integrity to vote out articles of impeachment against a President of your own party.

I don't know what the vote will be in the final result in this committee or on the floor of the House, but I believe that Members on both sides of the aisle will try to show courage and integrity and act in that fashion.

But I am very concerned about the motivation of the White House today in attempting to raise the bar, in attempting to try to describe the standards that we are applying here as being somehow different than the standards applied in the Watergate hearings.

Congressman Canady, I think, has very correctly pointed out that there were many, including Congresswoman Holtzman, the only remaining member of the committee who still serves today, Congressman Conyers, who voted out an article of impeachment against President Nixon under circumstances in which he made a false oath on his tax return, so I think that that is an unfair standard.

I think the effort to try to impose upon the committee the burden of "beyond a reasonable doubt," the standard of proof in a criminal proceeding, is also incorrect. There is no evidence that the Watergate committee used such a standard. In fact, as Congressman Smith pointed out, Congresswoman Barbara Jordan explicitly rejected that standard. Some even set a much lower bar.

Let me read you this quote: "We are seeking what some people have described as whether there is probable cause, and I do not think it really reaches that. I have not found anything in the literature that says the House is looking even for probable cause. We are trying to find out whether there are enough matters in the articles we draw up that would warrant a trial that would resolve the questions."

That was said by Congressman Conyers, the Ranking Minority Member, during the Watergate proceedings. I think that is too low a standard, quite frankly. I think clear and convincing evidence is an appropriate standard for this committee to look at this evidence.

But this effort to suggest that this committee is politically motivated in our efforts is contradicted, this effort on the part of the White House and the White House's witnesses to suggest that there is somehow a different standard being applied here, when in point of fact the evidence is quite to the contrary.

It has been suggested, and Congresswoman Holtzman, I think you suggested, this is simply merely lying about an embarrassing personal situation, attempting to cover that up. But before the Federal grand jury, Mrs. Holtzman, the President's statements I think clearly indicate false statements. Unless some evidence is brought forward by the President to rebut them, they clearly were not for the purposes of covering up an embarrassment, because minutes after the President made those statements under oath before the grand jury, he went before the American people and acknowledged doing some embarrassing personally indiscreet things.

Before the depositions in the civil lawsuit seven months earlier, the President clearly was not making those allegedly false statements for the purpose of covering up personal indiscretions, because in the same depositions the President acknowledged other personal indiscretions with Gennifer Flowers and so on.

So I think the purpose of the President in both instances was something other than to cover up personal indiscretion. I think the purpose of the President was to defeat the lawsuit, the sexual harassment lawsuit; to obstruct justice in that case; to coach witnesses, and to bring forth a false affidavit from another individual.

And those, I think, are very serious charges, very similar to the charges that the Watergate committee considered regarding President Nixon and his tax return. And I think upholding the rule of law and standing up for honesty and truth in our judicial system

is a very, very serious matter that the American people are very concerned about.

I would finally point out that you can't look at polls to determine the final outcome.

The CHAIRMAN. The gentleman's time has expired.

The gentlewoman from California.

Ms. WATERS. Thank you very much, Mr. Chairman and members of the committee. I thank our witnesses for being here today, our former Members. I am trying to hold onto the belief that most members of this Committee on the Judiciary are wrestling with their conscience on questions of perjury and obstruction of justice.

I have long since decided that I cannot, in good conscience and with a sense of integrity and fairness, support the impeachment of President Clinton based on the allegations in this inquiry.

We have had some discussion on the question of perjury. Some on this committee have held onto an argument that perjury for the purpose of prosecution is and should be considered as a simple statement of less than pure fact or detail. This is a holier-than-thou attitude that allows no room for misstatement; no room for inability to clearly and concisely recollect; no room for taking advantage of legal definitions crafted by legal minds that may not comport with lay definitions; no room for nuances or gradations.

Mr. Chairman, I am going to say this. I hate to. But your statements and your actions during these hearings place you at the head of the class in the category of strictest and purest interpretation of perjury. You have waxed eloquent about the rule of law, a zero tolerance of lying. You have said no exception can be made for lying to cover up an embarrassing sexual affair.

You said, "For my friends who think perjury, lying, and deceit, are in some circumstances acceptable and undeserving of punishment, I respectfully disagree". You further said, "The truth is not trivial, playing by the rules. We are fighting for the rule of law. I think it is our constitutional duty under the law to pursue impeachment."

You said, "I am frightened for the rule of law, and I don't want that torn down or diminished."

Mr. Chairman, you are our leader and the chairman of this powerful committee. Many members of your party are following your lead, taking your advice, and looking to your experience and integrity to guide their decision.

Mr. Chairman, a few days ago I read a column written by Mr. David G. Savage in my hometown paper, the Los Angeles Times, and I was simply taken back by what I read. Mr. Savage did a little research on you, your statements and your actions.

Mr. Savage opened his article with the following line, quoting you, and I quote: "He mocked the sanctity of all who sermonized about how terrible lying is. 'Granted, lies were told,' he said, 'but it hardly makes sense to label every untruth and every deception an outrage.' He also condemned the disconcerting and distasteful whiff of moralism and institutional self-righteousness that led Congress to conduct hearings on the deceptions coming from the White House, and he denounced the result as a witch hunt."

Mr. Chairman, this columnist was talking about you, you who led the defense of the Reagan administration during the Iran-

Contra hearings. This columnist's research also shows you in direct and absolute contrast to your belief about what was not a lie in 1987 as opposed to what is a lie in 1998.

Mr. Chairman, what are we to think about these contrasts, as we review what you said then, and about understanding the nuances of lies and your zero tolerance stage today? What must your colleagues in the Republican Conference who are wrestling with history, legal definitions and conscience, think about the possibility that your statements today are in deep conflict with your 1987 statements?

To tell you the truth, I am a little disappointed. Never in my wildest imagination did I think that you would have such conflicting views about perjury and lying. You have done a 360-degree turn on your deep philosophical beliefs about how lying should be placed in proper context and nuances.

Mr. Chairman, I don't want you to default on your good name and leadership. History will not be kind to you and the stark contradictions of your leadership. It will surely be a sad commentary on your long years of service to be recorded as one who led the selective impeachment of the President of the United States, not based on a consistent philosophical belief, but rather on a petty partisan need to satisfy the need to retaliate, embarrass, or feed the insatiable appetites of a group of hate-mongering——

The CHAIRMAN. I ask unanimous consent that the gentlelady be permitted to finish her attack on me.

Ms. WATERS [continuing]. Who will stop at nothing to destroy President Clinton. Thank you, I appreciate that, Mr. Chairman.

Mr. Chairman, you sent 81 questions to the President. Based on Mr. Savage's article and his accusations about you, I am going to send you some questions. You don't have to answer them, and if you are going to allow me all of this precious time——

The CHAIRMAN. Oh, please don't abuse the privilege, Ms. Waters. You have finished your prepared statement, haven't you?

Ms. WATERS. I really haven't, because it includes the questions that I am going to send you.

Mr. BUYER. Regular order, Mr. Chairman.

The CHAIRMAN. I am sorry, I will have to tell you that your time has elapsed. But we will continue this in private.

Ms. WATERS. Thank you.

The CHAIRMAN. I now yield myself 5 minutes to respond to the gentlelady.

In a way, I am glad you brought that up, because I read that article in the Los Angeles Times, and I went back to my library and I dug out the report of the Iran-Contra hearings back in '87. I wrote a special dissenting report, and I reread it. If I do say so myself, it is real literature. I will get a copy and have you read the whole thing, rather than a few excerpted sentences.

Now, it is true, at that time I was on the Intelligence Committee, and when I had a more nuanced view about misleading people, at no time did I sanction perjury. At no time did I sanction Ollie North or Poindexter lying under oath. I objected and I made my objections known.

But what I tried to explain—and I said context is everything, and I stand by that—clandestine operations to get hostages out of

Iran required secrecy and occasionally withholding information that others wanted. Trying to save Central America from a Castro takeover required some clandestine operations, and they required sometimes withholding information. That happened, and it takes a little understanding that people's lives and resources are at stake.

And while the Democrats did not agree, they preferred no money going to the Contras, whom they portrayed as thugs; the Sandanistas, with Mr. Ortega and Mr. Castro, seemed to fit in well with them. That was a great controversy back in 1987.

But you cannot find any place or any time where I condoned or justified perjury, or raising your hand and asking God to witness to the truth of what you are saying, and then lying.

Ms. WATERS. Will the gentleman yield?

The CHAIRMAN. No, I will not yield.

Ms. WATERS. I want to take you to something that is in contradiction to what you have said.

The CHAIRMAN. You have had your turn, Ms. Waters. This isn't going to be the Maxine-Henry show.

Ms. WATERS. Too bad about that. I would like that.

The CHAIRMAN. I just wanted the record to show that my opposition to perjury and lying under oath has been constant, and is as strong today as it was then.

But as long as I am using my 5 minutes, I want to ask my friend, Father Drinan, a question. This may categorize me as a member of the religious right, and I will tell you now, I have not been to any meetings lately in anybody's basement, so I am not a part of the conspiracy.

But what is the significance of asking God to witness to the truth of what you are saying? Does that add a little heft to the undertaking of promising to tell the truth, the whole truth, and nothing but the truth?

Father DRINAN. No, Mr. Chairman, that was just—everybody knows that they have a very solemn duty. If this Saturday the vote comes out 21 to 16 to impeach, and if the Republicans put intensive pressure upon their own people, and if impeachment is passed by seven votes, as is now predicted, I think that we all here will say, "Awesome. What are the motives for that?" That is what I meant.

The CHAIRMAN. Let's get back to my question: What about the rule of law? What does the chief law enforcement officer, when he raises his hand in a lawsuit, swears to tell the truth and then doesn't, then lies—does that erode, diminish, depreciate the rule of law which protects you and me?

Father DRINAN. I suppose the answer is yes, but that is not the right question. The question is——

The CHAIRMAN. I got the right answer. I will do the questions, you do the answers. I yield back my time. Thank you, Father.

Father DRINAN. You people have to make the big answer. Is that up to the level of impeachability, so that we will distract and disturb the country and erode the independence of the White House?

The CHAIRMAN. It is inconvenient, I will grant you that. It would be inconvenient to have an impeachment, no question. The question is, how inconvenient is it to have the rule of law eroded, corroded, diminished, lessened, cheapened? That is the other side of that coin.

Father DRINAN. That is your assumption, sir, that all of that is going to happen. My assumption is that further gray things might happen. We have to weigh.

The CHAIRMAN. That's right. And everyone has to in the end answer to their conscience. Absolutely right.

Now, we can get back to normality.

Mr. Meehan is next. Mr. Meehan.

Mr. MEEHAN. Thank you, Mr. Chairman. I am glad all of you were here today, because you, among all the witnesses who have appeared before us, bring, I think, an important historical perspective to the table.

What I would like to do is read to you some of the portions of the Nixon tapes, essentially to take you back to the days where you sat in judgment of a prior President, and then ask you how the facts before us compare with those that you grappled with. Many of us have heard a lot of conversations about what happened in the Nixon era and the Watergate era, so I think it is important to go back and compare.

Let me start with a June 17, 1971 conversation between President Nixon and H.R. Haldeman, John Ehrlichman, and Henry Kissinger. Haldeman tells Nixon that there is a file at the Brookings Institute on Lyndon Johnson's implementation of a bombing halt in the Vietnam War. Nixon responds, quote, "Goddamn it, get it. And get those files. Blow the safe and get it."

On June 30, 1971, in a conversation with the same individuals and Ron Ziegler and Melvin Laird, Nixon elaborates on his plans with respect to the Brookings Institute: "They have a lot of material. I want Brookings. I just want to them to get it, to break in and take it out. Do you understand?"

On September 18th, President Nixon and John Ehrlichman had a conversation in which they discussed using the IRS to harass Senator Edmund Muskie, Senator Edward M. Kennedy, and their supporters. Nixon says the following: "John, but we have the power, but are we using it to investigate contributors to Hubert Humphrey, investigate contributors to Muskie?" He goes on, "Are we going after their tax returns? Do you know what I mean?"

Haldeman, "No, we haven't."

Nixon, "Hubert, Hubert has been in a lot of funny deals."

"Yes, he has."

"Teddy, who knows about the Kennedys? Shouldn't they be investigated?"

September 10, 1971, President Nixon approves Ehrlichman's proposal for a break-in of the National Archives to get secret Vietnam papers of former President Johnson's aides.

Ehrlichman: "There is a lot of hanky-panky with secret documents, and on the eve of the publication of the Pentagon papers, those guys made a deposit into the National Archives under an agreement of a whole lot of papers. Now I am going to steal those documents out of the National Archives."

Nixon: "You can do that, you know."

Finally, on June 23rd, 1972, the infamous smoking gun conversation occurred. In that conversation, President Nixon and Haldeman conspired to call in the CIA director, Richard Helms, and direct him to tell the acting FBI director, Patrick Gray, that the FBI's in-

vestigation of the Watergate break-in interfered with CIA operations.

Here is Haldeman laying out the plan for getting Helms to call off the FBI investigation. Haldeman: "They say the only way to do this is from White House instructions, and it's got to be Helms and what's his name, Walters."

Nixon: "Walters."

Haldeman: "And the proposal would be that Ehrlichman and I call him," meaning CIA director Helms.

Nixon: "All right. Fine."

Ms. Holtzman, Father Drinan, Mr. Owens, we have heard attempts to compare President Clinton's conduct in this case with that of President Nixon. Indeed, we have seen the Independent Counsel strive to mirror the language of the Nixon impeachment articles in his referral, throwing out terms like "obstruction of justice", "abuse of power", despite the lack of evidentiary support for either allegation.

To set the record straight, isn't it fair to say that President Clinton's conduct doesn't even hold a candle to President Nixon and what he did?

Mr. OWENS. There is no question that it does not. I listened as he instructed John Dean on how to lie to the grand jury. I heard the tape. I heard the President's own voice. I couldn't believe it.

"Just tell them you don't remember, John. They can't indict you if you don't remember," and told him to "get $120,000, by God, today, and pay it to Mr. Hunt, because he was going to blow by nightfall." I couldn't believe what I was hearing.

Mr. MEEHAN. Cash, wasn't it cash?

Mr. OWENS. There is nothing like that in this evidence here. There is nothing that touches on the immoral or—the illegality of the evidence that we had with Richard Nixon.

We had no choice but to impeach. This committee has no choice but to release the President, to vote down this article.

Mr. SENSENBRENNER [presiding]. The gentleman's time has expired. Mr. Buyer.

Mr. BUYER. I thank all of you for coming today.

One of the things that is a lot different is we don't have John Dean. You had someone on the inside that came forward. We don't have someone, a Sidney Blumenthal or someone else who comes forward and says, you know, enough is enough. I can't take it anymore down at the White House. I want to tell you all about the conversations.

We don't have the benefit of the taped conversations, as they put together their defenses and their schemes and their plans. We don't have all of that. We have the transcripts from the grand jury testimony. So there are some differences. And I have great respect for what you went through, because we have gone through only half of it. Your proceeding was nine months, and this has been four.

I do have a couple of questions. Father Drinan, you piqued my interest earlier when you brought up the word "vengeance." Why do you think in our society we think it is so important that when we give someone an oath, we ask them to either swear or affirm to God, and we also, in many courtrooms around America, we ask

someone to place their left hand on a Bible? Father, why do you think we do that in our society?

Father DRINAN. It goes way back. For centuries it was very sacred. But I don't think that you can invoke the oath and say that, immediately, that someone who may have violated it is impeachable when he is the President.

You are asking the right thing. Sir, we all agree on this. Don't make us say that, well, we are going to minimize the oath. We are not doing that. We took the oath today. I teach legal ethics at Georgetown. We solemnize all of this.

But that is not the question. The question is if this individual—if this were a private matter, not related to government process, is he impeachable because of that question?

Mr. BUYER. Let me ask another question of you, Father Drinan. Tell me what the difference is between vengeance and accountability under the legal system? What is the difference between those two?

Father DRINAN. Vengeance is only—it is a legal term only sometimes. We don't make vengeance a crime. I used that term because I, like the whole Nation, find it unfathomable that the whole Republican establishment says this is an impeachable offense, and the rest of the country doesn't get it.

Mr. BUYER. Father Drinan, I find it almost unfathomable that there are some of my own Democrat colleagues, that somehow believe or feel that if the President lied before a grand jury, that that was wrong but it is not impeachable.

Then I have to watch, even in these proceedings, how the President's own counsel, and as they work with the minority counsel—there is coordination here between minority, the minority side, and the President's defense.

I would ask unanimous consent that an article that was in the Wall Street Journal on November 30th, 1998—it is a declaration concerning religion, ethics, and crisis in the Clinton presidency, signed by 132 religious scholars—be placed in the record.

Mr. SENSENBRENNER. Without objection.

[From the Wall Street Journal Nov. 30, 1998]

BILL CLINTON'S ETHICS—AND OURS

The following statement—"Declaration Concerning Religion, Ethics, and the Crisis in the Clinton Presidency"—was signed by 95 religion scholars including Paul J. Achtemeier (Union Theological Seminary), Karl Paul Donfried (Smith College), Jean Bethke Elshtain (University of Chicago), Stanley M. Hauerwas (Duck University), Robert Peter Imbelli (Boston College), Max L. Stackhouse (Princeton Theological Seminary), and Harry Yeide (George Washington University):

As scholars interested in religion and public life, we protest the manipulation of religion and the debasing of moral language in the discussion about presidential responsibility. We believe that serious misunderstandings of repentance and forgiveness are being exploited for political advantage. The resulting moral confusion is a threat to the integrity of American religion and to the foundations of a civil society. In the conviction that politics and morality cannot be separated, we consider the current crisis to be a critical moment in the life of our country and, therefore, offer the following points for consideration:

1. Many of us worry about the political misuse of religion and religious symbols even as we endorse the public mission of our churches, synagogues, and mosques. In particular we are concerned about the distortion that can come by association with presidential power in events like the Presidential Prayer Breakfast on September 11. We fear the religious community is in danger of being called upon to provide authentication for a politically motivated and incomplete repentance that seeks to

avert serious consequences for wrongful acts. While we affirm that pastoral counseling sessions are an appropriate, confidential arena to address these issues, we fear that announcing such meetings to convince the public of the President's sincerity compromises the integrity of religion.

2. We challenge the widespread assumption that forgiveness relieves a person of further responsibility and serious consequences. We are convinced that forgiveness is a relational term that does not function easily within the sphere of constitutional accountability. A wronged party chooses forgiveness instead of revenge and antagonism, but this does not relieve the wrong-doer of consequences. When the President continues to deny any liability for the sins he has confessed, this suggests that the public display of repentance was intended to avoid political disfavor.

3. We are aware that certain moral qualities are central to the survival of our political system, among which are truthfulness, integrity, respect for the law, respect for the dignity of others, adherence to the constitutional process, and a willingness to avoid the abuse of power. We reject the premise that violations of these ethical standards should be excused so long as a leader remains loyal to a particular political agenda and the nation is blessed by a strong economy. Elected leaders are accountable to the Constitution and to the people who elected them. By his own admission the President has departed from ethical standards by abusing his presidential office, by his ill use of women, and by his knowing manipulation of truth for indefensible ends. We are particularly troubled about the debasing of the language of public discourse with the aim of avoiding responsibility for one's actions.

4. We are concerned about the impact of this crisis on our children and on our students. Some of them feel betrayed by a President in whom they set their hopes while others are troubled by his misuse of others, by which many in the administration, the political system, and the media were implicated in patterns of deceit and abuse. Neither our students nor we demand perfection. Many of us believe that extreme dangers sometimes require a political leader to engage in morally problematic actions. But we maintain that in general there is a reasonable threshold of behavior beneath which our public leaders should not fall, because the moral character of a people is more important than the tenure of a particular politician or the protection of a particular political agenda. Political and religious history indicate that violations and misunderstandings of such moral issues may have grave consequences. The widespread desire to "get this behind us" does not take seriously enough the nature of transgressions and their social effects.

5. We urge society as a whole to take account of the ethical commitments necessary for a civil society and to seek the integrity of both public and private morality. While partisan conflicts have usually dominated past debates over public morality, we now confront a much deeper crisis, whether the moral basis of the constitutional system itself will be lost. In the present impeachment discussions, we call for national courage in deliberation that avoids ideological division and engages the process as a constitutional and ethical imperative. We ask Congress to discharge its current duty in a manner mindful of its solemn constitutional and political responsibilities. Only in this way can the process serve the good of the nation as a whole and avoid further sensationalism.

6. While some of us think that a presidential resignation or impeachment would be appropriate and others envision less drastic consequences, we are all convinced that extended discussion about constitutional, ethical, and religious issues will be required to clarify the situation and to enable a wise decision to be made. We hope to provide an arena in which such discussion can occur in an atmosphere of scholarly integrity and civility without partisan bias.

Mr. BUYER. It starts by saying, "As scholars interested in religion and public life, we protest the manipulation of religion and the debasing of the moral language in the discussion about presidential responsibility. We believe that serious misunderstandings of repentance and forgiveness are being exploited for political advantage."

Then they lay out six points. I think it is very good. I invite my colleagues to read that.

I was very concerned, Father Drinan, for you to come in here and to challenge the motives of this committee. I suppose that as you sat on the impeachment, the three of you, there were people that would challenge your motives and did at the time.

Father DRINAN. If I may say, I don't recall anything like that in the House Committee on the Judiciary in 1974. We had the highest esteem for each other, and I had high esteem for Caldwell Butler, who agonized over this and eventually voted for it.

Mr. BUYER. Father Drinan, you are the first individual that I know that has ever challenged, and I will take it personally here because you said it to all of us, that we are driven by vengeance. That is why I asked you the specific question about the difference between accountability in our legal system and vengeance. That is very important. So I am very disappointed that the President's defense would send witnesses to this committee that would say we are driven by vengeance, that we are zealots and fanatics and cowards.

Father DRINAN. I didn't say fanatics or cowards.

Mr. BUYER. You did not, but a witness from the previous panel.

Mr. DRINAN. Don't make me accountable for what other people said.

Mr. BUYER. I am not making you accountable. I will make you accountable for the vengeance statement.

Mr. SENSENBRENNER. The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Thank you. Father Drinan, welcome, my former teacher at Boston College Law School.

You are all Democrats. I think it is important to point out to you and to the American people that a former colleague of yours, Charles Wiggins, who is presently serving on the Court of Appeals in the Ninth Circuit, agrees with you, and he is a Republican.

I am going to quote from testimony that Charles Wiggins gave to this committee a short time ago, back on December 1st. I am quoting: "I am presently of the opinion that the misconduct immediately occurring by the President is not of the gravity to remove him from office." I think that goes to much of what you have all said today in terms of the gravity of the conduct, even if it is presumed to be accurate.

He goes on to state, on page 141, "I find it very troubling that the Committee on the Judiciary seems to be willing to impeach the President. I find that there is not any necessity that the President knew his acts were impeachable, that he was obstructing justice or abusing power at the time he did them."

So I think it is very important that you understand you are here in a bipartisan sense with Judge Wiggins. He also stated, and you just stated rather elegantly, Mr. Owens, that—and again, I am quoting him—"We heard testimony from Haldeman, we heard testimony from Ehrlichman, and we heard testimony from John Dean." You just referred to that, listening to that particular tape. It was the smoking gun.

It is my position that we have a process here, and I think process is important, because it is the process, not the names of the principle players, whether they be William Clinton, Ken Starr, Monica Lewinsky, or Linda Tripp, that will serve as a precedent for the rest of our history.

I am really concerned that we have not heard direct evidence, and I am particularly disturbed when I hear from others that suggest that somehow the burden of proof to rebut what is—can only

be described as triple and quadruple hearsay is on the President of the United States.

We heard earlier from Mr. Craig when he said, "Much of what Monica Lewinsky said was erroneous." He did not accuse her of lying or testifying falsely, he said "erroneous."

I dare say it is the responsibility of this committee, of this committee, to hear from the principal witnesses, to make those critical determinations in terms of memory, in terms of credibility, and in terms of evidence. I would welcome your comments. Ms. Holtzman.

Ms. HOLTZMAN. I think you are absolutely correct. You know, the question was what standard of evidence should be applied. We actually had evidence beyond a reasonable doubt. We had the tapes of the President of the United States himself. There was no question of the level of evidence. We heard witnesses, direct witnesses. We heard tapes. I don't think it is——

Mr. DELAHUNT. Reclaiming my time, I think it is very important that you know and the American people know that we have heard direct testimony in deposition from only two witnesses. I think it is absolutely wrong for this body and for this institution to abdicate its responsibility under the Constitution to an independent prosecutor that merely served as a conduit for so-called evidence, while it goes to the United States Senate for a trial which I think we can all agree will be traumatizing this Nation and creating great instability within the body politic.

I yield back.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Tennessee, Mr. Bryant.

Mr. BRYANT. Thank you, Mr. Chairman. I would like to thank the panel, a couple of you, for your second—I guess for the rerun here.

I am reminded by my colleagues' from Massachusetts statement of my years in trial, when the other side often argued that there is no proof here today on this point, when they too had the subpoena power and the ability as such to call in that proof if they really, really wanted that proof there.

One would have to assume that by providing some 30 hours, if you look at eight-hour work days, almost four complete days of work hours before this panel, that if one really wanted that type of proof, if they wanted confrontation with these witnesses and if they wanted to cross-examine these witnesses, and they were so, so dissatisfied with the process, that one would think they might issue a subpoena and call some of these witnesses in.

On another subject, there are many issues here and I want to touch on just a couple of them. I have heard today argued that private conduct is not grounds for impeachment. I see the hypocrisy in the White House of spending so much money and time and legal effort in asserting the White House presidential privilege, which we all know covers official conduct. So if we are talking private conduct only, why aren't we litigating in court the official conduct and the executive privilege issue?

This panel seems to be arguing that, unless you have the Richard Nixon case, you can't impeach anybody. We have 32 counts and one article of impeachment in that case. That sounds to me like if you have got a bank robber out there that robbed 32 banks, and

then you have got a second bank robber who only robbed four, that you can't charge that person with bank robbery; that everybody from here on has to rob 32 banks before they can be charged.

I suspect when it all settles in, this case will fall in between the Andrew Johnson impeachment and the President Nixon impeachment. It is for this panel to vote their conscience and decide whether, within that spectrum, if indeed there are sufficient articles of impeachment.

One final argument I might say, woe be it to this country if we go through this process, another government shutdown. I have heard that term used today. But let me tell you, this is important work that we are doing today. We are doing it not because we started it, but because it is the President's own conduct that began this.

Back in 1974 when you folks were sitting in these seats, your Democrat chairman of this committee faced similar circumstances in terms of the troubles that this country had been through at that point, and probably a sentiment in America that just didn't want to do this.

In his opening statement in the Congressional Record, Mr. Rodino eloquently states that, "We know that the real security of this Nation lies in the integrity of its institutions and the informed confidence of its people. We will conduct our deliberations in that spirit. It has been stated that our country, troubled by too many crises in recent years, is too tired to consider this one. In the first year of the Republic, Thomas Paine wrote, 'Those who expect to reap the blessings of freedom must, like men, undergo the fatigue of supporting it.' For almost 200 years Americans have undergone the stress of preserving their freedom, and the Constitution that protects it. It is now our turn."

With that, I yield back the balance of my time.

Mr. SENSENBRENNER. The gentleman's time has expired. The gentleman from Florida, Mr. Wexler.

Mr. WEXLER. Thank you, Mr. Chairman.

Father Drinan, I think, as you described earlier, you were asked to come today to tell us what happened during Watergate. For those of us that don't really remember Watergate, it was chilling for me to hear Congressman Meehan repeat verbatim President Nixon's language, and I think at least for some of us that don't recall the actual testimony, because we were too young or otherwise, and then have it compared to the President's alleged behavior is very dramatic.

Mr. Owens had an opportunity, I think, to answer a question earlier. I would like to give you an opportunity. Describe in your words what was the abuse of power, the abuse of office by President Nixon, and compare that, if you would, in an objective fashion, which I know you can, to the alleged abuse of power or abuse of office by President Clinton.

Father DRINAN. Thank you for the question. I think the documentation exists here. This, along with other books, indicates the extent of the upgrading or downgrading of government. It is just unbelievable. That is the whole point, that we sat here and listened to it. It was almost unbelievable.

I remember sitting right over there with the microphones, listening to President Nixon telling his Attorney General, "You are not going to appeal that ITT case. Understand that? You are not going to appeal that." And then they lied about that afterwards: "Well, we never got any instruction." And there is nothing, compared to—now, I mean all these things, whatever you call them. This was an eruption of corruption in the White House for which the Framers intended impeachment. The Nation recognized that.

Mr. Rodino presided majestically, and the whole Nation was impressed. The other day Mr. Rodino said there are no impeachable offenses in anything that he has seen about these events.

So we are glad to be here to have an opportunity. But it becomes more unbelievable every day, the possibility that the Congress, the House, could go forward and impeach this person. What are they looking at? Where are the documents? It is just unbelievable.

I want Ms. Holtzman to respond.

Ms. HOLTZMAN. Mr. Wexler, I mentioned in my testimony, but it bears repeating, one claim of abuse of power was that the President had to be subpoenaed, did not voluntarily appear before a grand jury despite being invited several times. He ultimately appeared. What is the abuse of power?

Secondly, the other claim was that he invoked executive privilege so that the special prosecutor would have to be put to his proof in court. Once the court ruled, the President turned over the information. Where is the abuse of power here?

When we talk about the Nixon impeachment here and the abuse of power, when the President uses his office to get the FBI to—the CIA to stop an FBI investigation, or gets the IRS to audit his political enemies, that is an abuse of power that threatens the people of the country and the operation of government. We don't see that here.

I think that the members of this committee have to—obviously have to search their conscience, but this process will be judged by how bipartisan it is and how much the public is willing to put up with a huge disruption because of the level of presidential misconduct. I don't think we see that. The public is not prepared to see that, that level of disruption take place.

Mr. WEXLER. Thank you, Mr. Chairman.

Mr. Owens.

Mr. OWENS. If you will permit, I am about to say something that is about to put me on a hotter seat than Father Drinan had. But when you talk about abuse of powers, I wonder about the powers of this committee and the leadership of the House which will not permit Members of the House, as I understand, to vote on censure, which insists on impeachment or nothing.

This President should be condemned for his actions. He did lie to a grand jury, in my view, and to say to the Members of the House, you cannot censure him, you either have to impeach him up-or-down or let him go. Many Members on the hot place do not believe he should be impeached, apparently—at least two Republicans have expressed it to me—and yet they have no choice, either they impeach or they turn him free, I think that is bordering on an abuse of power.

Mr. WEXLER. Thank you.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you. Ms. Holtzman, let me go back to your testimony here this morning. You stated, "Nearly a quarter of a century ago I never imagined in my lifetime we would see another impeachment. I am saddened to be here today."

And I can assure you that we are all very saddened to be here today, but we are here because of the conduct and the seeming inability to tell the truth of only one person, and that is William Jefferson Clinton.

Let me go back to a statement that you made in the Nixon impeachment era, back in 1974. You stated at that time that "The President of this country ought to set a standard of strict, scrupulous obedience to the law." Do you still feel that way? Do you still feel that the President of the United States should set a standard of strict obedience to the law, that the President should be honest?

Ms. HOLTZMAN. Of course I believe the same thing. The question is, what happens when the President is not? What is the punishment? That is really the question you have to grapple with. Even if in your conscience you feel impeachment is warranted, if you don't have bipartisan support and if the public won't accept it, are you going to put this country through a terrible disruption? For what? Try to find the common ground.

That was what distinguished us in Watergate. We drew up the articles of impeachment with the Republicans. It wasn't an effort of a single party.

Mr. CHABOT. Let me move to Father Drinan now, because our time is relatively brief, as you know.

Censure, Father, has come up several times here in this committee today. Let me address censure for just a moment here. You had testified previously in this committee, and you stated back on November 9th when you appeared before us at that time, and I will quote, "A vote to censure a President by one or both bodies of Congress would establish a dangerous precedent."

I agree with you. I am concerned that censure could lead to using a censure against a President for political purposes. For example, I strongly disagree with President Clinton's veto of the partial birth abortion ban. Despite my strong opposition to that, however, I don't think we should punish him for what was essentially a political act on his part.

Do you continue to believe that censure by either this committee or the House is not the appropriate course for us to take?

Father DRINAN. That is up to the Congress itself. But I think many people would say "I am not certain about impeachment, and I will vote for a censure." People do feel strongly about presidential misconduct, and the President realizes that.

The consequences, however, still worry me, that this will intimidate future Presidents; that they will censure him, shortly before election, for political reasons and not for reasons that might be impeachable.

Mr. CHABOT. So your feeling is that censure is probably not the course that we ought to take?

Father DRINAN. Well, it is up to people who are wiser than I to say what is the appropriate.

Mr. CHABOT. Thank you, Father.

Congressman Owens, let me go to you at this point. I am going to quote from a statement attributed to you back in 1974, again, in the Nixon impeachment proceedings.

You stated at that time that "Impeachable conduct need not be conduct prohibited by criminal statute, although it must be clearly offensive; that is, known to be wrong by the person who commits it at the time it was committed. It could be a substantial abuse of power, blatantly unethical conduct, or a flagrant violation of constitutional duties."

Doesn't the President of the United States have the constitutional duty, when he raises his hand and swears to tell the truth, the whole truth, and nothing but the truth, so help me God, to tell the truth?

Mr. OWENS. Obviously he does, and I regret that he didn't. My concern here—I disagree, obviously, with Father Drinan on censure. I disagree with Barbara Jordan as she is quoted to us. I disagree with Congressman Owens as he is quoted to us. I am now 24 years older and at least 10 years more mature.

But I think it is very important that the punishment fit the crime here. I'm just trying to say to the committee, the offense does not rise to impeachability. The President was like a deer caught in the headlights of a car. His marriage all of a sudden was in danger, his presidency was in danger by his own sexual infidelity.

Mr. CHABOT. He also, as a private citizen—

Mr. OWENS. I understand.

Mr. CHABOT. Excuse me.

Mr. OWENS. I understand how he got caught in that mess, and I think he ought to be censured for having done the wrong thing.

Mr. CHABOT. He also had a private citizen, Paula Jones——

Mr. OWENS. It does not rise anywhere to the level of impeachability as compared to Richard Nixon's offenses, whom we are here to contrast today for you, the actions of that President. That is the point I am trying to make.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from New Jersey, Mr. Rothman.

Mr. ROTHMAN. Thank you, Mr. Chairman. I was just about to make the statement, but Congressman Owens made it for me. But I will repeat it, because it is the appropriate issue for us: What is the appropriate punishment for the President's wrongful conduct?

Now, we all want to uphold the rule of law for ourselves, our children, and our judicial system. But we have civil courts and criminal courts, and we have President Clinton already liable to be sued civilly and criminally for any action that he has taken. So the rule of law will apply to this President.

As my friend from California said, this is about a civil procedure. Of course it is. If the President was deemed to have done something wrong in a civil deposition, the civil judge, upon discovering that, had the right to sanction him, punish him, and thus uphold the rule of law. So the rule of law already applies to the President.

We were talking about whether the punishment, the nuclear bomb punishment, the death penalty punishment of impeachment

is necessary or appropriate for the President's wrongful conduct. This does not get to the question of whether those seeking the President's impeachment have presented a scintilla of factual evidence to justify or to meet a burden of clear and convincing evidence. They have not presented a single fact witness. But that is for another day. Hopefully they will come to their senses and meet that clear and convincing standard of proof requirement.

But my friend from Indiana, Mr. Buyer, was saying, that when you raise your hand to tell the truth, that is so important. Of course it is important. Anyone who violates that can be sued civilly and criminally. But is the violation of that oath per se treason, bribery, or other high crimes and misdemeanors, so we need to add the punishment of impeachment and removal to the punishment the President can already sustain, civil punishment and criminal punishment; knowing, of course, that the punishment of impeachment and removal is not just a punishment and will not just have an effect on President Clinton, but it will have an effect on the entire country and perhaps the world?

So that is the standard. No one has the right to draw to themselves the mantle of the protector of the rule of law, even if you believe he lied under oath, know that most scholars say, lying under oath is different than perjury, which is lying with specific intent, and it has a material effect. But even if you believe lying under oath is wrong and rises to the level of impeachment, ask yourself if that was what the Founders had in mind by treason, bribery, and high crimes and misdemeanors? And say, is that an appropriate punishment that fits the offense, the wrongful conduct of President Clinton? That is what we have to decide. I hope my colleagues will bear that in mind.

Again, on the issue of whether or not any factual evidence has been brought before us by those seeking the President's impeachment, I dare say, not yet. That disturbs me greatly, because I believe that the American notion of fairness and due process puts the burden of proof on the accuser to prove by clear and convincing evidence someone's guilt.

It gives the accused the right to demand the accuser meet that burden before the accused says anything, if at all. It is not up to the accused to prove his or her innocence. That is the American way. That is our rule of law in America. I hope we will get to that sometime before this inquiry is completed.

Thank you. I yield back.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Georgia, Mr. Barr.

Mr. BARR. I would like to yield 30 seconds to the gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. I thank the gentleman for yielding. In the previous testimony here, it was assumed that the President lied to protect his wife and his daughter, et cetera. But I think it is just as likely that he lied in order to defeat a fellow citizen's lawsuit against him, a sexual harassment lawsuit which was a very significant lawsuit.

I yield back. I thank the gentleman for yielding.

Mr. BARR. Thank you. You all are here today in support of the President, in defense of the President. I understand that. That is

certainly very appropriate. You all are not here to present new evidence in terms of rebutting evidence, evidence that might rebut the specific charges against the President, but rather to present your opinions or evidence, as you may call them, of your view of impeachment; as Father Drinan said, to contrast the procedures in Watergate, your view of the standard that was used then, as opposed to the standard that either is or should be used here.

That is fine. That is part of the process here. What I find somewhat disturbing, though, is the effort by many of the defenders of the President to really mischaracterize, in their zeal to defend the President and rewrite history, to mischaracterize prior proceedings and put them in a light that really, on careful examination of the actual, historical record, really is not quite fair.

For example, we have heard from the President's defenders how it is that there is not sufficient time for the President's lawyers to engage in whatever it is that they want to engage in, a thorough and sifting cross-examination, perhaps, or what not.

We constantly hear, particularly from the oh, so eloquent ranking member of this committee, how fair the proceedings were in Watergate as contrasted to the all unfair proceedings currently.

Yet, in fact, according to many of those involved in your very proceedings back in 1973 and 1974, for example, with Jerry Zeifman, a lifelong Democrat, the chief counsel from '73 to '74 of the committee, there was a tremendous battle in your committee, particularly among the staff and among the chairmen.

In fact, one Hillary Rodham—of whom we have heard mention in other proceedings in which we have been engaged as one of the authors of the impeachment research document that many of us referred to as part of the paper that was put together by the Watergate impeachment staff, that stands for the proposition that the impeachment is indeed a political process, that it is not necessary to show violation of criminal laws, and so forth, for impeachment to lie—according to Mr. Zeifman, Hillary Rodham wrote a memorandum arguing that President Nixon should be denied any representation of counsel. In fact, in many of the proceedings Mr. James St. Clair, who basically was Mr. Craig's predecessor, Special Counsel of the President, was not allowed to participate.

Also we have heard a great deal about the lack of evidence as opposed to or in addition to the material that Judge Starr sent us, as if this is somehow also at diametric odds with the great open, thorough, and sifting search for the truth in the Watergate proceedings.

As a matter of fact, again drawing on not my research but the research of those involved, such as Mr. Zeifman, it is very clear, as he documents, that in fact on the morning of May 9, 1974, the beginning of the so-called Watergate hearings by the committee on which you all served, they consisted of nothing more in open session than the chairman gavelling them to order and then going into executive session for many days, at which time new evidence was not received. There was none received. It was simply a rehashing and a reading of the evidence that had been developed by other sources, such as the Irving committee. That really formed the basis for your all's deliberations.

I am not arguing with that. But what I am arguing against and want to set the record straight is that all these sanctimonious references to how open the proceedings were back in 1973 and 1974, as contrasted with the proceedings that we are moving through nowadays, based in large part on the very voluminous work of Judge Starr, and on which case we have given certainly a great deal of time to the President's lawyers, not what they would like but a great deal of time, is somehow much less worthy of the work of this committee and the Congress. In reality, the procedures were very, very much the same.

Mr. SENSENBRENNER. The gentleman's time has expired.

Mr. OWENS. I just wondered if an old has-been can rise to a point of personal privilege. Mr. Canady quoted me out of context, and I have now got the correction, and I think it would be a one-minute reading if I might be permitted to correct the testimony he gave.

Mr. SENSENBRENNER. I will be happy to indulge the witness.

Mr. OWENS. I am now in agreement with myself.

Mr. SENSENBRENNER. Well, then you ought to set the record straight.

Mr. OWENS. Does the gentleman permit it, the Chair?

Mr. SENSENBRENNER. Yes.

Mr. OWENS. Thank you very much. Page 549 of the hearings, I don't know the date, the gentleman's former boss, my good friend Caldwell Butler yielded me 2 minutes.

"I believe Mr. Nixon did knowingly underpay his taxes," I said, in the four years in question, "by taking unauthorized deductions, and he knowingly ordered or caused to be ordered improvements on his properties in Florida and California at government expense. These are offenses against the people, and I think the government should pursue its remedies. But you don't impeach for every offense, nor, on the other hand, do you excuse any offense by saying others did it. But whether to impeach or not is a question of judgment, permitted to each of the members; is it sufficient, is it that serious, and, on the evidence available, these offenses do not rise in my opinion to the level of impeachability. It is not sufficient to the standards. I promised the people of Utah when I sat down to impeachment that I would impeach only if there were hard evidence and which was sufficient to support conviction in the Senate, and I found it in four instances, and I do not find it this 6th, to which I feel I must apply the same remedy."

I thank the Chair.

Mr. SENSENBRENNER. Thank you.

Mr. CANADY. Mr. Chairman, I ask unanimous consent to respond to the gentleman.

Mr. SENSENBRENNER. The Chair will state that you can ask somebody else who is recognized for time, but if we start this kind of a debate, we are going to be here until 4 in the morning rather than midnight.

My colleague from Wisconsin, Mr. Barrett, is recognized.

Mr. BARRETT. Mr. Owens, I was the person who handed that to you.

Mr. OWENS. Thank you very much.

Mr. BARRETT. The reason I did was earlier today I joined in with Mr. Pease because I felt it was wrong for committee members to

castigate members and to question their motives. I think that the standard applies to us as well, and I think it is wrong for us to take words out of context and apply them to the witnesses, and that is exactly what was done to you. And I felt that once you did read your entire statement from 24 years ago, that you would agree with yourself, and I am glad that you——

Mr. OWENS. I thank the gentleman. That is a very nice courtesy to an old has-been. Thank you very much.

Mr. BARRETT. When this proceeding started three months ago or four months ago, the Chairman indicated that he felt by the end that it would be bipartisan. I think he couldn't conceive that we would vote out articles of impeachment, I don't know if he was referring to the House or to the committee, on a strictly partisan basis. All indications, of course, are that five days from now, or two days from now, we will do exactly that, and I have had many constituents who have come to me and said there is something wrong here. Aren't there any Republicans that agree with the Democrats, aren't there any Democrats that agree with the Republicans? And they are right, there is something wrong here, because we have been hearing that this would be a vote of conscience, and it defies logic, even for the most partisans, to think that there is not one person on either side of the aisle that is buying the arguments.

I think that part of the problem is that we haven't tried in any way to work on a bipartisan basis in open committee. Some of us have tried behind the scenes to see if we could move this along. I am of the firm belief, as I have said many, many times, that the President was wrong in his actions, that he should be held accountable. But I also think it has to be done in a bipartisan way, and we are not anywhere close to doing that.

So I am looking to you three for guidance. Since the committee did work in a bipartisan way, give us some tips as to how we can bring this to closure, because, again, as I have stated, for the sake of the American people, we have to get this resolved and we have to get it resolved in a manner that at least a majority of the American people feel is fair. I will ask you, Ms. Holtzman, if there is any advice you have. I realize you are all Democrats and I should be asking the same of some Republicans, but I think this committee needs some counseling and I am asking you to provide that.

Ms. HOLTZMAN. I don't have a therapist's hat to put on, and I don't want to presume to give you that counsel, but I must say I am troubled by what I hear, for example, with regard to the issue of evidence. On this side I have heard some Republican members say, well, if they want to hear it, let them call the witnesses. It didn't work that way during Watergate. We had a Republican—we had two Republican counsels, actually, and they worked together, the committee worked together in calling the witnesses, in trying to reach that common ground. And if people don't search for the common ground, they are not going to find it. But the American people will never accept the verdict of impeachment unless it reflects the common ground.

I think you just have to keep trying, and I would hope the Chair would lead that effort. Mr. Rodino was the one who made sure that the articles were not drafted before we had bipartisan input. Not what happened here, where you had the Republican counsel listing

15 charges, which reflected perhaps the view of the majority, but not the views of the minority, maybe there is some way that people can say, let's stop and see where there is a common ground for the good of the country and the reputation of this committee and the Congress.

Mr. BARRETT. Father Drinan?

Father DRINAN. I agree with you something is wrong. What is the wrong? We were called here today to say that this group has not followed what we did in 1974, and I don't know whether we are going to change any minds. A friend asked me this morning do you think that anybody will change their mind? And I said I always think that people can be rational and reasonable, and we can hope for that. But something is wrong in your terms, when and if this vote comes out 21 to 16.

Mr. OWENS. Mr. Barrett, it seems to me that bipartisanship would return if the House leadership and committee leadership would permit members an alternative vote on censure. I say to the committee, why can't you have a range of punishments here? I think bipartisanship would return if the House leaders would allow, if this committee would allow, a vote on censure as well as a vote on impeachment. Members deserve a full range of bipartisan responses to deal with the President's transgressions.

Mr. BARRETT. I would agree with you, and I know on this committee it is not going to happen. But I think on the full floor it would be a great injustice to this Nation if we don't have a vote on censure, because we have been told time and time again this is a vote of conscience. To deny that vote on the full House floor would be denying members the opportunity to vote their conscience.

Mr. SENSENBRENNER. The gentleman's time has expired. The gentleman from Tennessee, Mr. Jenkins.

Mr. JENKINS. Thank you, Mr. Chairman. Let me say thank you to those of you on this panel. It may become difficult to recruit members for this committee in the future when they find that you may have to come back and testify on such matters at some distant time down the road.

Let me say thanks to all of you, and especially, Mr. Owens, to you. You have demonstrated a great deal of understanding for this committee. I think you understand, and I am sure the others do, too, but you have expressed it more clearly, that none of us relish this responsibility that we have had thrust upon us. It is a little bit like when I was in the Army, I went and reported to basic training through the ROTC program. I had dreams of becoming an officer and a gentleman, and I remember one morning at 4 o'clock, we were still pulling KP in the Army then, and they got me up and the first job they assigned to me was cleaning out the grease trap. And it left an indelible impression on my mind as it was not the most pleasant task that I had ever been assigned to.

But I wanted to ask you, and I think you covered part of this in your statement, but would you agree that giving false testimony under oath to a material matter in either a civil lawsuit or a criminal matter or before a grand jury constitutes perjury? Would you agree that constitutes perjury?

Mr. OWENS. As I understand the definition, it seems to fit the classic mode.

Mr. JENKINS. All right. And I believe you agreed that perjury at least can be an impeachable offense.

Mr. OWENS. That is correct, but could I ask you a question in return? Why the House leadership won't let a full range of punishments come before the House? Because if there is perjury, it ought to be punished.

Mr. JENKINS. You are talking about punishments. All right, let's talk about punishments a minute. The Constitution says, as I read it, that in the event that anybody is accused and in the event they are convicted, then the remedy is removal from office plus one additional remedy, perhaps being foreclosed from holding public office in the future.

Is that not in your mind an impediment to a remedy of censure either in the House of Representatives or even in the Senate?

Mr. OWENS. Not in the least, Mr. Congressman. There is precedent. Andrew Jackson was censured. You can introduce any resolution you want. You can do anything that you can get by the Parliamentarian here. There is no question in my mind that it is totally constitutional, and here it is very practical. It would solve a very real problem.

Mr. JENKINS. So that doesn't give you any problem that that remedy is not provided for in the Constitution?

Mr. OWENS. None whatsoever, sir.

Mr. JENKINS. All right. Well, let me ask Father Drinan a question. Father Drinan, it appears to bother you, and I don't know how this vote is going to turn out. You may be absolutely right, it may be strictly along party lines. But you seem to be disturbed that the prospect exists that there could be 21 Republicans who would ultimately vote for an article of impeachment.

Are you not just as concerned that there might be 16 members of the other political party who would vote no on an article of impeachment? Does that not concern you too? Does it not work both ways?

Father DRINAN. Sir, I inherit the great tradition of 1974 when first this thing was in the country. We wouldn't do that. There was something wrong with our judgment if some Republicans can't agree with us. That was the beginning, from day one, that we can't trust our own judgment unless we have some Republican support. And we got seven people in the end.

Mr. JENKINS. Are you working on getting anybody on the other side of the aisle to change their mind, Father Drinan?

Father DRINAN. I think it would bother me all the time if there it is strictly partisan. There is something wrong with the logic if it doesn't appear to the other side.

Ms. HOLTZMAN. May I respond just briefly? We wrote the articles of impeachment with Republicans. They weren't crafted by one side that said here, take it or leave it. It was a joint effort, a joint writing.

Mr. JENKINS. I am about to run out of time, but if I have time, Ms. Holtzman, you said that a trial would disrupt the workings of the Supreme Court, is that correct?

Ms. HOLTZMAN. I believe so.

Mr. JENKINS. Was that true in 1974?

Ms. HOLTZMAN. We didn't get to that point.

Mr. JENKINS. Would it have been true if you had gotten to that point?

Mr. SENSENBRENNER. The gentleman's time has expired. The gentleman from Arkansas, Mr. Hutchinson.

Mr. HUTCHINSON. Thank you, Mr. Chairman. As I listened to the testimony today, it is like we yearn for the days of Camelot. I know those were tough times, but it sounds like we describe them in terms of great bipartisanship and everything was just smooth in the committee. Last night I had an opportunity to read back through many of the statements that were made during the Watergate proceedings, and I enjoyed the statement of James R. Mann, a representative at the time, who said something like you know some of the things that cause me to wonder are the phrases that keep coming back to me, oh, it is just politics, or, let him who is without sin cast the first stone.

So, I look back and I think you all heard some of the same things that we hear today, and I am impressed, no question about it, with your ability to achieve in the end not total bipartisanship, but some consensus where some Republicans, the minority, looked at the facts and concluded that there were impeachable offenses committed.

Now, I don't know who is right or wrong, but I do respect the other side that they are looking at this as a matter of conscience. I think we are all looking at this as a matter of conscience. It happens to divide us though. And I look at this panel right here, you know, there is disagreement right here, and you three reflect it. Father Drinan has tried to soften his comments based upon Mr. Owens' comments, but Mr. Drinan, you were very clear the last time you testified that censure was totally unacceptable, and I think you have tried to soften that today out of respect for your colleague. In fact you said at that time, there is no procedure for congressional censure and that the introduction of such a procedure could weaken the independence of the presidency and be a danger to the integrity of the separation of powers.

Is that an accurate quote, Father Drinan?

Father DRINAN. And I say it again.

Mr. HUTCHINSON. So the point is, there is disagreement even on this panel. I look at the testimony of Mr. Owens, and I wrote this down when you said it, but you said the President did lie to the grand jury, and then you conclude there should be a different outcome. And you said that his presidency was in danger, and that is one of the reasons that motivated him to lie, as well as protecting his family.

If you conclude that the President did lie to the grand jury, and that his motivation, whatever his motivation, was to protect his presidency, well, that rings like 1974. President Nixon was concerned about his presidency.

Mr. OWENS. Now, wait, Mr. Congressman, that is not what I said, with all respect.

Mr. HUTCHINSON. Tell me where I am wrong.

Mr. OWENS. I said that I think he did lie, and I think his response——

Mr. HUTCHINSON. You said lied to the grand jury, is that correct?

Mr. OWENS. Pardon me?

Mr. HUTCHINSON. I wrote it down that you said the President lied to the grand jury.

Mr. OWENS. Initially he lied, I think, in his testimony in the civil deposition, and then reiterated by implication that testimony in that grand jury. I think I meant to say the civil testimony, but I think by implication that it is also true with regard to his grand jury testimony.

But the point here is that the President was not defending—was not covering up a gross abuse of the presidential office, he was covering up a stupid infidelity, a sexual transgression. And I think very clearly he was concerned, I think, mostly about his wife and about his family, and then also by the great embarrassment, ultimately the presidency.

Mr. HUTCHINSON. I don't think I misquoted you then. What you just said is not any different than what I said you said.

Mr. OWENS. If I said what you said I said, then I didn't mean to say what you said I said, and I apologize.

Mr. HUTCHINSON. The point is, I think there is a difference among the panel, and I think there are some respectful differences in this body. I respect my colleagues, even though they might have a different view of this. I think it is an extraordinarily serious matter.

I come as a former prosecutor. Perjury is just an extraordinarily serious thing to me, and I am weighing that. And so I just hope that America can see that we are trying to do this carefully and thoughtfully.

One other point, finally. Some of you have referenced the "beyond a reasonable doubt" standard that arguably was applied, and I have heard that mentioned twice. In reading your statements in 1974 as well as the committee report, I believe that each of you applied the standard of clear and convincing evidence "and not beyond a reasonable doubt." Am I correct in that?

Father DRINAN. That is my recollection, yes.

Mr. OWENS. The testimony that I just read into the record in response to Mr. Canady's earlier quote says that I promise that I would impeach only if there were hard evidence and which was sufficient to support conviction in the Senate. That is my 1974 testimony. I wouldn't say that at another time I didn't talk about clear and convincing, but the test I had set for myself was ultimately what would sustain conviction in the Senate. But I am sure——

Mr. HUTCHINSON. It is in the record and in the additional views. It was clear and convincing.

Mr. SENSENBRENNER. The gentleman's time has expired. The gentleman from Indiana, Mr. Pease. The gentleman from Indiana, can you yield to me for one quick question?

Mr. PEASE. Of course, Mr. Chairman.

Mr. SENSENBRENNER. I would like to ask the panel, having heard about the necessity for bipartisanship, if during the 1974 Watergate hearings all of the Republicans who were then serving on the Judiciary Committee got taken in by the Nixon White House stonewall and refused to vote for any of the articles of impeachment, would the Democrats on the committee have gone ahead and re-

ported them out of committee and referred them to the House for debate and vote?

Ms. HOLTZMAN. But that is not what happened, Mr. Chairman. What happened is——

Mr. SENSENBRENNER. The question, Ms. Holtzman, was you said that it was necessary to report out articles on a bipartisan basis. My question is if bipartisanship could not have been achieved in 1974, would you have proceeded to report the articles out of committee and sought a floor vote on those articles? It is a simple question that can be answered yes or no.

Ms. HOLTZMAN. Well, I don't know that anybody can rewrite history. The fact is that the committee worked together to achieve a bipartisan result. We crafted articles of impeachment because—together—because we understood that the country would never accept a partisan impeachment and we wanted to make sure, because in answer to Mr. Hutchinson——

Mr. SENSENBRENNER. I guess I am not going to get an answer to that question. I will give the time back to Mr. Pease. Mr. Pease is recognized. He can proceed as he wants.

Mr. PEASE. I did want to follow up on my colleague Mr. Hutchinson's line of inquiry regarding the proper standard, and whatever folks may have said 25 years ago or today is not as important to me as the current discussion of what you think ought to be the standard. Whatever the differences may be on what constitutes an impeachable offense, what do you think ought to be the standard, number one, and we have heard beyond a reasonable doubt and clear and convincing; and secondly, what do you think ought to be the process by which we make the decision about whether to go forward? Whether that ought to be simply that we believe there is probable cause, or whether it ought to be that we believe that there will be a conviction in the Senate, or whether it is something in between, such as whether there is sufficient evidence for a conviction, not necessarily a certainty that there will be?

I know that is two major questions for a short period of time, but if you could address both of those, I would appreciate it. We will just start with Ms. Holtzman.

Ms. HOLTZMAN. I tried to address it in my testimony, that very point. Personally when I voted for impeachment, I believed that we did have evidence beyond a reasonable doubt and that that was the standard that in our hearts we used. If we had to articulate it, maybe we wouldn't, and maybe that standard doesn't have to apply. But it has to be a very, very high standard, because of the disruption of the country that you should be able to do.

With regard to how you assure yourselves, I would say definitely not as a grand jury. We are not dealing with probable cause. We believed when we voted for the impeachment of Richard Nixon, we believed not only that he should be removed, but that he would be removed and that he had to be removed.

Mr. PEASE. Do you believe that that ought to be the standard?

Ms. HOLTZMAN. Yes, because I don't think you start this process lightly. I think you have to have in your head that the conduct warrants removal and that the likelihood of removing him be there.

Father DRINAN. Sir, the evidence was so overwhelming that we didn't have to get to the refined question of clear or present or beyond every reasonable doubt. It was just so absolutely baffling.

Mr. OWENS. Mr. Pease, I don't think the grand jury analogy is perfect here, and thus clear and convincing is not necessarily definitive and not the best answer.

I thought that and feel today where the country is so polarized on this issue, and it was not in 1974, I think today that unless you have, not only clear and convincing evidence, but evidence beyond a reasonable doubt to justify your indictment of the President, that you ought not to indict, that you ought to have another alternative punishment in mind.

Mr. PEASE. Thank you all. I know there is not much time left, but I yield what I have to Mr. Canady.

Mr. CANADY. I do want to respond to the point that was made, which is totally erroneous. I did not misrepresent the gentleman's testimony, and I think if you look at the testimony, you will understand that the gentleman from start to finish focused on the inadequacy of the evidence that was before the committee, what you referred to as hard evidence. And that is inconsistent with what you have represented to the committee here today, that the committee at that point was deciding to drop the matter because they decided that it was not an impeachable offense.

You end up saying to the committee I urge my colleagues based on that lack of evidence to reject this article.

Your whole focus was on a lack of evidence, and not on the claim that you have made today that tax fraud, even if proven, would not be an impeachable offense.

Mr. OWENS. Well, the gentleman has not given me the courtesy of giving me a copy of my remarks, and I don't have them in mind.

Mr. CANADY. You have them before you. You read from it.

Mr. OWENS. I have this page, and I just quoted it to the gentleman.

Mr. CANADY. You know the paragraph that comes right after it. It is right there. I ask unanimous consent to place these full remarks in the record of the hearing.

[The information follows:]

Mr. OWENS. I thank the gentleman from Virginia.

I believe Mr. Nixon did knowingly underpay his taxes in the 4 years in question by taking unauthorized deductions, and that he knowingly ordered or caused to be ordered improvements on his properties in Florida and California at Government expense. These are offenses against the people and I think the Government should pursue its remedies.

But you don't impeach for every offense, nor, on the other hand, do you excuse any offense by saying others did it. But whether to impeach or not is a question of judgment permitted to each of the members. Is it sufficient? Is it that serious? And on the evidence available, these offenses do not rise, in my opinion, to the level of impeachability.

It is not sufficient to the standards I set. I promised the people in Utah when I sat down to impeachment, that I would impeach only if there were hard evidence and which was sufficient to support conviction in the Senate, and I found it in four instances and I do not find it in this sixth, to which I feel I must apply the same remedy.

At least twice in the past, once at the first presentation of evidence and once as recently as 2 weeks ago, I asked the staff to obtain the sworn testimony of the President's attorneys and the appraiser and others. They were unable to get it, as I understand, because of the expressed wishes of the Special Prosecutor, Mr. Jaworski, and so we are here having to decide this issue without any hard evidence which will sustain tying the President to the fraudulent deed or which will support, in my opinion, the inference and close the inferential gap that has to be closed in order to charge the President——

The CHAIRMAN. The gentleman has consumed 2 minutes.

Mr. OWENS [continuing]. With an impeachable offense and based on that evidence, I urge my colleagues to—based on that lack of evidence, I urge my colleagues to reject this article.

Mr. BUTLER. Mr. Chairman, I yield 2 minutes to the gentleman from Arkansas.

Mr. THORNTON. I thank the gentleman for yielding. I think it is apparent that in this area there has been a breach of faith with the American people with regard to incorrect income tax returns and the improper expenditure of public funds. But it is my view that these charges may be reached in due course in the regular process of law.

This committee is not a tax court nor criminal court nor should it endeavor to become one. Our charge is serious and full enough, in determining whether high crimes and misdemeanors affecting the security of our system of Government must be brought to the attention of the full House, debated there, and if found to exist, presented to the Senate. And to my view, by so doing and by bringing those serious charges to the attention of the House which we have already brought we are doing our part to ensure that this system of justice—which will enable all men to receive equal treatment before the law—will continue and can be applied in these instances which have been described to us tonight.

Mr. BUTLER. I thank the gentleman. Mr. Chairman——

The CHAIRMAN. The gentleman from Virginia has 1 minute.

Mr. BUTLER. Mr. Chairman, I would like——

The CHAIRMAN. One and a half minutes remaining. I am sorry.

Chairman HYDE [presiding]. Without objection, so ordered. The gentleman's time has expired. Mr. Cannon.

Mr. CANNON. Mr. Chairman, I would like to begin by associating myself with the remarks of Mr. Goodlatte, when he said President Clinton's purpose appears not to have been to avoid personal embarrassment, but to obstruct justice in the Jones case and to suggest it to the American people that we are all looking for evidence from the President to the contrary on that point. I would also like to associate myself with your comments, Mr. Chairman, about where you asked the question how inconvenient is the erosion of the rule of law comparing that to the inconvenience of an impeachment of the President.

Now, we have some parallels today between myself and one of my witnesses, that is Mr. Owens from Utah. He was a freshman in the Nixon impeachment 24 years ago, as am I. We are both lawyers, we both have deep interests in Utah, and national public lands issues. I might say that we also have some very deep differences that divide us, but I don't think that that goes beyond our friendship.

Frankly, Mr. Owens, I was intrigued by the comments that you have made without much opportunity to really flesh them out about censure. I take it you believe that censure is an option we ought to have. Frankly, I think that is something that many of us on the committee would like to see at least debated. Personally I am not yet of a view that censure is appropriate, for which I would like to hear your comments.

You have talked about the seriousness of what the President did. Would you mind, first of all, commenting about the seriousness of what the President has done and why censure is appropriate in that context? And then if you would deal with issues like whether a penalty like a monetary penalty or an appearance in the well of the House would be appropriate?

Mr. OWENS. Well, I appreciate my friend from Utah's giving me this opportunity. I have argued for a long time, before Gerald Ford made it in a more persuasive way, that censure is the alternative here which should be considered.

To lie, to mislead, under oath, and in my mind to look into the eyes of the American people and say in a straight, very straightforward way what is not just misleading, was a lie, that he "did not have sex with this woman, Ms. Lewinsky," I think deserves some punishment. But it does not rise to the level of impeachability, as I said several times, and that there ought to be an alternative way of expressing the displeasure and the disapproval of the Congress, and state such before the American people. The American people, according to polls, would support censure.

Mr. CANNON. How do you make censure substantial? Personally I don't think it means much. Would you add a penalty?

Mr. OWENS. I am not involved in any of the negotiations, but, of course, the press is saying the President would pay up to $300,000. I don't know, it sounds a little like another deal in this body recently——

Mr. CANNON. I think that deal would result in $4.5——

Mr. OWENS. I am sorry?

Mr. CANNON. I think that deal, if you modeled it on that deal, it would be about a $4.5 million penalty.

Mr. OWENS. Well, whatever. The President would have to agree to it, because you couldn't assess it. You have no authority, constitutional authority, to do anything in any material way to the President's powers short of impeachment.

Mr. CANNON. If the President agreed to it, what does that do to separation of powers?

Mr. OWENS. The pain would be that he would be the second President in the history of the country to have been censured and condemned by this body. I think President Clinton would do whatever you require. He would pay, if he does pay a fine, he would come to the well of the Senate, or the House, and express his apologies and accept responsibility. That would be a very degrading experience, but it would get us beyond this crisis. It would be a powerful punishment, and in my view, as an old 25-year observer of these issues, I think would be an adequate punishment, a proper punishment.

Mr. CANNON. I wish I had more time, because I would like to pursue it, and maybe we can privately, but it seems to me the issue here is not punishment of the President; it is political hygiene, it is solving a problem, it is solving an example of the destruction of the rule of law, of the sanctity of perjury.

I don't care whether the penalty is large or small. It doesn't seem to me that is the issues as much as the constitutionality of a penalty. I think that the submission of a President to either a penalty or to standing in the well of the House and demeaning the office of the presidency is a far graver constitutional problem than the inconvenience of an impeachment hearing, and thus I find myself compelled to think that there is only two alternatives, impeachment or vindication.

Thank you. I yield back the balance of my time.

Chairman HYDE. The gentleman from California, Mr. Rogan.

Mr. ROGAN. Thank you, Mr. Chairman.

I not only welcome our former colleagues to the Judiciary Committee, but if I may be so bold, I welcome you home. I was a 15-year-old rabid liberal Democrat during the Nixon impeachment debate. Having been transfixed to the television in those days, you were all heroes of mine. Although I am now more selective in my party affiliation, I still deeply respect your service to our country and to the Congress.

Mr. OWENS. I hope it wasn't our impeachment of the President which made a Republican of you, sir.

Mr. ROGAN. No, I just gave up drinking hard liquor! [Laughter.]

A couple of things: First, with respect to the concept of censure, it is a fact that Andrew Jackson was censured by the Senate of one Congress, and then the censure was expunged by a later Senate when its majority makeup were of Jackson's own party. Further, my recollection in the law is that an "expungement" means that the act never occurred for legal purposes. In fact, when criminal records are expunged, defendants can apply for a job and put down that they have never been convicted, and that legally is a truthful statement. So one of the problems with censure is that it can be removed and be expunged from the record.

But I don't want to spend my time belaboring that point.

There are a couple——

Mr. OWENS. Might I just comment on that, Congressman?

Mr. ROGAN. If I have time remaining, Congressman Owens, I would be more than happy to invite comment. But, as you know, the red light does come on rather quickly, and I do want to make a couple of observations.

I am very proud of the fact that during the Watergate era a number of Republicans who served on this committee were prepared to put their party affiliation aside, to look at the merits of the case, and cast what had to be one of the toughest votes of their entire career.

I remember as a freshman member of the California State Assembly voting against the budget of my Governor and how tough that was. I can't imagine what it had to be like for members of the Republican Party on this committee to vote to impeach the President of their party—probably a President who had appeared in their districts, had raised money for them, had supported them and had campaigned for them.

Today there is the suggestion that if committee Democrats do not vote for any articles of impeachment, and all the Republicans on this committee do vote for articles of impeachment, that somehow delegitimizes the vote of this committee. I certainly hope that is not the expression that any of you are trying to make.

I will cast my vote ultimately as a matter of conscience. I would never suggest that any of my colleagues on the other side would do anything other than the same.

I know all of my colleagues on this committee, and I deeply respect them. On matters of grave national urgency not relating to impeachment, such as economic principles, foreign affairs, national security and the like, there are times when there are party line votes. It doesn't necessarily mean that partisanship is ruling the day. It means that people with honest differences of opinion have done their very best to make a decision as they see fit. And I am sure that has been the repeated legislative experiences of our three former colleagues who join us today.

I am also concerned about what I perceive to be a double standard, not necessarily promulgated by this panel, but certainly suggested throughout the day by some. We are constantly being reminded that there are polls that have been taken suggesting that the American people do not want the President to be impeached and, therefore, Congress should abrogate their constitutional obligations and simply follow the polls.

I reject that notion. The polls are interesting. They are something we politicians take into account. But if polls alone are to govern our judgment, we then should just simply shut down the legislative, executive and judicial branches and turn governing over to Dr. Gallop's organization.

If somebody wishes to press the issue, then I respectfully suggest they consider the other side of it. The latest poll I have seen says that if the President lied to a grand jury, he should leave office—by a 57 percent margin. Further, the polls showed that if the President encouraged others to lie, he should resign. The agreement on that principle was 60 percent.

Now, we don't see supporters of the President who argue we should follow the polls in committee down to the White House and saying, "Mr. President, the polls explicitly say over and over that you should resign from office if you have lied." One can't have it both ways. In fact, according to my notes, even Congressman Owens said today he believed the President lied before the Federal grand jury.

Those are a couple of observations I wanted to make with respect to the testimony that has been elicited today.

Chairman HYDE. The gentleman's time has expired.

Mr. ROGAN. Thank you, Mr. Chairman.

My apologies to Congressman Owens. I was trying to squeeze a few seconds out for you.

Chairman HYDE. The gentleman from South Carolina, Mr. Graham.

Would Mr. Graham yield to me for just a second?

Mr. GRAHAM. Absolutely.

Chairman HYDE. Put your mike on.

Mr. GRAHAM. Absolutely.

Chairman HYDE. Mr. Rogan was talking about the efficacy of polls in our political careers, and I would like to ask Father Drinan a question, if you would, on polls. Someone said that if Jesus had taken a poll, he would never have preached the gospel. Do you agree?

Father DRINAN. That is beyond my realm.

Chairman HYDE. Okay. I hope not. Mr. Graham.

Mr. GRAHAM. Thank you.

Being a Baptist, that gets me going here.

Let me make a couple of observations, and I really do appreciate your coming. I have talked to at least one of you privately. And this is very difficult. It is not like Watergate. It is not exactly what you were dealing with. In many ways what you were dealing with was probably more serious or at least you could put your hands around it and say it is more serious.

You have really got to dig in this case I think to feel uncomfortable, and the more I dig, the more uncomfortable I feel, because it is easy to write it off as somebody, like the deer in the headlights. That is a good analogy. That is what I thought at first. I thought the President got stunned, he is trying to protect himself and, you know, he just started telling a lie and couldn't get his way out of that.

I am not so sure I believe that anymore, but I do believe this: If we impeach a President based on a consensual sexual affair, no matter how inappropriate, we are going to screw this country up, pardon the terms. I don't mean to be crude about it, but we are going to really mess this country up. And that has always been off the table for me, because I don't want to go down that road. Because we have elections, and impeachment should be reserved for very serious offenses like you were dealing with.

Now, I would say this to you, that if every Republican had voted no during your time, history would acquit you well. You were right to have voted to remove President Nixon.

Let me tell you what I am becoming more and more concerned about. This is more like Peyton Place than it is Watergate, but there is a component to this case that is very unnerving.

Richard Nixon cheated the electoral process. I think Richard Nixon didn't trust the American people to get it right in an election, and he had operatives going and breaking into the other side's office, and when he knew about it he cheated to cover it up. Richard Nixon cheated the American electorial process.

I am beginning to believe more and more that this is not about being caught in the headlights, of a person caught in a lie about a consensual matter, but that the President was very much, in an organized fashion, trying to cheat the legal system and cheat the party in opposition to him.

I believe, whether you believe it or not, that when he went to his secretary and planted a story in her mind along the lines, Monica came on to me and I never touched her, right? She wanted to have sex with me, and I couldn't do that—he said that the day after his deposition, that he had a sinister motive, not an innocent motive. I believe that he went to Ms. Currie in an unlawful manner to change her testimony, and I will tell you later what I think was going to happen to Monica Lewinsky.

I believe that when his lawyer had to write a letter to the court saying I apologize for putting a false affidavit in evidence, that his lawyer was duped by the President. I believe that, like Richard Nixon, Bill Clinton was very involved in unlawful activity, to cheat the legal system.

I am willing, with some admissions on his part and reconciliation on his part to the law, to consider another disposition, because this is not totally like Watergate. However, if he does not reconcile himself with the law, if he continues to dance on the head of a pin, if he continues to bring people in here who won't say anything about the facts but tell me how to vote, I don't think he has the character to be our President, and I will vote to impeach him based on what he did, not based on any other sinister motive.

I yield back the balance of my time.

Chairman HYDE. I thank the gentleman.

The gentlewoman from California, Ms. Bono.

Mrs. BONO. Thank you, Mr. Chairman.

Way a long time ago, Mr. Owens, you made a comment that hit me pretty hard. You mentioned that it is our fault that 7-year-olds in this country have heard about sex, and I disagree with that statement wholeheartedly.

I think that we have to remember that the President is a role model. It is solely his actions that have caused this, not ours. I think if we start with that, at least putting some responsibility where it belongs, it is a pretty good start, at least as a parent. I would like to just point that out. I don't know if you truly meant that it is our fault.

Mr. OWENS. I don't think I said it in that fashion. I said it is this committee's responsibility or fault that they passed the raw grand jury evidence directly, unexpurgated, gave to America, to the 7 and 8 year olds, the knowledge, or raised the question of, what oral sex is, what telephone sex is and what you can do with a cigar sexually.

I was interviewed yesterday in Salt Lake City as I left by a reporter who said, I don't appreciate my little children asking me those questions.

Mrs. BONO. Mr. Owens, I get that question more than anybody. I really have to say I get that quite often, and I have to tell you that is not quite what you said, and it is nobody's fault. It is not our fault. The responsibility must lie with the President with this one. You know, the buck has to stop there on that one.

I want to make a point generally in response to what the witnesses have said today. You have said that in 1974 you voted according to your consciences and have no regrets. Please know that now, in 1998, we are proceeding according to our consciences based on the facts and the law. None of our guests have done what my colleagues and I have done. That is gone to the Ford Building and reviewed the thousands of pages of documents and watched the videotape deposition. Those are the facts that are relevant to this inquiry. I am sure if you had taken the time to review this compelling evidence that you would also support the impeachment with no regrets.

But my question is to you, Ms. Holtzman, somebody I respect and I admire for having been in this seat years ago. If in 1974 you would have had no Republican support whatsoever, would you still have reported out those articles of impeachment?

Ms. HOLTZMAN. Well, I know you go back to that because you find yourself in a very awkward position, where you don't have the support and there is no bipartisan support. So I want to urge what my colleague Wayne Owens said, which is to find an alternative that can bring Republicans and Democrats together.

Because even if you are voting in your conscience, in the end, how does the public judge the legitimacy of these proceedings? If it is bipartisan, if there is a common ground found, that is something the people can take away and say the Congress acted properly. If it doesn't find the common ground, then the people are befuddled and confused and bewildered. That is what I am saying.

This is such a serious effort, and I don't mean to minimize the search of your conscience or the difficulty of this job. I was there. It is not easy. What I am saying to you is how important it is to come away with public respect for and public confidence in what you are doing. Maybe the common ground that is not your first choice, but maybe, if we are going to live with this verdict for history, it is the best choice.

Mrs. BONO. I am curious, what evidence do you base this on? And have you seen the videotape deposition or read the transcript in its entirety? What are you comfortably basing your opinion on today?

Ms. HOLTZMAN. Well, you don't have bipartisan support right now. I am trying to say to you, in terms of ultimately how this go down in history and how the public will accept it and how they will deal with——

Mrs. BONO. My question is a simple one.

Ms. HOLTZMAN [continuing]. They won't. It will be difficult.

Mrs. BONO. Can you answer my question?

Ms. HOLTZMAN. I am sorry. I must have misunderstood your question.

Mrs. BONO. You must be a lawyer, because you are good at this.

My question is very simple. It is a very simple one, but, actually, Lindsey Graham has asked for me to give him my time, and I will be happy to do that.

Mr. GRAHAM. I don't mean to interrupt. Just do you believe the President committed grand jury perjury, Ms. Holtzman?

Ms. HOLTZMAN. Well, he came very close to a line. I don't know whether he danced over it——

Mr. GRAHAM. But—very close, but no cigar. Let me tell you—and, every time, that shows you the problem, where this case—there is a thousand million jokes out there. This is serious. There is a thousand million jokes, and you can't go to Rotary Club—and it is not because of our fault. It is because of Bill Clinton's fault. And if he doesn't reconcile himself with the law—he committed grand perjury. And when you come to believe that like we do, if it is 21–16, so be it.

Ms. HOLTZMAN. But if you do it, you need to do it with evidence. You need to do it with the facts. You need to do it with witnesses. You have to assure the public that this process has been one that is honorable.

Chairman HYDE. The gentleman and the gentlewoman's time has expired. And Mr. Conyers, who reserved his time earlier today, is now recognized.

Mr. CONYERS. I want to congratulate my former colleagues for a long afternoon and evening's work here. You have helped me keep hope alive that we might somehow be able to persuade a few Members of Congress, maybe even on this committee, some of whom have spoken today, about evidence against the President.

But, you know, generalities are not enough to impeach. Instead, there must be concrete evidence that is clear and convincing and arises to the level of an impeachable offense. And when we look at the evidence, examine it carefully, what do we see? An allegation of perjury in the Paula Jones deposition.

Well, what we see beyond the fact that the President's testimony was not material is that he was confronted at the deposition with a tortured definition of sexual relations that he hadn't seen before and which was inconsistent with the Webster definition. To make matters worse, the presiding judge changed the definition as the President sat there.

The simple fact supported in the record is that the definition was ambiguous, and it is the Jones lawyers, not the President, who bear the responsibility for that ambiguity. They could have just asked the President who touched who where, but they chose not to. The President can't be blamed for that. That cannot, therefore, be the foundation for an article of impeachment.

Now, my friends across the aisle say that the President lied in the grand jury, but they neglect to mention that he admitted to an improper sexual relationship there. So then we have these three alleged, attenuated theories of perjury: that the President somehow understood the term "sexual relations" to be something more than the limited and contorted definition provided by the Paula Jones lawyers; two, that he lied about a difference of a mere 3 months regarding the inception of the relationship; or, three, that he actually touched Ms. Lewinsky in certain places.

Ladies and gentlemen, are we serious? Do we really intend for the second time in our history to impeach a President over a case that holds out these weak, puny perjury charges as its foundation? Do we wonder why this committee's ratings are not going up? We are in trouble here inside of this room.

Some of my Republican friends have realized the flimsy nature of these allegations and are trying—well, they are grasping at an even perhaps less persuasive case on obstruction.

Think about where that goes. They say that Lewinsky's return of the gifts somehow amounts to obstruction, but then again neglect to mention that the testimony clearly establishes that Ms. Lewinsky and not the President sought the return of the gifts.

Remember also that Monica Lewinsky said no one told her to lie, no one promised her a job. The job search started long before the Jones case, and Betty Currie wasn't even on a witness list when the President refreshed his recollection with her. So that conversation could not possibly lead into witness tampering.

Now we hear novel charges that the President lied about his conversations with Vernon Jordan. But when you examine the record closely, the record is clear that the President answered poorly worded questions regarding his conversation with Jordan to the best of his current knowledge. There is no evidence that he gave false answers.

So I close, the charges against the President, when stripped away of partisan rhetoric and factual gaps, are, in reality, a paper tiger. Do we on the Democratic side contest the charges? We sure do, and we assert that this committee has done no independent factual inquiry, no evidentiary witnesses as it is incumbent upon them to do to justify any case of impeachment.

I am delighted to, if the Chairman will allow any of you that would like to make a comment about my assertions as the final questioner, perhaps you might want to try that. Father Drinan?

Father DRINAN. You want additional comments?

Mr. CONYERS. Well, no, if you had something that you added to my comments. But I didn't want to prolong my time. It has expired.

Father DRINAN. I think we all have to pray for each other so we can come to the right decision.

Chairman HYDE. That is a very——

Mr. CONYERS. That is appropriate.

Chairman HYDE. That is a very appropriate note to end this session on.

Mr. OWENS. Mr. Chairman.

Chairman HYDE. Who is seeking——

Mr. OWENS. In front of you, sir. I just want to commend you for your conduct of these hearings. I think you bring great integrity to them.

Your old friend from Utah strongly believes that if you are to heal the country and bring us together you have to give an alternative for a censure resolution, and I urge in the strongest way that you afford that opportunity to your colleagues in the House. I thank the gentleman for his courtesy.

Chairman HYDE. I certainly hear what you are saying and take note of it.

Ms. HOLTZMAN. I would like to echo his comments, Mr. Chairman.

Chairman HYDE. Fine. I just want to thank you all, three wonderful troopers, former members of this great committee, and we were instructed and illuminated by your being here today.

Mr. OWENS. Any time you want us to come here and tell you how to do your job, Mr. Chairman, you just give us a call.

Chairman HYDE. You may have to wait in line, but that is fine. Thank you so much.

Now we are ready for the next panel.

Our third panel is composed of James Hamilton and Richard Ben-Veniste. Would the witnesses please rise to take the oath?

[Witnesses sworn.]

Let the record reflect the witnesses answered the question in the affirmative.

James Hamilton is a member of the Washington, D.C., law firm of Swidler, Berlin, Shereff & Friedman. He served as Assistant Chief Counsel in the Senate Watergate Committee and is the author of The Power to Probe, a Study of Congressional Investigations. He is former Chairman of the Legal Ethics Committee of the District of Columbia Bar.

Richard Ben-Veniste served as an Assistant United States Attorney and Chief of the Special Prosecution Section in the Office of the United States Attorney for the Southern District of New York. He was also Assistant Special Prosecutor and Chief of the Watergate Task Force from 1968 to 1973. More recently, he served as Minority Chief Counsel to the Senate Whitewater Committee during 1995–1996. He has also served as Special Counsel to the Senate Subcommittee on Government Operations and as Special Counsel to the Senate Subcommittee on District of Columbia Appropriations.

Each of you will be recognized to make a 10-minute statement and then be subject to the 5-minute rule questioning by the members.

TESTIMONY OF JAMES HAMILTON, ESQUIRE, SWIDLER, BERLIN, SHEREFF & FRIEDMAN, WASHINGTON, DC; AND RICHARD BEN-VENISTE, ESQUIRE, FORMER ASSISTANT U.S. ATTORNEY

Chairman HYDE. So, Mr. Hamilton, when you are ready, we will put the switch on. Either one want to go first?

Mr. BEN-VENISTE. I think I will go first.

Chairman HYDE. Very well. Mr. Ben-Veniste.

TESTIMONY OF RICHARD BEN-VENISTE, ESQUIRE

Mr. BEN-VENISTE. Thank you, Mr. Chairman, Mr. Ranking Member and members of the committee.

I have served under Democratic and Republican United States attorneys as a Federal prosecutor. I have served as an Assistant Special Prosecutor in the Watergate Special Prosecutor's Office. I have prosecuted corrupt officials of both political parties, including the administrative assistant to a Democratic Speaker of the House.

At the request of both Democratic and Republican Members of the Senate, I have served in a pro bono or part-time capacity in

various capacities, as the chairman has indicated. I have been engaged in the private practice of law since 1975 and have represented clients in a wide variety of civil and criminal matters.

I am presently a partner in the D.C. office of Weil, Gotshal and Manges, and, obviously, the views which I express today are my own. I am providing my observations and analysis not as a witness to the events in question, but as one whose professional experience over the last 30 years may provide some perspective on the issues before you.

I confess that I have spent more than one sleepless night considering whether anything that I can say will help extricate us all from the terrible mess that we are in.

In my view, this process has suffered from too much partisanship, too much hypocrisy, too much sensationalism, and too little time for reflection.

I ask whether impeachment will become still another arrow in the quiver of the warrior class of ever more truculent partisan politicians in Washington. If this is so, will we ever see an end to the gamesmanship of "gotcha" and pay-back that has already taken such a toll on civility and comity within these hallowed halls?

I have been talking about proportionality and moderation for some time. Back in August, well before Mr. Starr sent his referral to this committee, in an opinion piece published in the Washington Post I suggested that the appropriate resolution of the Lewinsky matter was for a group of respected leaders to come forward and propose a congressional resolution of reprimand to deal with Mr. Clinton's reckless and improper personal conduct.

I continue to believe that respect for the momentousness of the constitutional remedy of impeachment and appreciation of the common sense application of proportionality to the offensive conduct in question make a resolution of censure the appropriate result. Such a resolution, not impeachment, will give voice to the public will in retaining their twice-elected President's services, while expressing firm disapproval for his private conduct.

In my view, such a resolution would be consistent with the obligations of the House of Representatives and would be in the best interests of our Nation.

The first Watergate Special Prosecutor, Archibald Cox, was fired on the orders of Richard Nixon when he refused to back down after subpoenaing Mr. Nixon's famously incriminating White House tape recordings. In response to the firestorm of public opinion following the Saturday Night Massacre, President Nixon replaced Professor Cox with Leon Jaworski, a conservative Texan who vowed to continue the investigation with the independence and professionalism that had marked Mr. Cox's truncated turn at the helm. By all accounts, Leon Jaworski made good on his promise, and today his record provides the model against which all high-profile investigations and prosecutions are measured.

In Watergate, the serious abuses of power committed by the Nixon administration resulted in the prosecution and conviction of numerous individuals who held public office during Mr. Nixon's tenure, including two Attorneys General, the White House Chief of Staff, the chief and deputy domestic advisors to the President, a senior advisor to the President, the counsel to the President, and

many others. Their offenses went directly to the abuse of power of the President's office and misuse of the CIA, the FBI, the IRS, the FCC, in violation of important rights of others.

The obstruction of justice and perjury that was committed in furtherance of the Watergate coverup was designed to shield higher-ups from detection while blaming everything on the lower level individuals who had been caught red-handed.

Upon his appointment, Mr. Jaworski immediately withdrew from his lucrative law practice and devoted himself entirely to his duties as special prosecutor. Even with President Nixon's unlawful firing of Archibald Cox, the Watergate coverup case was investigated and prosecuted within 21 months of the creation of the Special Prosecutor's Office.

The credibility of the Watergate Special Prosecutor's Office was dependent on the public's perception that our investigation would be professional, impartial and fair. If we had leaked such explosively damaging evidence as President Nixon's taped instruction to continue the coverup or his admission regarding the promises of presidential clemency to the Watergate burglars, it would not only have been unfair, it would have violated the law. No leaks occurred.

Mr. Starr has the unhappy distinction of being the first Independent Counsel to come under investigation himself for unethical and possibly illegal conduct. In addition to the 24 prima facia instances of improper leaks of grand jury material identified by Chief Judge Norma Holloway Johnson, there was the spin leak of the Starr referral itself in the days leading up to its actual transmittal to this body.

Mr. Starr's response to Representative Lofgren's question as to whether he would release any journalists from promises of confidentiality, "that it would be unwise" for him to do so, he said, may well be true, but it only serves to reinforce the basis for Judge Johnson's suspicions.

In addition, the aggressive and disproportionate tactics employed by Mr. Starr's office, sometimes in violation of Department of Justice guidelines, have left the public with a justifiable perception that Mr. Starr has conducted more of a crusade than an investigation, with the political objective of driving President Clinton from office rather than uncovering criminal activity.

Leon Jaworski took extraordinary care not to intrude beyond the proper boundaries of his office. Mr. Jaworski would be the last person to suggest that an attempt to pierce the attorney-client privilege of the President or to interfere with the time-honored protective function of the Secret Service could be justified as an appropriate exercise of prosecutorial discretion, no matter what a court might ultimately rule.

Even 25 years ago, it was the practice of Federal prosecutors not to subpoena the target of a grand jury investigation. On the other hand, it was considered unfair to deprive the target of an investigation the opportunity to testify if he so desired.

Accordingly, Mr. Jaworski extended an invitation to President Nixon to testify before the grand jury. When Mr. Nixon declined, Mr. Jaworski did not publicize the exchange, because to do so

would have been unfair to comment on Mr. Nixon's decision not to testify. And, again, there was no leak.

By comparison, Mr. Starr has aggressively pursued every opportunity to push the limits of legal boundaries.

Mr. Jaworski recognized that he had a responsibility to transmit to Congress important evidence bearing on the House Judiciary Committee's impeachment inquiry. At the same time, he was careful not to encroach on Congress's constitutional function of evaluating evidence and determining whether impeachment was warranted. Because the evidence was obtained through grand jury subpoenas, Mr. Jaworski first sought the grand jury's approval and then sought permission from Chief Judge Sirica to transmit the material as an exception to rule 6(c), which would otherwise prohibit its dissemination.

Chairman HYDE. Can you wind up?

Mr. BEN-VENISTE. I would like to, Mr. Chairman. Unfortunately, yesterday I was told I would have 20 minutes and I have tried to boil it down as best I can.

Chairman HYDE. Well, I don't want to foreclose you because we are down to just two witnesses, so——

Mr. BEN-VENISTE. May I have an additional five minutes, sir?

Chairman HYDE. It is Christmas week, but you are setting a terrible precedent with my Republicans, but go ahead. Take five.

Mr. BEN-VENISTE. Thank you, Mr. Chairman.

Judge Sirica reviewed the transmittal which we had sent up to him through the grand jury. He found that the transmittal rendered no moral or social judgments. He found that the grand jury had taken care to assure that the report had no objectionable features, and that the grand jury had respected its own limitations and the rights of others, and then he passed it along to the Judiciary Committee.

At the same time, Mr. Jaworski did not inform the House that the grand jury had voted to authorize him to name Richard Nixon as an unindicted coconspirator in the upcoming Watergate cover-up trial. While the grand jury's action provided insight into its views of the evidence, the grand jury's decision was not itself evidence, and again, it would have been prejudicial at that point to make that information public, and again, this explosive information was never leaked.

Mr. Starr, as we know, did not submit his report to the grand jury for its approval or consideration, and thus no one, the chief judge, and not even the three-member court which gave him carte blanche authority, ever reviewed the aggressively accusatory and gratuitously salacious referral before it was transmitted to this committee. Mr. Starr's ethics advisor resigned when Mr. Starr agreed to act as chief advocate for impeachment, as a witness before this committee.

I believe, Chairman Hyde, that you stated at the outset that in substance—and I am not quoting, but this is my own recollection—that unless the public perceived this exercise before your committee as a bipartisan effort, that it would not have the kind of credibility necessary to bring an article of impeachment to the Floor of the House. In my view——

Chairman HYDE. If I could just interpret, what I really said was that the impeachment would not succeed without bipartisan support, but I was adverting to the two-thirds requirement in the Senate.

Mr. BEN-VENISTE. You mean conviction?

Chairman HYDE. Yes, I was talking about that. My hope was that as this process moved along, the public would get more and more educated as to its details, but I never really expected a lot of bipartisanship here, although I hoped for it. Thank you.

Mr. BEN-VENISTE. In my view, Mr. Chairman, the inability to find a bipartisan consensus in this committee is not a function of the individual characteristics of the Members, but it is more rooted in the wide gulf between the President's conduct, even assuming that the factual allegations against him are true, and were proved, and the grave consequences of a vote of impeachment.

I do not condone the President's conduct in his relationship with Ms. Lewinsky, or his conduct in the Paula Jones deposition. Indeed, I was personally let down and disappointed by his conduct. But it is clear to me that attempting to criminalize that conduct, much less make it the basis of an article of impeachment, would do a disservice to the Constitution and any notion of proportionality, moderation, and common sense.

I thank you for extending the time, Mr. Chairman.

Chairman HYDE. Thank you, Mr. Ben-Veniste.

[The information follows:]

December 8, 1998

STATEMENT OF RICHARD BEN-VENISTE

I am a graduate of Columbia Law School (J.D., 1967) and Northwestern University Law School (L.L.M., 1968). I served as Assistant United States Attorney and Chief of the Special Prosecutions Section in the United States Attorneys Office for the Southern District of New York from 1968-1973. Thereafter, from 1973-1975, I served as Assistant Special Prosecutor and Chief of the Watergate Task Force under Archibald Cox and Leon Jaworski.

More recently, I served as Minority Chief Counsel to the Senate Whitewater Committee during 1995-1996. In addition, I have served as Special Counsel to the Senate Subcommittee on Government Operations at the request of former Senator Lawton Chiles, and as Special Counsel to the Senate Subcommittee on District of Columbia Appropriations at the request of Senator Arlen Specter.

I have been engaged in the private practice of law continuously since 1975 and have represented clients in a wide variety of civil and criminal matters. In addition to serving as an assistant special prosecutor, I have also had the experience of defending a client indicted by Independent Counsel James McKay.

I am presently a partner in the Washington, D.C. office of Weil, Gotshal & Manges. Of course, my views stated before you are my personal opinions.

I am providing my observations and analysis -- not as a witness to the events in question, but as one who has had the opportunity during my professional career over the past thirty years to gain experience sufficient to offer some perspective on the issues before you.

The first Watergate Special Prosecutor, Archibald Cox, was fired on the orders of President Richard M. Nixon when he refused to back down after subpoenaing Nixon's famously incriminating White House tape recordings. In response to the firestorm of public opinion following the "Saturday Night Massacre," President Nixon replaced Professor Cox with Leon Jaworski, a conservative Texan who vowed to continue the investigation with the independence and professionalism that had marked Cox's truncated turn at the helm. But by all accounts, Leon Jaworski made good on his promise, and today his record provides the model against which all high profile investigations and prosecutions are measured.

In Watergate, the serious abuses of power committed by the Nixon Administration resulted in the prosecution and conviction of numerous individuals who had held public office during Nixon's tenure, including two attorneys general, John Mitchell and Richard Kleindeinst; H.R. Halderman, the White House chief of staff; the chief and deputy domestic advisors to the president, John Erlichman and Egil Krogh; Chuck Colson, a senior advisor to the president; the counsel to the president, John Dean; and others. Their offenses went directly to the abuse of the power of the president's office and the misuse of the CIA, the FBI, and the IRS in violation of important rights of others. The obstruction of justice and perjury that was committed in furtherance of the Watergate cover-up was designed to shield higher-ups from detection while blaming everything on the lower level individuals who had been caught red-handed.

Upon his appointment, Mr. Jaworski immediately withdrew from his lucrative law practice and devoted himself entirely to his duties as Special Prosecutor. Even with President Nixon's unlawful firing of Archibald Cox, the Watergate cover-up case was investigated and prosecuted within 21 months of the creation of the Special Prosecutor's office.

The credibility of the Watergate Special Prosecutor's office was dependent upon the public's perception of our investigation as professional, impartial and fair. If we had leaked such explosively damaging evidence as President Nixon's taped instruction to continue the cover-up, or his admission regarding promises of presidential clemency to the Watergate burglars, it would not only have been unfair, it would have violated the law. No leaks occurred.

Mr. Starr has the unhappy distinction of being the first independent counsel to come under investigation for unethical and possibly illegal conduct. In addition to the 24 prima facie instances of improper leaks of grand jury material identified by Chief Judge Norma Holloway Johnson, there was the spin-leak of the Starr referral itself in the days leading up to its actual transmittal. Mr. Starr's response to Rep. Zoe Lofgren's question as to whether he would release any journalists from promises of confidentiality – that it would be "unwise" for him to do so – may well be true, but only serves to reinforce the basis for Judge Johnson's suspicions. In addition, the aggressive and disproportionate tactics employed by Starr's office, often in violation of Department of Justice guidelines and bar association standards of professional responsibility, have left the public with a justifiable perception that Mr. Starr has conducted more of a crusade than an investigation – with the political objective of driving President Clinton from office, rather than uncovering criminal activity.

Leon Jaworski took extraordinary care not to intrude beyond the proper boundaries of his office. Mr. Jaworski would be the last person to suggest that an attempt to pierce the president's attorney-client privilege, or to interfere with the time-honored protective function of the Secret Service, could be justified as an appropriate exercise of prosecutorial discretion – no matter what a court might ultimately rule.

Even twenty-five years ago, it was the practice of federal prosecutors not to subpoena the target of a grand jury investigation. On the other hand, it was considered unfair to deprive a target of the opportunity to testify if he so desired. Accordingly, Mr. Jaworski extended an invitation to President Nixon to testify before the grand jury. When Mr. Nixon declined, Jaworski did not publicize the exchange – because to do so would have been an unfair comment on Nixon's decision not to testify. Again, there was no leak.

By comparison, Mr. Starr has aggressively pursued every opportunity to push the limits of legal boundaries – irrespective of the relatively minor significance of the subject matter of his inquiry, when compared to offenses that might involve misconduct of constitutional dimension.

Mr. Jaworski recognized that he had a responsibility to transmit to Congress important evidence bearing on the House Judiciary Committee's ongoing impeachment inquiry. At the same time, he was careful not to encroach upon Congress' constitutional function of evaluating evidence and determining whether impeachment was warranted. Because the evidence was obtained through grand jury subpoenas, Mr. Jaworski first sought the grand jury's approval and then sought permission from chief Judge Sirica to transmit the material as an exception to Rule 6(e), which would otherwise prohibit its dissemination outside the grand jury. Judge Sirica reviewed the proposed transmittal and found:

> "It renders no moral or social judgments. The Report is a simple and straightforward compilation of information gathered by the Grand Jury, and no more. . . . The Grand Jury has obviously taken care to assure that its Report contains no objectionable features, and has throughout acted in the interests of fairness. The Grand Jury having thus respected its own limitations and the rights of others, the Court ought to

respect the Jury's exercise of its prerogatives." In re Report, etc. 370 F. Supp. 1219, 1226 (D.D.C. 1974).

At the same time, Mr. Jaworski did not inform the House that the grand jury had voted to authorize him to name Mr. Nixon as an unindicted co-conspirator in the upcoming Watergate cover-up trial. While the grand jury's action provided insight into its view of the evidence, its decision was not evidence. Again, this explosive information was never leaked.

By comparison, Mr. Starr never submitted his proposed referral to Chief Judge Johnson for advance review, nor did he ask the grand jury to pass on its contents. Instead, we are told, he sought and received carte blanche permission from the three judge special court which first appointed him to disseminate such information to the House as he deemed appropriate. Thus, no one but Starr and his subordinates reviewed the aggressively accusatory and gratuitously salacious referral before it was transmitted to the Judiciary Committee. Against the advice of his ethics advisor, Mr. Starr agreed to act as chief advocate for impeachment as a witness before this Committee. Professor Dash resigned in protest, accusing Mr. Starr of violating his statutory obligations and unlawfully intruding on the House of Representatives' exclusive power of impeachment.

For some time I have been concerned about the lack of proportionality that has characterized Mr. Starr's investigation, and now this Committee's inquiry. I believe Chairman Hyde stated at the outset, in substance, that unless the public perceived this Committee's efforts as bipartisan, it would lack the credibility to bring articles of impeachment to the floor. In my view, the inability to find a bipartisan consensus in this Committee is rooted in the wide gulf between the President's conduct – even assuming all the factual allegations against him were to be proved – and the grave consequences of a vote of impeachment.

While I do not condone the President's conduct in engaging in his relationship with Ms. Lewinsky, or in the way he dealt with that issue in the Paula Jones deposition, it is clear to me that attempting to criminalize that conduct, much less make it the basis of articles of impeachment would do a disservice to the Constitution and any notion of proportionality, moderation and common sense.

Terms like "perjury" and "obstruction of justice" are constantly repeated before this Committee without regard for the context of the conduct. There was no lying about anything to do with disloyalty to the United States, or bribery or using the vast powers of federal agencies to inflict pain or embarrassment upon political or personal adversaries. Clearly, Mr. Clinton attempted to mislead and obfuscate about something which his adversaries already knew – that he had engaged in an improper physical relationship with a young intern. His misleading or even false testimony in that civil deposition did not change the result in the Paula Jones civil suit. The Court ruled that evidence about Ms. Lewinsky was too remote to be included in any trial, and then dismissed the suit altogether on other grounds. Ironically, Mr. Clinton's deposition testimony about Ms. Lewinsky is probably responsible for the fact that the case was settled in the amount it was.

And as to Mr. Clinton's testimony before the grand jury, is it not clear that Mr. Starr's purpose in forcing Mr. Clinton to testify was simply to provide additional fodder for an impeachment referral? What interest would a federal grand jury have in investigating whether one consenting adult touched another consenting adult here, there or anywhere? Moreover Mr. Clinton acknowledged having engaged in this reckless and improper physical relationship, and apologized for having misled everyone about it.

Yes, I agree that there has been too much hair splitting and defending the indefensible by the President – but surely this cannot be the reason the House of Representatives tells the American public who twice elected Bill Clinton – and the world – that our President should be removed.

And turning to claims of obstruction of justice, has this Committee asked the basic question – who was obstructed and how were they obstructed? Who did not learn what they needed to know; what injustice was perpetrated and on whom and to what result? These are not rhetorical questions – although I believe we all know the answers. These are questions that any serious or fair decision maker would want answered, because they go directly to the heart of the evaluation of the conduct in question.

What we do know is that the two supposed grounds for an obstruction charge – Vernon Jordan's attempt to find a job for Ms. Lewinsky and the "talking points" memorandum given Ms. Tripp by Ms. Lewinsky – which formed the basis for Mr. Starr's request to Attorney General Reno that his authority to investigate be expanded – are both dead letters. And Mr. Starr knew that before he called President Clinton as a grand jury witness.

I believe this Committee has not inquired sufficiently into the potential for mischief in misusing the powers of the Independent Counsel statute to exaggerate and skew an investigation.

I believe the Committee still has the opportunity to clarify the important distinction between what may be a prosecutable offense and what can be considered an impeachable offense. That the meaning of the expression "no man is above the law" had to do with whether the President, like anyone else must provide relevant evidence if subpoenaed – not whether the President must be impeached for any offense, like shoplifting or tax evasion, simply because other individuals may be prosecuted for similar conduct.

Conclusion

On August 28, 1998, in an opinion piece published in the Washington Post, I suggested that the appropriate resolution of the Lewinsky matter was for a group of respected leaders to come forward and propose a Congressional resolution of reprimand to deal with Mr. Clinton's reckless and improper personal conduct. It appears that such a group has begun to coalesce. Former President Gerald Ford, Sen. Joseph Lieberman, Sen. John Kerry, Rep. Peter King, and Rep. Martin Frost are among a bipartisan number of such leaders who, while unambiguously critical of the President's conduct, recognize that respect for the momentousness of the constitutional remedy of impeachment, and appreciation of a common sense application of proportionality to the offensive conduct, make a resolution of censure the appropriate result. Such a resolution, not impeachment, will give voice to the public's will in retaining their twice elected President's services, while expressing firm disapproval of his private conduct. In my view, such a resolution would be consistent with the obligations of the House of Representatives and in the best interests of our nation.

The Case Against Ken Starr

By Richard Ben-Veniste

WASHINGTON

Did Kenneth Starr know that Linda Tripp had tape-recorded her phone conversations with Monica Lewinsky weeks before Jan. 12, the date when he said he first learned of the tapes? If he did, the implications would be significant.

A flurry of recent news reports has revealed that disclosures about Ms. Tripp's activities were made to Mr. Starr's office in the week before Jan. 12. While important, these revelations may be but a part of a more serious chain of events dating from last year.

Ms. Tripp began recording her conversations with Ms. Lewinsky in the fall of 1997. When she consulted her lawyer in December, he apparently

Interconnected lawyers, intriguing questions..

told her that the taping was illegal under Maryland law, according to an Associated Press report. several months ago. Ms. Tripp's adviser and literary agent, Lucianne Goldberg, told A.P. that Ms. Tripp then "panicked" and sought a new lawyer who could get her immunity. According to The Washington Post, Ms. Goldberg and other allies of Ms. Tripp soon approached several politically conservative lawyers known to be supporters of Mr. Starr, including Theodore Olson, an Assistant Attorney General in the Reagan Administration and a close friend of Mr. Starr's.

If this information is correct, a case could be made that Mr. Starr's allies had the opportunity to pass along information to him that President Clinton had engaged in an illicit relationship with a young intern, who had been captured on tape admitting the affair to a "friend" who would be seeking immunity from prosecution. Why would these lawyers have kept this information from Mr. Starr?

Revelations in Mr. Starr's report to Congress and supporting documents, together with recent investigative news reports, are consistent with the hypothesis that Mr. Starr knew about the tapes much earlier than he has admitted.

For example, The Los Angeles Times has reported that Ms. Tripp was in contact with David Pyke, a lawyer for Paula Jones, about Ms. Lewinsky as early as Nov. 21, 1997. And Gilbert K. Davis, a lawyer who represented Ms. Jones until September 1997, has now acknowledged that the Jones team repeatedly sought advice on the case from Theodore Olson. Mr. Olson has also represented David Hale, Mr. Starr's main witness in the Whitewater-related trial of James and Susan McDougal and Gov. Jim Guy Tucker of Arkansas. I find it hard to believe that lawyers with connections to both the Jones team and the independent counsel's office would have kept Ms. Tripp's recordings a secret from Mr. Starr.

Mr. Starr's office has maintained that it had no knowledge that Ms. Tripp passed along information to the Jones lawyers the night before President Clinton's Jan. 17 deposition in the Paula Jones sexual-harassment case. Is it plausible that there was no cross-pollination of this information between Mr. Starr's confidants and Ms. Jones's extended legal family? After all, there would be no better way to "criminalize" the President's improper personal behavior than to have him ambushed in a perjury trap.

Those who are skeptical that there was a working relationship between the Starr and Jones camps must ask how it could be that the independent counsel's deputies could confront Ms. Lewinsky for the first time on Jan. 16 armed with knowledge that her lawyer had submitted a false affidavit in the Jones case. According to the Starr report, while the affidavit had already been sent to the Jones lawyers by Jan. 16, the judge in the case, Susan Webber Wright, didn't get it until the next day.

If Mr. Starr knew of the tapes weeks before he has acknowledged, it would mean that he deceived Attorney General Janet Reno when he explained the chronology of events to her on Jan. 15 in his feverish bid to expand his jurisdictional mandate to include Ms. Lewinsky. So too would Mr. Starr's report to the House be tainted by a fundamental misrepresentation of the facts.

If Mr. Starr did not tell the entire truth, what might have motivated him? To find the answer, the House Judiciary Committee should investigate to what extent surrogates for Mr. Starr may have provided an unseen hand, directing Ms. Tripp in her manipulation of Monica Lewinsky. Mr. Starr's justification for investigating the Lewinsky matter — possible obstruction of justice involving Vernon Jordan — now appears to be a scenario entirely scripted by Ms. Tripp.

Indeed, according to Ms. Lewinsky's testimony, it was not until Jan. 9, just a week before Mr. Clinton's deposition in the Jones case, that Ms. Tripp introduced the notion that Mr. Jordan find a new job for the former intern as a quid pro quo for Ms. Lewinsky's denial that she had sexual relations with Mr. Clinton. Similarly, the talking points memorandum has now been debunked as an interactive project between Ms. Tripp and Ms. Lewinsky.

In short, we need to find out what caused Ms. Tripp to appear to focus her efforts on trying to coax Monica Lewinsky and others into the *appearance* of obstructing justice — a far stretch from her earlier efforts to get Ms. Lewinsky to talk about details of her improper relationship with the President.

The Starr report raises new questions about the conduct of the grand jury investigation. According to the report, Lucianne Goldberg was not called to testify before the grand jury. It seems curious that Mr. Starr would not call the person who admittedly encouraged Ms. Tripp to tape the phone calls and who was apparently involved in Ms. Tripp's every step if his sole interest was, as he has claimed, "getting the truth."

Another mystery is what has become of the tapes that Ms. Goldberg told the F.B.I. she made of her conversations with Ms. Tripp in September 1997. And as to Ms. Lewinsky's alleged perjury, when the Starr deputies dissuaded her from contacting her lawyer when they first confronted her on the evening of Jan. 16, it prevented her lawyer from having the opportunity to withdraw her affidavit before it was filed with the court.

Much of the public's resistance to the claimed gravity of the Starr report is found in the common-sense realization that Mr. Starr's quest to "get" President Clinton at all costs goes against our basic sense of justice and fair play. Mr. Starr is now himself the subject of an investigation by Judge Norma Holloway Johnson of the United States District Court into alleged improper leaks of grand jury material.

The Justice Department and Judiciary Committee should investigate whether Mr. Starr misrepresented the facts about his knowledge of Ms. Tripp's tapes. If he did, it would be time to consider his removal and a reassessment of his charges against the President. C

Richard Ben-Veniste was chief of the Watergate task force in the Watergate special prosecutor's office from 1973 to 1975 and was counsel for the Democratic minority on the Senate Whitewater committee in 1995 and 1996.

Note to Readers

The Op-Ed page welcomes unsolicited manuscripts. Because of the volume of submissions, however, we regret that we cannot acknowledge an article or return it. If manuscripts are accepted for publication, authors will be notified within two weeks. For further information, call (212) 556-1831.

EXHIBIT B

To Statement of Richard Ben-Veniste

Richard Ben-Veniste

The Perfect President

Personally, I haven't seen one yet, although Harry S. Truman, the first president I remember, came close. Steadfast, honorable and solid, Truman rose above his modest résumé and guided us through the end of World War II and into the postwar period. Imagine what Truman's presidency would have been like if he had had an independent counsel on his tail for four years, examining his old ties to the Pendergast political machine in Missouri.

The independent counsel statute has become so skewed in its application that there is little doubt about its demise next year. A law rooted in the historical fact of a president, his highest aides and his attorney general criminally abusing the powers of the presidency has been misused to sanction a largely political fishing expedition. For more than four years Kenneth Starr has trolled through the waters of President Clinton's life, dating back to when he first entered politics two decades ago. The scope of that inquiry and the zealousness with which it has been conducted—unprecedented in its intrusiveness—was nevertheless unavailing in producing evidence of impropriety by Mr. Clinton, much less illegality.

But before the imminent collapse of his investigation, Starr seized upon the Paula Jones case to resuscitate his quest. The Supreme Court—in a decision now shown to have been naive in the extreme—ruled that it would not be overly intrusive on a president's official duties for him to comply with pretrial discovery in a civil case about matters antedating his term of office.

The Paula Jones case is the Cheshire cat in the current imbroglio. The case has disappeared, thanks to Judge Susan Webber Wright's ruling (although it periodically threatens to reappear). All that is left is the mischief of pretrial deposition answers by the president when he walked into the Tripp/Jones/Starr ambush.

More important than Webber Wright's dismissal, however, was her finding that the Lewinsky matter was not essential to the core issues in Jones's complaint and could not be part of the case if it went forward. Thus, it can be reasoned, if the president had refused to answer the questions put forward on that topic instead of answering, the judge eventually would have reached the same conclusion. All the recent hyperbole about obstruction of justice (precisely *who* was obstructed, and *how*, one ought to ask) would have been avoided. But the president's reckless indiscretion and lack of candor have enabled Starr, finally, to demonstrate impropriety. In the process, Starr has himself become the first independent counsel to be the subject of a court-authorized investigation into unethical and perhaps illegal misuse of grand jury information.

Now that we have come to this unhappy juncture, how do we proceed?

In any rational system, the punishment should be proportionate to the offense. Yes, it was offensive for President Clinton to engage in a physical relationship with a White House intern. And, yes, it was offensive that the president failed to acknowledge the relationship candidly when the issue first arose, thereby causing all sorts of collateral problems while he temporized with denials.

We don't need to hear any more of the lurid details.

But a prolonged period of torturing Bill Clinton will serve no purpose other than a narrow political one. In the meantime, the national interest will most assuredly be harmed, as the events over the past few weeks in Africa and Afghanistan only preview. The collision between an implacable and overzealous independent counsel and an imperfect and proud president should not be allowed to escalate further into extended hearings, filling in the lurid details about what we already know. It is now up to those with the stature and commitment to the national interest to rise above partisan politics and bring closure to this lamentable episode.

Perhaps Kenneth Starr will act to rescue his damaged reputation by assuming the role of statesman/prosecutor and decline to send a report to the House, acknowledging that the Framers had only official acts of misconduct in mind when they drafted the impeachment clause in Article II of the Constitution. Perhaps pigs will fly.

Only slightly less unlikely is the possibility that a group of respected leaders will appear on the scene as a collective deus ex machina. They will put things right again in the nation by proclaiming that Congress should pass a resolution reprimanding the president for his inappropriate relationship with a White House intern, and for lack of candor in his civil deposition and over the several-month period thereafter. And let the legitimate business of government go forward.

The alternative scenario—going through the full circus of leaked Starr report, report, further leaks, airing of Tripp tapes, sanctimonious declamations, counterstrikes regarding sexual hypocrisy, all brought to us nonstop, in color, 24 hours a day, for all the world to see—is almost too horrible to contemplate.

The writer, a Washington lawyer, was chief of the Watergate Task Force of the Watergate Special Prosecutor's Office and chief minority counsel of the Senate Whitewater committee.

EXHIBIT A
To Statement of Richard Ben-Veniste

Chairman HYDE. Mr. Hamilton.

Mr. HAMILTON. Mr. Chairman, members of the committee, thank you for the opportunity to address you in this——

Mr. CONYERS. Move your mike closer, sir. Thank you.

Mr. HAMILTON. Thank you for the opportunity to address you on the momentous issue of impeachment that you now face. I wish to focus mainly on the abuse of power allegations made by Mr. Starr in items 10 and 11 of his submission to this committee and by Mr. Schippers in item 14 of his reformulation of the charges. Read together, the assertions are that President Clinton, in addition to committing perjury, abused his power by various other actions:

First, by lying to the American people and the Congress about his relationship with Ms. Lewinsky. Second, by lying to his wife, the Cabinet, and his present and former staff about that relationship, which caused some of them to repeat his falsehoods to the grand jury, the public and the Congress. Third, by repeatedly and unlawfully invoking executive privilege to conceal his personal misconduct from the grand jury. And fourth, by refusing six invitations to testify before the grand jury, and by declining to answer relevant questions when he did testify in August 1998.

A central question before this committee and the Congress is whether these alleged abuses of power, assuming they are proven true, rise to the level of impeachable offenses. In my view, they do not.

A proper starting point is the abuse of power allegations in Article 2 of the impeachment resolution against President Nixon that caused this committee to vote 28–to–10 to impeach him. The contrast between President Nixon's conduct and President Clinton's conduct is striking.

The committee voted to impeach Nixon for the following five abuses of power: first, for causing the Internal Revenue Service to initiate audits and investigations of Nixon enemies, and to provide his associates with information about these enemies for the President's political benefit. Second, for causing the FBI and the Secret Service to engage in unlawful wiretaps for the President's political advantage, and for causing the FBI to conceal evidence of these wiretaps. Third, for maintaining a secret investigation unit, the plumbers, that using CIA resources and campaign contributions, engaged in various unlawful covert activities, including the break-in of the office of Daniel Elsberg, psychiatrist. Fourth, for allowing conduct that impeded the investigations of the break-in of the DNC headquarters, the ensuing cover-up, and other misdeeds. And, fifth, for interfering with the FBI, the Criminal Division, the Watergate special prosecutor's office, and the CIA for personal political advantage. This interference included Nixon's firing of Special Prosecutor Cox and his attempts to abolish the special prosecutor's office in order to stymie its investigation.

Mr. Chairman, this conduct rightly was considered to constitute high crimes and misdemeanors that justified impeachment. To use the words of Founder George Mason, who proposed the phrase "high crimes and misdemeanors," Nixon's conduct constituted great and dangerous offenses against the State that amounted to acts to subvert the Constitution. The notion of great and dangerous of-

fenses against the State captures the essence of what an impeachable offense should be. It must be as Alexander Hamilton said. It must relate chiefly to injuries done to the society itself. A President should not be impeached to subject him to punishment, but rather, to protect the State and society against great and dangerous offenses that might reoccur if he is allowed to remain in office.

I respectfully submit that the alleged abuses by President Clinton do not indicate that he is a danger to the Nation. Lying to the public and to his Cabinet and aides is disgraceful, but if we would impeach all officials who lie about personal or official matters, I fear that the halls of government would be seriously depleted. Other Presidents, for example, Lyndon Johnson as to Vietnam, have not been candid in their public and private statements. There must be a higher bar for impeachment.

It is true that Article 1 of the impeachment resolution against Nixon charged that he misled the public about the scope of his administration's investigation of Watergate misconduct, and the lack of involvement by administration and reelection committee personnel in this misconduct. But these statements involve lies about official actions and were part of a massive cover-up of government misdeeds. This is far different than lies about private consensual sexual conduct.

The claim that unsuccessfully asserting executive privilege to the grand jury is impeachable is, in my view, extraordinarily thin. The President did so upon the advice of counsel, and the district court recognized that the President's conversations were presumptively privileged, although it found that the needs of the criminal justice system outweighed that privilege. At no time did the court suggest that the privilege was claimed in bad faith. Losing a privilege argument, Mr. Chairman, should not present grounds for removal from office.

As this committee may know, I had my own battle with Mr. Starr about whether Vince Foster's attorney-client privilege survived his death, which I won in the Supreme Court. Even in my angry moments about that case, and there have been some, I would not contend that Mr. Starr should be removed from office under the good cause provision of the Independent Counsel Act simply because he failed to convince the Supreme Court that he was right.

Neither the President's reticence to appear before the grand jury, nor his failure to answer certain questions put by the prosecutors, should constitute impeachable offenses. The President was well aware that he was facing a hostile prosecutor, of whom he had much to fear. He was not under subpoena, and thus had no obligation to appear at a time certain. Moreover, Mr. Starr agreed to the rules that allowed the President to decline to answer certain questions in his grand jury deposition. In these circumstances, to brand his conduct as impeachable is untenable.

The claim that the President lied under oath, of course, is more troubling than these other allegations against President Clinton. But lying about private consensual sexual conduct seems more appropriately designated as a low crime, rather than a high crime. While reprehensible, it is not a great and dangerous offense against the State that demonstrates the necessity of removing the President from office to protect the Nation from further abuses.

Now, I readily concede that lies under oath about treason, bribery, the break-in at the DNC, or matters of national security could be high crimes and thus impeachable, but the conduct at issue seems of a different character. The committee should recall that the claim that President Nixon fraudulently evaded his tax obligations, which essentially involved private, not official wrongdoing, was not made part of the impeachment charges against him.

Mr. Chairman, because this Nation requires a strong and secure presidency, this committee and Congress should be chary of making impeachment too easy. Long ago, in 1691, the Solicitor General, later Lord Chancellor Somers, told the British Parliament that the power of impeachment ought to be like Goliath's sword, kept in the temple and not used but on great occasions. In a similar vein, Justice Story wrote that impeachment is intended for occasional and extraordinary cases where a superior power, acting for the whole people, is put into operation to protect their rights and to rescue their liberties from violation.

Mr. Chairman, we must guard against turning our system into a parliamentary one, where a national election can be negated by a legislative no-confidence vote.

Chairman HYDE. Would you like another five minutes?

Mr. HAMILTON. I would like another three minutes.

Chairman HYDE. Oh, that is so much the better. Please continue.

Mr. HAMILTON. This is particularly true because the Congress has another tool with which to express its strong disapproval of the President's action: A concurrent resolution of censure. With the Chair's permission I will submit for the record several articles I have recently written showing that a concurrent resolution of censure would be fully constitutional and in accordance with congressional practices. These articles also contend that a sharp censure coupled with a significant agreed-on fine would be an appropriate remedy. I will be pleased to expound on my views if the committee desires.

Some argue that a censure resolution would injure the presidency by setting a precedent that would make censure commonplace. I have no doubt that censure resolutions, if judgment is not exercised and partisanship abounds, could be used unwisely to weaken the presidency. But how much more harm would be caused by impeaching a President for actions that, while deplorable, do not amount to great and dangerous offenses against the State or require his removal to protect the Nation?

With all deference, Mr. Chairman, this is a time for statesmanship, wisdom and conscience, not partisan politics. In my judgment, a vote for impeachment along party lines would be a horrendous result from which the presidency and the Nation would suffer for years to come. The goal should be to end this matter now in a nonpartisan fashion that appropriately sanctions the President and allows the government and the Nation to return to the other pressing problems we face.

Thank you for your attention.

[The information follows:]

December 8, 1998

HOUSE JUDICIARY COMMITTEE
TESTIMONY of Jim Hamilton

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Third, by repeatedly and unlawfully invoking executive privilege to conceal his personal misconduct from the Grand Jury.

And fourth, by refusing six invitations to testify before the Grand Jury and by declining to answer relevant questions when he did testify in August 1998.

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2. For causing the FBI and the Secret Service to engage in unlawful wire taps for the President's political advantage and for causing the FBI to conceal wire tap evidence.

3. For maintaining a secret investigation unit -- The Plumbers -- that, using CIA resources and campaign contributions, engaged in various unlawful covert activities, including the break-in of the office of Daniel Ellsberg's psychiatrist.

4. For allowing conduct that impeded the investigations of the break-in of the DNC headquarters, the ensuing coverup, and other misdeeds.

5. For interfering with the FBI, the Criminal Division, the Watergate Special Prosecutor's Office, and the CIA for personal political advantage. This interference included Nixon's firing of Special Prosecutor Cox and his attempts to abolish the Special Prosecutor's Office in order to stymie its investigations.

Mr. Chairman, this conduct rightly was considered to constitute "high Crimes and Misdemeanors" that justified impeachment. To use the words of George Mason, who proposed the phrase "high Crimes and Misdemeanors," Nixon's conduct constituted "great and dangerous offenses" against the state that amounted to "acts to subvert the Constitution."

The notion of "great and dangerous offences" against the state captures the essence of what an impeachable offense should be. It must, as Alexander Hamilton said, "relate chiefly to injuries done to the society itself." A President should not be impeached to subject him to <u>punishment</u>, but rather to <u>protect</u> the state and society against "great and dangerous offenses" that might reoccur if he is allowed to remain in office.

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Losing a privilege argument should not present grounds for removal from office. As the Committee may know, I had my own privilege battle with Mr. Starr about

whether Vince Foster's attorney-client privilege survived his death, which I won in the Supreme Court. Even at my angry moments about that case -- and there have been some -- I would not contend that Mr. Starr should be removed from office under the good cause provision of the Independent Counsel Act simply because he failed to convince the Supreme Court that he was right.

Neither the President's reticence to appear before the Grand Jury nor his failure to answer certain questions put by the prosecutors should constitute impeachable offenses. The President was well aware that he was facing a hostile prosecutor of whom he had much to fear. He was not under subpoena and thus had no obligation to appear at a time certain. Moreover, Mr. Starr agreed to the rules that allowed the President to decline to answer certain questions

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Some argue that use of a censure resolution would injure the Presidency by setting a precedent that would make censure commonplace. I have no doubt that censure resolutions, if judgment is not exercised and partisanship abounds, could be used unwisely to weaken the Presidency. But how much more harm could be caused by impeaching a President for actions that, while deplorable, do not amount to "great and dangerous offenses" against the state or require his removal to protect the nation.

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Presidency and the nation would suffer for years to come. The goal should be to end this matter now in a non-partisan fashion that appropriately sanctions the President and allows the government and the nation to return to the other pressing problems that we face.

Thank you for your attention.

Chairman HYDE. Thank you, Mr. Hamilton.

The gentleman from Wisconsin, Mr. Sensenbrenner.

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

First of all, let me express my concern that the White House really does not want to work with this committee to resolve this matter in the manner in which you have just described. I was in the back room having a couple of slices of pizza before coming out here for the questions and answers, and on CNN as we speak, Wolf Blitzer and Greta Van Susteren are talking about the 184-page response that Mr. Craig said was coming up to the committee. They have read it, they have been able to dissect it, they have been able to analyze it, and we have never gotten it. And it seems to me, when I was practicing law way back when, that you always gave counsel on the opposing side a copy of your pleadings before releasing it to the press. Isn't that standard law practice?

Mr. HAMILTON. Well, I think it depends on who your opponent is. But I understand, Congressman—I think—I understand, Congressman, that you will receive that brief in the near future.

Mr. SENSENBRENNER. Well, both of you have criticized Mr. Starr for leaking things prematurely, so that the White House and members of the committee and the American public have learned things before they really were supposed to. Now, aren't you, Mr. Hamilton, saying that there are different strokes for different folks here?

Mr. HAMILTON. Well, I believe it was Mr. Ben-Veniste who criticized Mr. Starr in his opening statement for leaking, Congressman. Maybe I will let him speak to that.

Mr. BEN-VENISTE. Let me say this, Mr. Congressman.

Mr. SENSENBRENNER. Will you please turn the mike on, Mr. Ben-Veniste?

Mr. BEN-VENISTE. Yes, sir. Let me say this. It is not my practice, and nor would I have provided copies of that material to anyone else prior to its designated recipient. I don't think that is the appropriate way to do it.

Mr. SENSENBRENNER. So you are saying that the practice of the White House in releasing it, at least to CNN, before sending it up here so that members of the committee could have it, is inappropriate?

Mr. BEN-VENISTE. If that is what happened, it is not the way that I would have handled the matter. But to follow on to your question, the idea of leaking grand jury matters, I am sure you will agree, is by several steps much more dangerous and indeed illegal, and so we are really not talking about comparable events.

Mr. SENSENBRENNER. Mr. Ben-Veniste, last month when Judge Starr was here explaining the content of his referral, Mr. Kendall, who is one of the President's personal attorneys, was given an hour to cross-examine him. And one of the issues of cross-examination that Mr. Kendall raised was whether or not the Independent Counsel staff treated Monica Lewinsky unfairly at the time of the interview in the Ritz-Carlton Hotel about a week before all of us found out who Monica Lewinsky was.

Apparently, that issue was litigated, and there was a sealed decision rendered months before Judge Starr's testimony that Judge Johnson reviewed the matter and determined that there had not

been prosecutorial misconduct. I assume that Mr. Kendall, as the President's lawyer, was familiar with that sealed decision.

Judge Starr did not refer to it. He didn't leak it. He didn't testify before the committee. What do you think the ethics are of bringing up a sealed decision that you know has occurred in an attempt to get the lawyer on the other side to try to admit the misconduct or unethically refer to a sealed decision?

Mr. BEN-VENISTE. Well, there are two things about that, and I have not read the decision. I don't know whether it has been released publicly or not.

Mr. SENSENBRENNER. It was in the newspaper. It was released.

Mr. BEN-VENISTE. I have not read it. But I understand that there were two aspects to it.

One is whether the actual circumstances of her interrogation were unlawful, that is, whether she was free to go or not; and, secondly, whether it was appropriate for the prosecutors to attempt to plea bargain with her in the absence of her attorney whom they knew was representing her. And I think as to the latter question, that was, at least unethical and probably improper. So I think there is a distinction——

Mr. SENSENBRENNER. That was not my question. My question was whether it was ethical for Kendall to ask those questions.

Chairman HYDE. The gentleman's time has expired.

The gentleman from Michigan, Mr. Conyers.

Mr. BEN-VENISTE. Does the Chairman wish me to answer the question?

Mr. CONYERS. I think I will just let Mr. Ben-Veniste quickly conclude his response to Mr. Sensenbrenner.

Mr. BEN-VENISTE. Well, I think the area of inquiry was quite appropriate. The confidence of the American public in whether an Independent Counsel has performed consistently with the public's expectations of fairness and independence is an appropriate area of inquiry. Unfortunately, in watching Mr. Kendall's examination, that exchange, it seemed to be a combination of cross-examination and beat the clock. I have practiced trial law for 30 years, and I have never had that kind of restriction placed on a cross-examination. It is a very difficult, difficult obligation to undertake, Mr. Sensenbrenner.

Mr. CONYERS. Mr. Ben-Veniste and Mr. Hamilton, you are two of the most seasoned lawyers that we have in the area across the years and down through time. Let me just solicit your opinions on these two considerations.

How has the Starr investigation harmed the present impeachment inquiry? Would an investigation that had not been tainted by possibly unfair and unethical tactics have brought us to a different result today? And how has this committee's process negatively impacted on the inquiry that we are charged to dispose of?

Mr. BEN-VENISTE. Well, let me take the latter question first.

To the extent that there is the impression in the public's mind that this process has not been bipartisan or fair, where people haven't had an adequate opportunity to either express their views or explore the subject matter or inform the public, then I think we all suffer as a result of that. I don't know what happens in executive session, or whether there have been accommodations made,

but simply in reading the newspapers there seems to be the impression that we are in some kind of a hurry-up mode, and yet there is this disconnect in proportionality between the gravity of the offenses and the speed with which you are conducting these hearings, and I think the process does suffer in the public mind in that sense.

Mr. CONYERS. Mr. Hamilton.

Mr. HAMILTON. Mr. Conyers, let me just say that I think that one reason that the Watergate Committee, the Senate Watergate Committee was so successful is that Senator Erwin and Senator Baker worked together to—in a bipartisan fashion. That is not to say that there were not strong disagreements, but most of these were worked out behind the scene, and the committee worked together to get the information and, of course, produced a unanimous report. And I think, for that reason, its conclusions have stood the test of time.

Mr. CONYERS. Well, I certainly hope that somewhere in our congressional body among those two dozen Republicans that are, you know—I don't know what they are doing besides reading and praying and trying to find the fortitude to help forge this middle path so that we can all get to this exit door with some shred of dignity, rather than to just push this thing over the cliff where we know nothing will happen. I am hoping that somehow there will be some epiphany, if necessary, to help us get across this hump. I am hoping that your discussions with our colleagues tonight and the work we do in the next 48 hours will help something like that happen.

Mr. BEN-VENISTE. I join in that hope and——

Mr. CONYERS. Is that too optimistic?

Mr. BEN-VENISTE. Well, Father Drinan's prayer I think set an admirable tone, and I cast my ecumenical vote in that direction.

Mr. CONYERS. Thank you.

Chairman HYDE. The gentleman's time has expired.

The gentleman from Florida, Mr. McCollum.

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

Good to see both of you here today.

I have a couple of observations about today. It seems to me that in the President's defense through this day we have been proceeding through some fairly carefully crafted patterns. This panel principally seems to be designed to attack Mr. Starr. With all due respect, that is what I think you are doing, or have done, or attempted to do, which has been a tactic of the White House defense team for some time but diverts attention from the probative questions of whether the President did commit the felonies he has been charged with or whether or not indeed there is an impeachable offense.

The previous panel spent a great deal of time in the question and answer period and some of their testimony trying to scare folks with the belief that if we impeach that we are going to have a long, protracted trial and the consequences of impeachment are going to be very dire for the Nation, when, in fact, based on what Mr. Craig said earlier this morning, with the admission of the White House counsel, the truthfulness is not questioned of what Betty Currie said or what Vernon Jordan said.

With a record fairly complete, with no need to call up any witnesses, since we have a formal record collected for us which all of us can examine and have been, I would suggest the trial in the Senate could be very short, probably simply rendered, first of all, from the President's defense standpoint to a summary judgment request on the basis that these aren't impeachable offenses and then, if not, pretty much the facts are going to speak for themselves.

Certainly the President could have chosen to call some of these folks as witnesses if he wanted them cross-examined. We didn't think it was necessary. I don't today think it is; and I guess. By not calling them, the President doesn't either, because the record is so complete on the facts. There just may be some hair-splitting differences.

We will hear Mr. Ruff talk about more tomorrow on those facts and then, of course, the claim that this isn't impeachable in some way.

I would submit that the consequences of this, if indeed the facts do bear us out, and I think they do, that the President lied under oath a number of times, committed perjury in the case involving Paula Jones multiple times, committed perjury before the grand jury, which Professor Dershowitz said, if indeed he believed it were true, though he doesn't, and I think the facts show it is true, would be an impeachable offense for which the President he said should be impeached. If that is the case, committed the crimes of obstruction of justice regarding the matters of the affidavit and the gifts and maybe what he said to Betty Currie, all of these things or even a substantial number of them or even if it is only the grand jury perjury, as Professor Dershowitz points out, are true, and we believe that, then our failure to impeach the President would be a terribly dire consequence for the Nation.

In fact, to suggest that these don't rise to the level of impeachable offenses begs a great question. The Constitution says, treason, bribery and other high crimes and misdemeanors. Bribing a witness and perjury are one and the same thing, essentially. They are treated the same way by the Sentencing Commission.

Interestingly enough, the Sentencing Commission has exactly the same level of punishment recommended for both of them. Perjury and bribery of a witness go to the basic premise that if a party to a lawsuit cannot get the truth on the record, if somebody lies or encourages somebody else to lie or somebody, as a witness, hides the evidence or encourages somebody else to hide the evidence, a party in a lawsuit cannot get justice, they cannot get a judgment rendered by a court that is fair and just to them, which is the traditional American way. So it is considered very grave.

And if bribery and bribing a witness is part of the bribery laws of this Nation, if bribery is specifically named in the Constitution as an impeachable offense, it seems to me, so is perjury. And the consequence of not going forward with perjury in these cases would be grave. Because, in that case, we are undermining the integrity of the court system. We are going to encourage more people, it seems to me, to commit perjury in the future or to witness tamper or whatever.

We are likely to find fewer cases where Federal judges will be impeached for perjury. People will be treated differently than the

President. One hundred and fifteen people are already in prison today for perjury in the Federal system. If this President committed it, we have a double standard.

I think the consequences of not doing it are extraordinarily dire, and I am disappointed that the President's defense has not come forward with a more substantive process with regard to the facts. Now that may happen tomorrow. It has not happened today. I am looking forward to tomorrow, because I want to engage that, since I happen to believe, based on what I have seen, it is going to be a heavy burden to prove that the facts are not right, that are in every bit of the evidence that we have before us that indeed the President committed the perjury numerous times, that he committed obstruction of justice and so forth.

So I will look forward to tomorrow. I don't think today was very constructive.

Thank you, Mr. Chairman.

Mr. BEN-VENISTE. I take it there was no question in that?

Mr. MCCOLLUM. There was no question, just an observation.

Mr. BEN-VENISTE. Because I do disagree most respectfully with many of the things you have said.

Mr. GEKAS. Regular order, Mr. Chairman.

Chairman HYDE. I am sorry. I was talking to Mr. Conyers. That does happen now and then.

Mr. MCCOLLUM. My time expired. I yielded back.

Chairman HYDE. It has expired.

Mr. MCCOLLUM. I have no question.

Chairman HYDE. Mr. Frank.

Mr. FRANK. I want to begin with just an observation. Because one of the things we have been talking about has to do with censure, and I am convinced that we should have censure as an option. I believe that it represents a majority.

But I am struck by two arguments against it. And just as it seems to me two of the articles of grand jury perjury are articles in the alternative, that is, they contradict each other, the second and third accusations. The major arguments against censure are being made in the alternative, and I thought I would just ask my colleagues to pick one or the other. Because I do think when we get to the floor we can't act like lawyers anymore and argue two inconsistent things in the hope that one of them will stick.

One argument against censure is that it is meaningless, that it is trivial, that it is a slap on the wrist, that it does not sufficiently injure the President and, therefore, is not suitable punishment. The other is that censure, once we begin it, will be so frequently resorted to that it will cripple the presidency. Now, it is a pretty fragile president who could be crippled by a slap on his wrist or it would be a pretty hefty slapper.

The arguments, one, that censure is wrong because it is too little a punishment, directly contradicts the notion that censure is wrong because it would be too heavy a punishment. I would be perfectly—I don't hold my colleagues to too high a standard; one consistent argument will do. But two inconsistent ones it seems to me ought to be dropped, and you ought not to be arguing that censure is both too much of a punishment and would, once resorted to, become interference with the presidency and also too little of one.

Now, let me turn to our witnesses here, because I do believe that the assertion that there was grand jury perjury is simply not true; and, with regard to the deposition, it does seem to be clear that the President lied in one case. I do not believe that the President did not remember whether or not he and Monica Lewinsky had been alone. The question there, though, does go to materiality, and I will be interested tomorrow in particular to talk about materiality.

But let me ask on the obstruction of justice from your standpoint as criminal attorneys, people who have tried and prosecuted and defended. One of the arguments is, my colleague from Florida just said, a witness being asked to lie, that that is high bribery, and I assume one of the accusations is that the President bribed, in effect, Monica Lewinsky, that by offer of a job and by other inducements the President got Monica Lewinsky to lie.

Let me ask both of you, if you were prosecuting attorneys and you contemplated bringing such a case and you found that, in a volunteered bit of testimony to the grand jury, the person who was presumably bribed not to tell the truth said, by the way, no one asked me to lie, and no one promised me a job for my silence, would that affect your decision to prosecute that case? And do you think a case in which the alleged subject, recipient of the bribe, volunteered that she had not been made any promise or asked, would that be a problem? And, secondarily, as a matter of lawyer's tactics, if you were the prosecutor, why would you never have asked her this?

Because Monica Lewinsky volunteered. At no point did the prosecutor ask her. So one reason you couldn't cross-examine her on the question about whether she was bribed is that she was never examined on that subject. The prosecutors quite scrupulously avoided asking her. So how would that affect your decision to bring the case? And if you were the prosecutor trying to bring such a case, would you have asked her, Mr. Ben-Veniste?

Mr. BEN-VENISTE. Well, certainly in my experience bringing that kind of a case would have some kind of scatological barnyard expletive attached to it. It is just not a case any Federal prosecutor would bring, in my experience.

On the other hand, because now we are talking about impeachment, the notion that the Founders gave consideration to the proposition that the President of the United States of this new republic might be on the "give" rather than on the "take" is certainly beyond comprehension. The specification of bribery and treason meant that the President should be loyal to the United States, that he should not commit treason, he should not accept bribes, he should not accept emoluments that were not appropriate to his office, he should conduct himself in an honest way in the affairs of state. That is what that was all about. In my opinion, the idea that the facts concerning efforts to help Ms. Lewinsky find a job have absolutely no connection to reality in terms of impeachment.

Chairman HYDE. The gentleman from Pennsylvania, Mr.——

Mr. CONYERS. Mr. Chairman?

Chairman HYDE. Oh, I am sorry. I recognize the gentleman from Michigan.

Mr. CONYERS. I ask unanimous consent to have printed overnight the submission by the counsel of the President to the Committee

on the Judiciary of the United States, this document that just has been delivered to yourself and myself.

Chairman HYDE. Without objection, so ordered.

Mr. CONYERS. I further ask unanimous consent to have printed with Professor Dershowitz' testimony a letter that he has sent to me.

Chairman HYDE. That would be in the previous record.

Mr. CONYERS. Exactly.

Chairman HYDE. Yes. Without objection, so ordered.

Mr. CONYERS. Thank you.

Chairman HYDE. The gentleman from Pennsylvania, Mr. Gekas.

Mr. GEKAS. I thank the Chair.

Mr. Hastings, I think—no, Mr. Hamilton it is, yes. Deja vu. You and I have the makings of a deal, I think. I have felt from the very first moment that we received the referral from Judge Starr that there were serious problems with his assertion that the assertion of executive privilege by the President, by itself, would constitute an abuse of power, and I am still delving into that mess in the formulation of my position, my final position. But while I am tending to give you that, it seems to me you have given me, and we have the makings of a deal, great concern about the President's alleged lying under oath. You exhibit a troubled mind as to that category of what we are considering in this case.

Do you believe that given the fact that if perjury or lying under oath was committed by the President in the Jones case, that it had the intended result of destroying the case of a fellow American citizen who lawfully, as decreed by the Supreme Court, had the chance to sue the President of the United States, with which decision, by the way, I disagreed, I still rue that decision by the Supreme Court. Don't you believe that this rises beyond the level of something as oh, it is just perjury and it is just about sex, and it doesn't matter? Aren't you willing to yield to me that that is serious enough for this panel to apply its conscience and its collective judgment in determining whether or not it is an impeachable offense?

Mr. HAMILTON. Well, I certainly think the panel should apply its judgment and its conscience in determining whether it is an impeachable offense. My position is that assuming that he lied in the Jones deposition or the grand jury, I think that you can look at that conduct and still say, it is not impeachable, because it is not a great and dangerous offense against the State. Sure——

Mr. GEKAS. We don't have a deal.

Mr. HAMILTON. I am sorry to hear that.

Mr. GEKAS. Mr. Ben-Veniste, I want to congratulate you on the most artful bill of particulars ever drawn up against a nonparty to the investigation. Your bill of particulars against Ken Starr is wonderful. It is masterful. You have an article here about the perfect President in which you criticize Starr; you have another one, the case against Ken Starr. Marvelous language and articulation of the case against Ken Starr.

This prompts me to invite you to be the first witness that I am going to have in next spring on the question of the reauthorization of Independent Counsel, which you seem to feel is of no value, at least the Independent Counsel statute. Just a moment, I will let you get to it.

The thing that bothers me is I didn't see any articles during the Lawrence Walsh reign of his incumbency as Independent Counsel. Did you have any such articles that you wish to submit to the committee about the Walsh conduct of Independent Counsel?

Mr. BEN-VENISTE. I did not. The Walsh——

Mr. GEKAS. Any other Independent Counsel? Of any other Independent Counsel appointed in the past?

Mr. BEN-VENISTE. Oh, yes, sir. I actually defended an individual in a case brought by Independent Counsel McKay. I am glad you gave me the opportunity to talk about it.

Mr. GEKAS. Did you write an article about him?

Mr. BEN-VENISTE. No, but I got a jury acquittal in that case, which is better than an article. It would not have been appropriate for me to write an article while I was representing the client. But let me say this, in all seriousness, and I will accept your invitation to come and talk about the Independent Counsel statute, because I feel strongly about the importance of the individuals who hold that office, and I think there is a bifurcation here between the statute and the expectations on an individual who holds the office that that statute creates.

Mr. Walsh's investigation, in my view, went on too long; there were a lot of defects with it. However, the subject matter, the *res*, if you will, of that investigation was momentous, it was important.

Mr. GEKAS. But you did not file any documents or——

Mr. SENSENBRENNER [presiding]. The gentleman's time has expired.

The gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman.

Mr. Hamilton, and Mr. Ben-Veniste, I would like you, for the purposes of your answers, to make two assumptions. First, the President lied under oath. Second, as to his grand jury testimony, those lies were not to cover up a consensual sexual relationship, but to avoid conceding that he had testified untruthfully in the civil deposition.

The question is, to deal with the contention that this conduct justifies impeachment because coming from the President, it is so corrosive of the judicial system and it so erodes the rule of law.

Mr. HAMILTON. Congressman Berman, clearly, lying under oath before a grand jury or in a deposition is reprehensible. I think the question is, does that rise in this circumstance where the lying is about private consensual sexual conduct, whether it rises to the level of an impeachable offense. Is it a great and dangerous offense against the State that indicates it would be a danger to leave the President in office.

My conclusion is that it is not.

Now, I will go on and say, as I have said both orally and in writing on several occasions, that I think this conduct demands a sharp censure, and indeed something more than censure. I think that the President should agree to some type of monetary penalty to emphasize the seriousness of his conduct. I also think that there obviously will be a possibility after the President leaves office that if some prosecutor really deems that this is a case that he could win, that he could be prosecuted for it.

Mr. BEN-VENISTE. Clearly, Mr. Berman, the President's conduct was not, we can all agree, lying about disloyalty, treason, matters of national security, bribery, or other things which are characterized as high crimes and misdemeanors.

Now, clearly, Mr. Clinton attempted to obfuscate in his civil deposition something which his adversaries already knew; that is, that he had had an inappropriate physical relationship with a young intern.

The question is, whether even in that context, the vice of perjury was accomplished. Did the President's conduct somehow skew the result in that case? Not even there, I think, did it have that effect.

Mr. BERMAN. I think in a way both of you are missing the point I was hoping to hear you speak to, which is, the contention by some that lying under oath by the President—assuming that's what he did—rises to the level of impeachment because they are so corrosive of the judicial process.

Mr. BEN-VENISTE. It is clearly under any circumstances something which is deplorable. However, what we are dealing with is the impeachment of the President of the United States, this most monumental, momentous task, that this committee can consider. And under that standard, the idea that no man is above the law has to do with whether a prosecutor could prosecute the President, as the Constitution provides, after he leaves office, but it has nothing to do with the application of the standard of high crimes and misdemeanors, in my view, and therefore does not warrant impeachment of the President.

Mr. SENSENBRENNER. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. I thank the Chairman.

Today, ladies and gentlemen, I have seen evidence of wringing of hands and intense anxiety expressed because of the lack of bipartisanship on the Judiciary Committee, and the implications seem to place most of that blame on the Republican corner of this room. I think no blame at all needs to be afforded to that corner or this corner. If we search our consciences and vote our sound judgments for or against impeachment, I don't know that any blame needs to be a allotted or attributed. Sure, it would be fine if we could do it in a bipartisan fashion, but the nature of this beast oftentimes avoids that.

Let me talk to you gentlemen about perjury. Some say that lying about sex to a grand jury is not sufficient to warrant impeachment. I guess for the sake of argument, let's assume that perjury is a crime that raises itself to the threshold of impeachment. If that is in fact true, which I believe it is, I think the subject about which one is lying is immaterial, because I don't think there are exceptions to the perjury statute.

Now, having said that, let me ask you all this: how about one who lies to a grand jury about his obstruction of justice, or his concealing evidence, or encouraging the filing of a false affidavit, or perhaps coaching a witness? If it has in fact been done, do you all believe that that would constitute crimes that raise themselves to the threshold of impeachment?

Mr. BEN-VENISTE. If, in fact, the obstruction of justice and the perjury had to do with the kind of weighty subject matter about

which the impeachment clause was created, that is treason or bribery, or some like offense, then I would agree, as I did in the case of Richard Nixon, that this would, in fact, constitute——

Mr. COBLE. My time is about to run out. Let me hear from Mr. Hamilton on this as well.

Mr. HAMILTON. Again, I think the question is whether the lying amounts to a great and dangerous offense, so that it is dangerous to allow the President to remain in office. That is a judgment you have to make with every specific factual situation that you are confronted with.

Mr. COBLE. I thank the gentlemen.

Mr. Chairman, with your permission, I am going to yield the balance of my time to the gentleman from Florida, Mr. Canady.

Mr. CANADY. I thank the gentleman. I just want to make a couple of points.

I want to thank both of you for being here today. You are both very distinguished lawyers and we appreciate you taking your time to be here. I have to candidly say, I don't think your testimony has added much to our deliberations, however. I am disappointed that we see the continued attacks on the Independent Counsel, and it is interesting that I still have not heard any claim of misconduct by the Independent Counsel which undermines the credibility or the reliability of the evidence, the sworn testimony that is before us. It is not there. And so I find—if we had something like that, then that would be relevant for us to consider, but——

Mr. BEN-VENISTE. I could give you something to think about.

Mr. CANADY. But to generalize charges of misconduct by the Independent Counsel I think are just an attempt to divert attention once more from the facts of this case. And it has been very disappointing today that we have had so little discussion of the actual facts of the case against the President. There has been some discussion of that, and I think that is good. But there has been very little of that, and I am hopeful that tomorrow we are going to see a change of focus and deal with these facts. And as I am going to discuss a little more in a minute, I think the facts are very troubling. And they are facts that we have to come to terms with.

Is this case equivalent to Watergate? My answer to that is no. But that doesn't resolve the matter for us. There are similarities I would also say, but I don't think anyone would responsibly contend that President Nixon somehow established the threshold there for what is impeachable. That is not right. We have got to judge this President's conduct on the evidence that is before us and make a judgment under the standards of the Constitution.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from New York, Mr. Nadler.

Mr. NADLER. Since the gentleman from Florida followed some of his colleagues' comments about making aspersions about your testimony and not permitting you to answer them, could you take about a minute to tell us about how Mr. Starr's misconduct may have affected conclusions about the President, and then let me ask my question.

Mr. BEN-VENISTE. Well, I think there are things that have not been fully investigated. I don't make the claim of misconduct, and in fact, The New York Times has its own way of putting a title on

an editorial piece. That was not my title, that was The New York Times' title.

Mr. NADLER. Do you think that Mr. Starr's misconduct, if misconduct it be, has any relevance to the factfindings?

Mr. BEN-VENISTE. I think to the extent that all inferences have been drawn in the referral received by this committee by Mr. Starr against the President, that there has been selectivity involved, that there has not been investigation of the activities of certain people who are responsible for starting——

Mr. NADLER. It has been a one-sided investigation, in other words.

Mr. BEN-VENISTE. Well, there is more to look at than has been looked at.

Mr. NADLER. Thank you. I have 2 quick questions and I will read them both so that you can answer them in the time remaining. I find somewhat startling the assertions made by some of our colleagues on the other side that the President's failure to call witnesses somehow proves his guilt.

The gentleman from Florida, the other gentleman from Florida said a few moments ago that a Senate trial can be whisked along in a matter of days, that they don't need to call witnesses there, that everything is clear. I had assumed that the alleged lack of a need for calling fact witnesses to prove by the prosecution, if you will, here was because of the analogy to the grand jury where we could use the hearsay testimony of Mr. Starr that certainly would have to call witnesses in the Senate. Is there really no obligation on the part of the accusers of the President to bring forward witnesses or direct evidence? Is it proper to rely on the Starr report to establish the facts? Is the President really required to prove his innocence rather than have his accusers prove his guilt? That is my first question.

My second question is for Mr. Ben-Veniste. My second question is, in your testimony you say that it is clear that Mr. Starr's purpose in forcing Mr. Clinton to testify was simply to provide additional fodder for an impeachment referral. What interest would a Federal grand jury have in investigating whether one consenting adult touched another consenting adult, whether the conduct first occurred in November or January, or how many gifts they exchanged. And further you say, that the 2 supposed grounds for obstruction of justice, Vernon Jordan's attempt to find a job for Monica Lewinsky in the talking points which formed a basis for the request of the Attorney General to extend the jurisdiction were both dead letters, and Mr. Starr knew that before he called President Clinton as a grand jury witness.

Are you asserting here or do you think it proper to state that therefore Mr. Starr's calling of the President before the grand jury was simply a perjury trap, and that in fact there was no basis, and that this was improper, and that that in some way affects how we should regard this whole thing?

Mr. BEN-VENISTE. Well, let me say that it escapes me as to what the grand jury was properly investigating at that point.

Mr. NADLER. And that makes any perjury, any alleged lying there, immaterial?

Mr. BEN-VENISTE. Well, it puts into some kind of context, Mr. Nadler, that the allegations of obstruction of justice and of perjury really do not have the kind of substance that one would find if something were actually obstructed, or somebody was actually harmed by a perjury, and I think it is in that context that you look at whether you get to the momentousness of conduct that would warrant impeachment.

Mr. NADLER. So in other words, it is hard to have obstruction if there is nothing being obstructed.

Mr. BEN-VENISTE. I think so.

Mr. NADLER. And it is hard to have perjury if it wasn't material to anything having to be proven.

Mr. BEN-VENISTE. I think so.

Mr. NADLER. My other question is, please answer my first question about the lack of witnesses establishing guilt, both here and presumably, according to Mr. McCollum in the Senate, is it the President's job to prove his innocence rather than the other way around?

Mr. HAMILTON. Well, I would think, Congressman, that it is the job of this committee to convince itself that the President has engaged in impeachable conduct.

Now, how the committee does that depends on the circumstances. It is true that neither the committee or so far the President has called any witnesses before this committee, and both sides are going on grand jury testimony. The majority seems to be relying basically upon Mr. Starr's analysis, and I think tomorrow the White House is going to give you their analysis of the grand jury record. But the bottom line is this committee has an obligation to do what is necessary to ascertain the facts that would support impeachment, or not support impeachment.

Mr. SENSENBRENNER. The gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Hamilton, let me read for you a longer quote by George Stephanopoulos, who is a former, as you know, senior advisor to President Clinton, and ask for you to respond.

"When President Clinton turned his personal flaws into a public matter, he made the whole country complicit in his cover story. This was no impulsive act of passion, it was a coldly calculated political decision. He spoke publicly from the Roosevelt Room"—that is in the White House—"he assembled his cabinet and staff and assured them that he was telling the truth and he sat back silently and watched his official spokespeople, employees of the U.S. Government, mislead the country again and again and again."

Mr. Hamilton, don't you think that the President's actions and statements were an effort to try to thwart the investigation that was then going on?

Mr. HAMILTON. Well, let me answer it this way. I am not sure I can put myself in the President's mind. I do think his conduct in this regard was disgraceful.

Mr. SMITH. Let's use the reasonable person standard. Don't you think a reasonable person, a reasonable American would listen to the President's statements, watch what he did, and conclude that he was making an effort to try to thwart the investigation that was then going on? Don't you agree with that?

Mr. HAMILTON. Well, Congressman, I am sure that he wanted the investigation to go away. I think there is no doubt about that. The question again, and if I sound like a——

Mr. SMITH. My question is pretty clear, and could you answer it for me?

Mr. HAMILTON. I think I did answer it. I think he clearly wanted the investigation to go away.

Mr. SMITH. Okay. That wasn't answering my question. Do you think that he was attempting to thwart the investigation that was then going on?

Mr. HAMILTON. Well, I am not sure there is a distinction there. I am sure he wanted the investigation to end.

Mr. SMITH. Was he actively trying to impede the investigation?

Mr. HAMILTON. He may have been trying to impede the investigation. I guess the question is——

Mr. SMITH. No, no, you——

Mr. HAMILTON. Well, let me finish, Congressman.

Mr. SMITH. I think you just answered my question. If you said he may have been trying to impede the question, you have answered it.

Mr. HAMILTON. The question is, was what he was doing improper or impeachable.

Mr. SMITH. Mr. Hamilton, don't rephrase my question. I think you have answered my question that he may have been trying to impede the investigation that was going on. That is all I was looking for. I would have to confess to you in part I was looking for that because that was Barbara Jordan's definition of an impeachable offense, and I think that that is the important point. Let me read, this is a little bit lighter subject, some letters to you from the 6th graders at Chisholm Middle School in Round Rock, Texas. They have a way of putting it very straightforwardly, even if it is not always grammatically correct. Here are three letters:

"If the President doesn't get impeached, it could be very dangerous because more people will start doing more crimes and say, quote, if the President can get away with it, I can."

Another one: "Last year I studied the Constitution in social studies. One thing I learned was that the Constitution stated, 'all men were created equally.' If we want an equal Nation we must make sure justice is served no matter how high on the branches of government."

And then lastly: "If everybody lied under oath, our justice system would fall apart."

That is a very succinct version, I guess, of a categorical imperative along the lines of never engage in any action which if engaged in by everybody else would, in effect, lead to chaos. Would you not agree that if everybody engaged in deceptive or misleading or evasive statements or perhaps was not telling the whole truth, that could in fact undermine the entire judicial system. In effect, what is the point of having courthouses if people aren't going to tell the whole truth?

Mr. HAMILTON. Of course I agree with that.

Mr. SMITH. Thank you, Mr. Chairman. I yield back.

Mr. SENSENBRENNER. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman. I would like to ask the witnesses, if you assume that the President has committed impeachable offenses and in fact should be removed from office my question is, what is a rational way to present the case? Mr. Ben-Veniste, did Mr. Jaworski testify to help make the case before Congress?

Mr. BEN-VENISTE. No, Mr. Jaworski was very careful to avoid any sort of advocacy in connection with transmitting evidence which we had obtained through the grand jury. We had obtained very damaging White House tape recordings and other grand jury testimony of witnesses which were transmitted without any sort of advocacy or pointing to what might be an impeachable offense. It was just the material. And Judge Sirica, who reviewed it, said that the grand jury had done its job in a fair way without making any comment or without arguing for any result in having done so.

Mr. SCOTT. Are witnesses appropriate in this case to be called to make the case if you are not going to rely on the prosecutor?

Mr. BEN-VENISTE. One would think that if an impeachment article were voted out of this committee that the committee should hear from an individual who has firsthand knowledge of the conduct on which an impeachment is based.

Mr. SCOTT. Should you rely on a presumption of guilt if the President doesn't prove his innocence?

Mr. BEN-VENISTE. Not in this country, sir.

Mr. SCOTT. Should the specific allegations be made available to the President before he has to respond? We have heard just today that the gentleman from Arkansas notified the President that there are other allegations that he might want to bring forward. The gentleman from Florida mentioned bribery as a possibility. The expansion and contraction of the scope of the inquiry changes daily and hourly. What about the specific allegations being available before the President has to respond?

Mr. BEN-VENISTE. That is the normal way in which any sort of judicial or quasi-judicial proceeding is begun. The advocate for one side who is bringing the matter, in some kind of a document, either a complaint or other document, sets forth the basis and the substance of what it is he has claimed the other side has done wrong so that the other side can then answer. It is I think a very difficult process if one does not know with some specificity what the allegation is.

Mr. SCOTT. Is the title of the offense—we hear a lot about perjury, obstruction of justice and other titles of offenses. Do you need more than the title of the offense in order to appropriately respond?

Mr. BEN-VENISTE. There is no question that you cannot respond to a claim of perjury unless you know what the false statement is and then you can address whether or not a case has been made out, or at least a prima facie case.

Mr. SCOTT. Now, in terms of whether or not it is an impeachable offense, we have heard the title of the offense, perjury, being sometimes impeachable and sometimes not impeachable. How would you measure—would you measure the title or would you measure the effect it has had on the Nation? Mr. Hamilton, if you want to respond to that.

Mr. HAMILTON. I think you measure the effect it has on the Nation. You look at whether the offense is so great that it is dangerous to allow the President to remain in office.

Mr. SCOTT. And the title of the offense is not the measurement but you would measure the effect. So whether it is obstruction of justice, or whatever the title is, is not the measurement but the effect it has as far as it is a grave danger to the Nation?

Mr. BEN-VENISTE. Even in the narrow confines of what we are discussing here, I have trouble understanding who was obstructed and how that person was obstructed by the conduct we are talking about.

Mr. SENSENBRENNER. The gentleman's time has expired. Before recognizing the gentleman from California, just to make sure that the documentation that has been submitted to the White House is all printed at once, the Chair would ask unanimous consent that the documentary appendix to the submission by counsel for President Clinton to the Committee on the Judiciary of the United States House of Representatives dated December 8, 1988 also be printed overnight. Is there objection to that?

Mr. NADLER. Mr. Chairman, I assume you meant December 8, 1998?

Mr. SENSENBRENNER. I stand corrected. It is this document. Without objection so ordered. The gentleman from California Mr. Gallegly is recognized.

Mr. GALLEGLY. Thank you very much, Mr. Chairman. Gentlemen, thank you for being here. It has been a long day. We started off a little over 8 hours ago. And for the past 8 hours we have been listening very attentively to the President's premier defense team. Mr. Craig started off the morning by advising us today we would be hearing to quote him "very powerful, to quote him, evidence supporting the President." So far I have not heard any new evidence, much less powerful evidence, that refutes the fact that the President lied under oath. Mr. Hamilton, do you believe that our legal system is dependent on people telling the truth?

Mr. HAMILTON. Of course.

Mr. GALLEGLY. Do you believe that perjury represents an attack on the integrity of our judicial system?

Mr. HAMILTON. Of course.

Mr. GALLEGLY. This morning and this afternoon, we heard testimony from two witnesses for the President, one Mr. Craig and one Mr. Owens. Mr. Craig testified earlier that he believes the President did not lie under oath. This afternoon Mr. Owens stated that the President did lie under oath. He didn't say "I believe." He says the President did lie under oath. Mr. Hamilton, do you believe the President lied under oath?

Mr. HAMILTON. I find the President's testimony very troublesome. It was clearly evasive and misleading. I understand that tomorrow Mr. Craig is going—Mr. Ruff is going to make an attempt to convince us all that it was not perjury.

Mr. GALLEGLY. But at this particular point, in your heart, do you believe the President lied under oath?

Mr. HAMILTON. I find his testimony extremely troubling. I am going to withhold judgment until I hear what Mr. Ruff has to say tomorrow.

Mr. GALLEGLY. Mr. Ben-Veniste, with a simple yes or no, do you believe the President lied under oath?

Mr. BEN-VENISTE. Are you talking about—what proceeding?

Mr. GALLEGLY. Before the Federal grand jury.

Mr. BEN-VENISTE. Before the grand jury? I have trouble with that. I have trouble with the grand jury proceeding.

Mr. GALLEGLY. Thank you very much, Mr. Ben-Veniste. You both are very capable lawyers and have a distinguished record. Mr. Hamilton, can you give me very clearly your definition of what it means to hold up your right hand and swear to tell the truth, the whole truth and nothing but the truth so help me God?

Mr. HAMILTON. It means what you say.

Mr. GALLEGLY. It does not mean to deceive and does not mean to minimize the truth?

Mr. HAMILTON. Of course not.

Mr. GALLEGLY. Thank you very much. Based on what you have seen and heard, do you think that the President has been truly candid and totally honest with the American public, to date? To date. Mr. Hamilton.

Mr. HAMILTON. Do I think—you mean in the past, do I think today——

Mr. GALLEGLY. I mean today in view of the months of presentations he has had, civil deposition, grand jury, the August 17 and the 81——

Mr. HAMILTON. He clearly has not been fully candid.

Mr. GALLEGLY. Thank you very much. My colleagues, the President has had the choice of telling the truth, the whole truth and nothing but the truth not on one occasion but at least on four occasions to the American public. First his deposition, second his grand jury testimony, third during the address to the American people and fourth just a few days ago in answering 81 questions submitted by this committee. It is clear in each of these four instances that the President has been less than honest. I am disappointed that the President has not presented any exculpatory evidence relating to these facts. I anxiously await tomorrow's presentation. I hope the President's lawyers take seriously the need to rebut the allegations that the President has lied under oath and that he has lied to the American people, which I think compromises his oath of office.

I yield back, Mr. Chairman.

Mr. SENSENBRENNER. The gentleman's time has expired. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. Mr. Hamilton, Mr. Ben-Veniste, if you assume everything that Mr. Gallegly just said, that the President was in fact less than honest, that he lied, has the President engaged in impeachable conduct in your opinion? Is it abuse of power?

Mr. HAMILTON. In my opinion, he has not engaged in impeachable conduct. He has engaged in reprehensible conduct. He has engaged in conduct for which I believe he should receive a sharp censure. Indeed I think he should agree to pay a substantial fine. But I don't think that he has engaged in conduct that demonstrates he is a danger to America.

Mr. WATT. Mr. Ben-Veniste.

Mr. BEN-VENISTE. I agree that the subject matter here which we all know is about the President's unwillingness to "fess up" to an inappropriate relationship that he had with a young intern is the core of everything that we are talking about. It is the core of what he walked into when his deposition was taken. The Jones lawyers were armed with the information that Linda Tripp had surreptitiously tape recorded from Monica Lewinsky. So they knew they had something. The President didn't know they had it. And the President gave testimony as artfully as he could, I think, to try to evade answering questions about Ms. Lewinsky. He should not have done that. That is an understatement. The question is whether everything that springs from that, Mr. Starr criminalizing that conduct by opening an investigation which in my view no other Federal prosecutor in this country would go after, at least no one of any reputable stature in this country. And then to try to draw from that the concept of an obstruction of justice, putting him before the grand jury, asking questions about where he touched Ms. Lewinsky, where Ms. Lewinsky touched him, on what day of the week, in what place in the White House, in what month of the year. How in the world can we be discussing removing a twice elected President of the United States on the basis of this kind of conduct? That is the question that I raise and that is, I think, the issue of proportionality and common sense that the American public has grappled with and has come to some conclusion, I think, expressing their great common sense. As a trial lawyer, I see people from all walks of life in the courtroom, and I have great respect for their collective common sense.

Mr. WATT. So I take it from that that notwithstanding what Mr. Gallegly said, you don't think this is impeachable?

Mr. BEN-VENISTE. That is correct, sir.

Mr. WATT. When Mr. Starr came before this committee, he made some references to Mr. Jaworski and suggested that he thought Mr. Jaworski would approve of the way that Mr. Starr had conducted this investigation. Would you give us your assessment of that, Mr. Ben-Veniste?

Mr. BEN-VENISTE. Well, I had the opportunity to talk with Mr. Jaworski's grandson just the other day. Joe Jaworski, who practices law in Houston, Texas, told me he was rather appalled by the comparison. I worked with Mr. Jaworski and quite frankly I was quite skeptical when he came on board and took over for Archie Cox, because, after all, Richard Nixon was the one who picked Mr. Jaworski. He was a conservative Texan. He said he was going to follow Mr. Cox's mode of investigating, he would be beholden to no one, he would conduct an independent investigation, and we were all prepared to watch what he did more than what he was saying. And by all accounts, his activity in not leaking and conducting a fair and vigorous investigation but not taking any cheap shots at the President, giving the President the benefit of the doubt, provides the model, I think, for all high profile investigations that have come thereafter.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Florida, Mr. Canady.

Mr. CANADY. Thank you, Mr. Chairman.

I wanted to go back to a point that I was making earlier. That is, that President Nixon's misdeeds do not somehow establish a threshold level of misconduct that must be met in order for there to be an impeachable offense. Do either of you disagree with that point?

Mr. BEN-VENISTE. I do not. God help us if we see that kind of conduct again.

Mr. CANADY. Mr. Hamilton?

Mr. HAMILTON. No, I don't disagree with that.

Mr. CANADY. Thank you.

Let me go on to make some comments about what I think is at stake in the case that is before us.

When we look at the facts concerning the President's conduct, what do we find? I believe, based on my reading of the evidence, that we find a pattern of calculated wrongdoing, a sustained course of criminal acts designed to thwart the due administration of justice. I know some people believe this is all trivial. But I believe that is what is going on.

We see evidence that the President last December—it starts in December—lied under oath in answers to interrogatories. We see evidence that in January he lied under oath repeatedly in his deposition in the Jones case.

And let me add that today we have heard the President's lawyer here before this committee affirm the obvious lie that the President told then when he said that he had no specific recollection of being alone with Ms. Lewinsky. Even Mr. Frank has recognized that that was a lie. But yet the President's counsel reaffirmed that lie before us today. And we find in the evidence that the President in August lied under oath before the grand jury to cover up and to avoid responsibility for his earlier lies.

Mr. Ben-Veniste, I believe you stated that you have got a problem with what happened before the grand jury and the President's conduct.

Mr. BEN-VENISTE. I have a problem with characterizing it as an obstruction of justice. The President admitted to the grand jury.

Mr. CANADY. Mr. Ben-Veniste, I am sorry, you have made that point. I have got some questions.

Mr. BEN-VENISTE. I thought you were asking me about it.

Mr. CANADY. If I have some time left, I will be happy to recognize you.

Then we find evidence along the way of various other acts in which the President attempted to corruptly influence the testimony of witnesses.

And, finally, I believe that we have evidence that the President just last month lied under oath to this committee in answers that he gave to questions propounded to him by the chairman of the committee.

Now, how do we respond to this? How do we respond to this substantial course of wrongdoing that was sustained over a period of a year?

Now, it has been argued essentially that we should forget about it because the underlying cause of it was sordid. I don't believe that the sordidness of the underlying conduct is a mitigating circumstance. Indeed, it is not a defense against these allegations. I

think that just doesn't make sense, that that is the claim that is being made, that is the primary claim, that we should see all of this go away, because the underlying conduct was sordid.

This was not some trivial lapse of judgment. The President wasn't blindsided. He was calculating every step along the way.

I believe that this is conduct that shows an utter contempt for the judicial process in this country, it is conduct that shows utter contempt for the dignity of the office of President, and it is conduct that, by its very nature, undermines the integrity of the office. It is conduct by the chief executive that harms our country and our Constitution by undermining respect for the law.

Now, that is what we have before us, I believe; and let me end by quoting again the first Chief Justice of the United States, Justice Jay, who said, "independent of the abominable insult which perjury offers to the divine being, there is no crime more extensively pernicious to society. It discolors and poisons the streams of justice and by substituting falsehood for truth saps the foundations of personal and public rights. Controversies of various kinds exist at all times and in all communities. To decide them courts of justice are instituted. Their decisions must be regulated by evidence and the greater part of evidence will always consist of the testimony of witnesses. This testimony is given under the solemn obligations which——"

Mr. SENSENBRENNER. The gentleman's time has expired.

Mr. CANADY. If I could just read one sentence here, in the middle of a sentence, "is given under the solemn obligations which an appeal to the God of truth imposes. And if oaths should cease to be held sacred, our dearest and most valuable rights would become insecure."

Mr. SENSENBRENNER. The gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. Thank you, panelists, for being here today and for your enlightening testimony.

Also, I just wanted to take a personal moment—I worked in a lowly position during the 1974 inquiry, and I would like to express my thanks to Mr. Ben-Veniste. You are someone who I looked up to and admired at that time for the service that you gave to our country then at a very difficult time.

Mr. BEN-VENISTE. Thank you.

Ms. LOFGREN. You did it skillfully and honorably.

Since you are here and because you do have experience in the Justice Department, I want to ask you just a quick question before I get to my real question. When Mr. Starr was before the committee, I asked him three questions, two of which had to do with when he found out certain information and the third about whether he would release reporters from their confidentiality bond. I recently received a letter from Mr. Bitman saying that Mr. Starr wouldn't answer any of the questions that were posed and sent to him because of Justice Department policies. Can you think of any Justice Department policy that would prevent Mr. Starr from answering the three questions I posed to him, that he said he would answer?

Mr. BEN-VENISTE. No. Indeed, I would think that Justice Department policies would compel an answer, particularly to an oversight committee——

Ms. LOFGREN. Thank you for that.

Mr. BEN-VENISTE [continuing]. Investigating whether the Starr investigation was somehow skewed, and whether there was an attempt to create an unwarranted appearance of obstruction of justice. I don't say that that occurred, but I think there is an obligation to look at that.

Ms. LOFGREN. Nor do I. I just wanted an answer.

Let me follow up on something that you mentioned in answer to Mr. Nadler's questions earlier. You mentioned that there were other things that perhaps should maybe have been looked at by the Independent Counsel, other witnesses that might have been called. You are familiar with the Independent Counsel's investigation, and you have a lot of experience as a prosecutor and an investigator. Do you think there were areas that merited further investigation by his office? Were there witnesses who were not called to testify before the grand jury who should have been called, who might have given a greater picture of the truth? Do you have any advice for us on that?

Mr. BEN-VENISTE. There was one anomaly that I found in looking through the volumes of material that Mr. Starr produced to this committee, and that was the fact that the individual who, by Ms. Tripp's admission and by that person's own admission, put Ms. Tripp up to tape recording was never put before the grand jury. That person is Luciane Goldberg.

If you look in the appendix that Mr. Starr submitted, at page 1225 on there is an FBI 302 report that shows that on January 22, 1998 Ms. Goldberg was served with a grand jury subpoena duces tecum to appear, testify and bring evidence to the grand jury. And yet there is no indication anywhere that I have seen that Ms. Goldberg was, in fact, compelled to go before the grand jury. And, as we know, this grand jury was fully capable of asking its own questions.

And so there is no answer in the Starr referral to questions about what Ms. Goldberg did with information, the tapes that she had in her possession, the information she was getting on a daily basis from Ms. Tripp and, perhaps more importantly, whether Ms. Goldberg or others were guiding Ms. Tripp in some way. None of those questions or answers are before us in any record because, as far as we know, Ms. Goldberg was never put before the grand jury.

At page 1227 of the Starr supplemental appendix there is an FBI 302 report that shows that 7 months after she received the grand jury subpoena, Ms. Goldberg was interviewed by an FBI agent working with Mr. Starr. That report raises some very interesting questions. I have not heard those questions discussed in this committee. Maybe it has been done in executive session or maybe you have received information that I have not heard about, but it seems to me——

Ms. LOFGREN. We can't say what we do in executive session, but we can say what we don't do in executive session. That is something we have not done in executive session.

You have provided us with some newspaper articles, and in the New York Times article you mentioned with the headline that you didn't write about Mr. Starr, you mentioned the "unseen hand" possibility. Understanding that we have a high standard for offenses

against the State, what would the "unseen hand" mentioned in the article have to do with any of what has been brought to us?

Mr. BEN-VENISTE. Mr. Sensenbrenner, if I may answer.

Mr. SENSENBRENNER. A sentence or two. The gentlewoman's time has expired.

Mr. BEN-VENISTE. Surely. I think when you are considering something like removing the President of the United States you ought to know whether somebody has created something and put it in motion to take him down. Public confidence in the process demands an answer to that question, and I think it is the obligation of this committee to investigate that possibility. I am surprised to hear, frankly, that Mr. Starr had not responded to the follow-up questions in that area. I don't know what the committee's procedure is for enforcing that.

Mr. SENSENBRENNER. The gentlewoman's time has expired.

The gentleman from South Carolina, Mr. Inglis.

Mr. INGLIS. Thank you, Mr. Chairman.

Mr. Craig is out of the room as far as I can see, but this third panel, I want to keep score here. Again, no criticism of these two witnesses. They were invited here by Mr. Craig to testify. But this is now zero for three in terms of anybody who can present any facts related to this case. No facts being presented here, no evidence.

And I would remind committee members of what Mr. Craig told us this morning: "Let me assure the members of this committee and the Members of the House of Representatives and the American public of one thing. In the course of our presentation today and tomorrow, we will address the factual and evidentiary issues directly." Not yet. Zero for three. Three panels, no facts, no evidence.

Mr. NADLER. Point of parliamentary inquiry.

Mr. SENSENBRENNER. The gentleman from South Carolina has the floor, and interruptions are only allowed when the holder of the floor yields. Does the gentleman yield?

Mr. INGLIS. I don't have time to yield. I am terribly sorry.

Mr. SENSENBRENNER. The gentleman will proceed.

Mr. INGLIS. Mr. Hamilton, on an issue, though, that I think you can testify here about, you are an officer of the court, a lawyer, is that correct?

Mr. HAMILTON. Yes.

Mr. INGLIS. If you have a client on the stand who commits perjury to your knowledge, what do the cannons of ethics require you to do in that case?

Mr. HAMILTON. The District of Columbia cannons are a little bit different than the ABA model rules. Basically, a lawyer is supposed to tell his client that he should correct his testimony. If the client doesn't do that, the lawyer withdraws from the case.

Mr. INGLIS. In that case, isn't it clear that what is happening there is that perjury is such, as Mr. Canady was just exploring, such a pernicious thing that it trumps the client's right to rely on counsel because in that case the lawyer must disclose this to the client and in many jurisdictions disclose to the court as well, correct?

Mr. HAMILTON. In some jurisdictions, yes.

To answer your question, the lawyer's obligation as an officer of the court in that circumstance supersedes his obligation to his client.

Mr. INGLIS. The only point I would make to everyone listening here in the committee is that, for those of us who are officers of the court, it shows how crucial this matter of telling the truth in court is, that it trumps the attorney-client privilege.

Mr. Ben-Veniste, I understand——

Mr. HAMILTON. It doesn't trump the privilege. The lawyer still has no obligation to reveal his client's perjury. But he does have an obligation to take some steps to disengage.

Mr. INGLIS. I understand.

Mr. BEN-VENISTE. And obviously this only occurs when the lawyer has actual knowledge that his client has lied.

Mr. INGLIS. Let me ask you a different question that has to do with something else.

I understand that there is a regular conference call from the White House that deals with communications efforts of the White House. Is that true, to your knowledge, that there is some regular conference call, if I understand it, at 11 o'clock possibly on every day of the week? Is that about right, to your knowledge?

Mr. BEN-VENISTE. I have participated on an irregular basis in what may be a more regular conference call.

Mr. INGLIS. So you participated in this call?

Mr. BEN-VENISTE. From time to time.

Mr. INGLIS. So then——

Mr. BEN-VENISTE. In recent weeks.

Mr. INGLIS. The evidence you can give here—actually, we have found something that you can testify about in terms of facts and evidence——

Mr. BEN-VENISTE. There is a lot I can testify about.

Mr. INGLIS [continuing]. Would be the effectiveness of the spin machine at the White House, which is interesting. Have you participated in calls that sort of coordinated the attack on Ken Starr, I wonder?

Mr. BEN-VENISTE. No, there are no such calls——

Mr. INGLIS. No calls——

Mr. BEN-VENISTE [continuing]. To my knowledge.

Mr. INGLIS [continuing]. Involving Ken Starr?

Mr. BEN-VENISTE. Coordinating some attack on Ken Starr?

Mr. INGLIS. Excuse me?

Mr. BEN-VENISTE. No, sir, I am unfamiliar with a call coordinating an attack on Ken Starr.

Mr. INGLIS. So you haven't participated in any such calls?

Mr. BEN-VENISTE. No, sir.

Mr. INGLIS. Well, it is an interesting fact that you could testify about. If we had more time maybe we could develop what is discussed on those calls, because it is a masterful operation. Those are facts that you could testify about, and I wish that Mr. Craig had let us know that ahead of time so that we could ask you about the facts that you could actually testify about.

Because neither of you—not any criticism of you, but neither of you can testify about the facts in this case; and, unfortunately, Mr. Chairman, once again zero for three. The third panel, no facts.

Mr. SENSENBRENNER. The gentleman's time has expired.

Mr. NADLER. Mr. Chairman?

Mr. SENSENBRENNER. For what purpose does the gentleman from New York——

Mr. NADLER. A point of parliamentary inquiry.

Mr. SENSENBRENNER. State your inquiry.

Mr. NADLER. My inquiry is that the gentleman from South Carolina just again stated that there has been no factual submission, implied that Mr. Craig, who said that there would be a factual submission today——

Mr. BUYER. Regular order, Mr. Chairman. That is not a parliamentary inquiry.

Mr. NADLER. My inquiry is——

Mr. SENSENBRENNER. State your inquiry.

Mr. NADLER. My inquiry is, was that side of the aisle not served with this material or was the gentleman being dishonest and misleading the television viewers by implying that there was no such submission made?

Mr. SENSENBRENNER. That is not a proper parliamentary inquiry; and the gentlewoman from Texas, Ms. Jackson Lee, is recognized.

Ms. JACKSON LEE. Let me thank both of the members of the panel for their presence and acknowledge as well their astuteness as lawyers and having a special insight into the proceedings we know as Watergate.

Mr. Ben-Veniste, let me thank you as well for your kind words about Leon Jaworski, who I had the honor and pleasure of working for and know full well the somberness and the high position he held his role and responsibility in Watergate.

A simple question to you before I begin. Did Mr. Jaworski ever leave his position as a prosecutorial implementator and move to the witness chair and become a fact witness?

Mr. BEN-VENISTE. No, he did not.

Ms. JACKSON LEE. To your knowledge?

Mr. BEN-VENISTE. No, of course not.

Ms. JACKSON LEE. Let me then proceed with words from Daniel Webster known as the March 7 speech in 1850 right before the long and elongated discussions about slavery and the potential Civil War in this Nation. He said simply, "I wish to speak today not as a Massachusetts man, not as a northern man but as an American and a Member of the Senate of the United States. I speak today for the preservation of the union. Hear my cause."

We come now almost to the end of this process, and I would like to thank Chairman Hyde, who is not in the room right now, for his kindness in the running of today's proceedings. I have a running objection on the time and the inability of many witnesses to answer questions, but I thank him for the way he has offered to those of us who disagree to answer or to ask our questions.

It is at this time that I call upon him as well for a matter of good faith and to heal this country. We should have any opportunity to present, as I have supported over the past couple of weeks, a censure resolution to heal this country and to address these circumstances. What troubles me is the precedent that is being set today or over these past few hearings that we have had, one in un-

dermining the institution of the presidency and how this is played to the American people. And the exaggeration of the gravity of these allegations such that children in American schoolhouses are believing that those who may tell untruths will go unpunished.

And so I have some questions both for Mr. Hamilton in his recounting of the allegations against President Nixon as it relates to abuse of power—you started out in your presentation that the allegations included unlawful wiretaps, concealing evidence of the wiretaps, secret investigative units such as the plumbers who, to my chagrin, to my appalling understanding, broke into a psychiatrist's office of an American. Could you ever imagine? And then the use of the CIA and the FBI.

My question to you, as I read from allegations of our Office of Independent Counsel, as he charged abuse of office: "The President repeatedly and unlawfully invoked the executive privilege to conceal evidence of his personal misconduct from the grand jury. The President refused six invitations to testify to the grand jury, thereby delaying expeditious resolution of this matter, then refused to answer relevant questions. The President misled the American people and the Congress in his public statement on August 17, 1998."

And might I just simply say, they refused to acknowledge that the Paula Jones case was dismissed, that she appealed it and then she settled it. They refused to acknowledge that. Mr. Bennett questioned the lack of clarity of the question to the President.

But my question, Mr. Hamilton, does this equate so that the American people will not believe that we are here covering up the Nixon case—the Clinton case? Do we have the same abuse of power?

Mr. HAMILTON. There is no comparison between the Nixon case and the Clinton situation in my judgment. The Nixon case involved serious repeated abuses against the State, violations of the constitutional rights of individuals.

Mr. SENSENBRENNER. The gentlewoman's time has expired.

Ms. JACKSON LEE. Will you heal this Nation and provide for us a censure resolution and stop the farce and the theatrics of what is going on in this matter?

Mr. SENSENBRENNER. The clock runs at the same rate for one of the members of the committee.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Mr. SENSENBRENNER. I would hope that the members would be respective of the time. The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. Along those lines, I would like to thank both of these gentlemen for their participation in the process today and for your answers to Mr. Canady's question, which you indicated earlier that the standards in the Nixon impeachment, the Watergate proceedings, are not a standard to be followed for impeachment. Is that correct, Mr. Ben-Veniste?

Mr. BEN-VENISTE. They are not a threshold.

Mr. GOODLATTE. All right. That is what I am looking for. And I take it you agree with that, Mr. Hamilton?

Mr. HAMILTON. I don't think they set the bottom position of the bar. But I do think they are indicative of the type of conduct we should look at when we are considering impeachment.

Mr. BEN-VENISTE. I agree with that.

Mr. GOODLATTE. Certainly. Certainly. But you see, I think that the whole purpose of the White House's presentation today has been to try to raise the bar to that standard. And I think that that, plus this effort to suggest that somehow the motives of the majority of this committee are somehow wrong, are the efforts of the White House today.

And, Mr. Ben-Veniste, you actually set this story straight a long time ago, long before you ever heard of Paula Jones or Monica Lewinsky, long before Bill Clinton was ever on the national scene. You wrote a book back in 1977 called "Stonewall, The Real Story of the Watergate Prosecution" by Richard Ben-Veniste and George Frampton, Jr. In that, in the closing, you wrote about the Watergate proceeding:

"Did the system work? True, the nationally televised debate and vote on articles of impeachment was a shining hour for the House Judiciary Committee. But all in all, the total course of the committee's investigation exposed the extreme political nature of impeachment." This is about the Watergate proceeding.

"The cumbersomeness of the process, its politicization, and the unwillingness of so many in Congress to recognize objectively the stark facts of criminal wrongdoing that were put in front of them make the Nixon impeachment case an unpromising precedent."

Here is where I think you are so farsighted, more farsighted than anybody who has been before the committee today: "Next time might it not be a potent defense for a President charged with wrongdoing to argue that his conduct, however improper, fell short of the spectacularly widespread abuse of the Nixon administration. If Watergate or more is what it takes to galvanize the impeachment mechanism, can we really rely on it to protect us in the future against gross executive wrongdoing?"

Let me ask you about the title of the book, Mr. Ben-Veniste, "Stonewalling". That is an effort to obstruct justice, to keep the process from moving forward, from discovering the truth. Is that not an accurate definition of that?

Mr. BEN-VENISTE. The title of the book came from Mr. Nixon's injunction to his subordinates, to stonewall, to deny everything, to blame everything on the lower level individuals so that the higher-ups would not be detected.

Mr. GOODLATTE. Let me ask you this. Do you believe that President Clinton has engaged in stonewalling in this matter?

Mr. BEN-VENISTE. I believe that President Clinton tried to obfuscate from the very beginning a very inappropriate relationship of a private nature about which he was, I am sure, and should be, ashamed.

Mr. GOODLATTE. Let me ask you this. Is exercising executive privilege over personal matters and not public matters, is inventing new forms of executive privilege, is coaching witnesses about what may have previously transpired, is engaging in efforts to suborn perjury and to get your Cabinet officials and other members to go out and repeat falsehoods, are all of those stonewalling devices?

Mr. BEN-VENISTE. No, I do not believe those are stonewalling devices.

Mr. GOODLATTE. You don't think those are comparable——

Mr. BEN-VENISTE. Stonewalling devices that were involved in Watergate involved individuals denying such things as the misuse of the FBI, the misuse of the CIA, the misuse of the Internal Revenue Service to inflict pain and embarrassment upon enemies of the President of the United States.

Mr. GOODLATTE. I think you have just changed the definition of stonewalling.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentlewoman from California, Ms. Waters.

Ms. WATERS. Thank you very much. Mr. Chairman and members. The last time I spoke I talked about Mr. Hyde's discussion of lying back in 1987, and I want to continue on that because I find these discussions about lying and perjury intriguing and troublesome. Intriguing because we discuss it in very interesting ways. We discuss lying as if it is fallen to us and if there are no gradations of lying that we understand and deal with on a daily basis.

Judge Higginbotham, when he was here, talked about gradations of lying and we pretended not to know what he was talking about. It appears we are reticent to discuss our knowledge and experiences with lying because we want to send a message about our own honesty and credibility. I humbly submit to this committee that it does not make us less than honest human beings to recognize that there are lies and there are lies. The court recognizes, and that is why there is a legal definition for perjury. I believe that we make these distinctions every day, with our children, our families, our friends, our colleagues. Most of us would like to be as strong and truthful as we can be, and many of us work at trying to correct our faults and our weaknesses.

In these hearings, we are attempting to hold the President to a standard that needs to be seen in context. Clearly the President's indiscretions are not impeachable. As Members of Congress, we take an oath and we swear to uphold the Constitution. The public does not believe politicians are as honest as we should be. They believe we are far too often guilty of extramarital affairs, violation of FEC laws, misuse of government resources, misrepresentations, promises not kept. The people do not necessarily demand expulsion of us for our poor judgments and less than candid actions. The public will know the difference between these actions and actions that defy our oath of office.

We are often criticized because of the ways we deal with situations. Why are we trying to send a message about our honesty, our lack of honesty, by attempting to communicate our belief in zero tolerance? Nobody believes us. And we further damage our credibility by attempting to make this President's indiscretions impeachable. The public does understand inconsistency and lack of candor.

Let me just put on the record the questions that I wanted to ask, and I will continue to ask of our chairman:

Mr. Chairman, did you lead the defense of the Reagan administration during the Iran-Contra hearings in 1987 when President Reagan and his top national security advisers were accused of lying to Congress and the public about their secret arms sales to a terrorist state? Did you argue forcibly for a more nuance view of lies and deception? Did you in fact say lying is wrong but context counts?

Mr. Chairman, did you say while Reagan aides may have lied, they did so for the larger purpose of fighting communism in Central America? In 1987, Mr. Chairman, did you say, "It just seems to me too simplistic to condemn all lying," and I further quote, "In the murkier grayness of the real world choices must often be made."

Mr. Chairman, do you agree with Charles Tifer, a deputy counsel to the Democratic members of the special Iran-Contra investigating committee, who said, "Henry Hyde of 1987 listened to Oliver North confess to an incredible career of lying to Congress, and he excused it." Mr. Chairman, do you agree with Mr. Tifer, who said, "We are dealing with hard core obstruction of justice, where documents were destroyed and phony chronologies were concocted at meetings on which all conspirators agreed the goal was to lie, and Mr. Henry Hyde condoned that."

Mr. SENSENBRENNER. The gentlewoman's time has expired.

Ms. WATERS. I have got more the next time.

Mr. SENSENBRENNER. I would ask unanimous consent that the other questions of Mr. Hyde be placed in the record, if that is what the gentlewoman from California wishes.

Ms. WATERS. No, I have got to keep telling them to you.

Mr. SENSENBRENNER. I hope those questions were not directed to the present occupant of the chair.

The gentleman from Indiana, Mr. Buyer.

Mr. BUYER. You would note that the gentlelady from California wants to propound detailed questions of the chairman but she has no questions to ask of the President nor of his conduct.

As I have heard some of the witnesses testify today on how unfortunate it has been for the committee to be so partisan, as if partisan is only defined by Republicans doing something and not perhaps even what the Democrats are doing. I mentioned it earlier. There is tremendous coordination in this town not only between you and Mr. Ben-Veniste, you go out on MS–NBC, you are one of the talking heads out there.

Mr. BEN-VENISTE. No Gong Shows.

Mr. BUYER. I have a specific question for Mr. Hamilton. I noted in your testimony you are endorsing a concurrent resolution of censure. My question is, what would be the actual purpose of a censure? What would be the objective purpose of the censure? And what would be the effect of the censure?

Mr. HAMILTON. The purpose of the censure would be to condemn the President's conduct. The effect I think would be significant. We all have read how the President values his place in history. I think if a concurrent resolution was enacted by the Congress with heavy participation by the Democrats, as I believe would happen, that it would have a pronounced effect on the President.

Mr. BUYER. The question was actual purpose and what would be the objective purpose. If you have to draft a censure resolution that condemns his conduct, are you then suggesting that within a censure, in order to do that there is some pronouncement perhaps of guilt on the President, on what he had done?

Mr. HAMILTON. I think the Congress has discretion to put in that censure resolution what it wants to put in there, and I would assume that there would be some pronouncement of guilt. I do not

have a draft in my pocket to show you, but I would assume there would be.

Mr. BUYER. Mr. Ben-Veniste, let me ask you the very same question about actual purpose, objective purpose and the effect of a censure.

Mr. BEN-VENISTE. Censure has been so infrequently used in our country to bring forward a strong and clear disapproval of conduct, that it is my view that this is not a slap on the wrist, but rather a device which is proportionate and appropriate to the misconduct committed by the President. Insofar as I have been asked about my statement 25 years ago about Watergate, there is a gulf between the crimes of Richard Nixon, what is an impeachable offense and what we have here before us.

Mr. BUYER. Let me reclaim my time because I don't want to get back to Richard Nixon. The reason I asked this question, gentlemen, is because of case law. In order for a legislative measure to survive a bill of attainder prohibition, it must pass the three-pronged test.

The test requires that the actual purpose, the objective purpose and the effect are not punitive. Courts are directed to examine the legislative intent of the measure to see if the intent was to punish. If the objective purpose was solely remedial, the measure may not qualify as punitive. Similarly, if the intent of the measure is to defer future acts of the same nature, it is likely not punitive.

So the problem we have here is a bill of attainder, it pronounces the guilt of a party without any forms or the safeguards of a trial. So if you do a censure and the President may face indictment when he leaves office, we have now prejudiced his case.

Mr. SENSENBRENNER. The gentleman's time has expired.

Mr. HAMILTON. Mr. Chairman, may I respond to that?

Mr. SENSENBRENNER. A sentence or two.

Mr. HAMILTON. A concurrent resolution of censure would not be a bill of attainder because it would not be legislation signed by the President. It would be a measure adopted by the two houses. It would not be an unconstitutional bill of attainder.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Massachusetts Mr. Meehan.

Mr. MEEHAN. Thank you, Mr. Chairman.

Mr. Ben-Veniste, as a former U.S. Attorney, you surely have extensive experience in bringing cases before grand juries and securing indictments. Indeed, you were deeply involved in the bringing of indictments in the Watergate cases before a grand jury in a nearby Federal district court, so I think you know what a grand jury does. You know the level of scrutiny it employs and what purposes it serves.

For that reason I would like to hear your views on an analogy that it seems we are hearing more and more about as we approach this vote on impeaching the President of the United States which will likely take place Saturday, probably about 4 o'clock, just before the network news and in time to make the Sunday morning papers, I would guess. Not that I would think that that would be a political question, but this analogy draws a parallel between the work that this committee and the House must do with respect to the Lewinsky matter and the work of an ordinary criminal grand jury.

And under this perspective, we on the House side of the Hill apparently exist for little other reason than to serve as a ready conduit for scandal between the Office of Independent Counsel and the United States Senate, and we simply flow this referral through us and give sort of a stamp of approval and send it over to the Senate for trial.

Now, personally I think that this analogy is a mistake. It is a grave mistake for our country. But I think that it is put forth by those who wish to send the following message to Republican House Members who are still struggling in good conscience with the impeachment issue. That is, vote for impeachment, it doesn't mean that you want the President to be removed from office, it doesn't make you responsible for whatever happens over in the Senate when they have a long trial and it breaks down. It is politically safe. All you are saying is, "Hey, look, there's enough here, why don't you guys over in the Senate handle it."

What do you think of this attempt to draw the analogy between us, this committee and the House, and an ordinary criminal grand jury?

Mr. BEN-VENISTE. I think that your responsibility, because it is constitutional in nature, is far beyond the responsibility of a grand jury when you consider articles of impeachment. That man whose portrait is here in this room, I can tell you, was so burdened by the question of impeachment of a President of the United States which had been placed on his shoulders that it showed through to every American who saw those proceedings. Peter Rodino cared deeply about what his committee would do and how it would affect America, and the responsibility to be fair and complete and to be as unbiased and impartial and bipartisan as possible, because he was speaking directly to the American public, which then had to determine whether this cataclysm of impeachment was warranted.

Mr. MEEHAN. I want to get to the grand jury testimony on August 17 of this year by the President, and I would like to ask you a couple of short questions.

It is interesting why and how the President was called before the grand jury. But I am interested, at the time the President was called before the grand jury, do you believe that Ken Starr had any thought of seeking an imminent indictment of the President for civil deposition perjury?

Mr. BEN-VENISTE. I have no idea what Mr. Starr thinks about.

Mr. MEEHAN. Let's assume he wasn't intending to seek an imminent indictment of the President in a civil deposition for perjury. Would he summon the President before a grand jury at that time for indictment purposes, or could it be perhaps he would wait until closer to the date in which he would be seeking an indictment, or willing to seek an indictment?

Mr. BEN-VENISTE. The latter would be true, but the practice in the United States in Federal prosecutors' offices is not to summon the target of an investigation before a grand jury.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Tennessee, Mr. Bryant.

Mr. BRYANT. Thank you, Mr. Chairman. Let me be clear and remind everyone once again as to what is going on today. We have the final two members of today's panels, witnesses number 8 and

9 today, who are in here on behalf of the President, testifying favorably for the President as a part of the 30 hours of testimony or time the President had to make his case.

Both of you gentlemen are very experienced in trial law and know that oftentimes people who testify are independent and don't have any dog in that hunt, so to speak. Sometimes they have biases and prejudices. You both have made something of a disclosure before you testified, but in the interest of broader and fuller disclosure, quite frankly, Mr. Ben-Veniste, you had the opportunity to, I think—Mr. Craig has been here as the President's lawyer today. You had the opportunity to serve in that capacity at one time, but declined that opportunity, or declined that job, did you not? It was offered to you, was it not?

Mr. BEN-VENISTE. Let me say that my feeling about this matter——

Mr. BRYANT. I understand. In the interests of full disclosure, I am not making any allegations. I just wanted to know, were you offered his job and you turned it down?

Mr. BEN-VENISTE. I don't think that would be an allegation. I think any individual who is a lawyer in the United States——

Mr. BRYANT. In your preliminary testimony you mentioned some things I thought were fair disclosure. I am trying to make sure that everybody understands you also had the opportunity to be the President's lawyer.

Mr. BEN-VENISTE. It has been reported in the newspaper, sir, if I may, that discussions were held as to whether I would come on board in some way. My view about that was that the issues of impeachment of the President go so far beyond the question of the defense of this particular President, that although it would be a great honor for any lawyer to be selected to counsel the President of the United States.

Mr. BRYANT. Okay. You have answered that fully.

Mr. BEN-VENISTE. To talk in a broader way.

Mr. BRYANT. Mr. Hamilton—he answered it fully, I think. I have 5 minutes. I don't have time for a filibuster.

Mr. BEN-VENISTE. I hope I wasn't trying to filibuster.

Mr. BRYANT. As counsel for the President, for the Clinton-Gore transition team for nominations and confirmations, you were the lawyer in 1992 and 1993?

Mr. BEN-VENISTE. Yes.

Mr. BRYANT. And you also mentioned voluntarily that you defended the case or you were involved against Mr. Starr somehow in the case against Vince Foster. You argued that case, I believe?

Mr. HAMILTON. Nine days before Vince Foster died he came to see me about legal representation. I took some notes. Mr. Starr wanted those notes. I thought those notes were protected, both by the attorney-client privilege and the work product privilege.

Mr. BRYANT. I understand. People are familiar with that case. I wanted to know, did you in fact represent Mr. Foster's estate?

Mr. HAMILTON. Yes.

Mr. BRYANT. You did. I am listening to my colleagues, and as time goes by we talk about how we want the facts, and how we have been disappointed that these nine witnesses have made essen-

tially no presentation as to the facts, and that we should wait on this 184-page document.

As part of that, I have quickly looked at about one-third of it, and in that it says that—somewhere along here, it says we are not going to be attacking Kenneth Starr anymore, and our submission to the committee is going to talk about the facts.

But just quickly, in the first 50 pages or so, I counted—we talked about sex earlier in his report, but I counted Mr. Starr's name, or the OIC or the Independent

Counsel, 42 times, just in a quick glance at the first 50–something pages.

I hope—and this I guess is a message to Mr. Craig as the President's lawyer—I hope the balance of the 130 pages are more fruitful in terms of giving us, once and for all, some defense of the President based on facts and not on attacks of Kenneth Starr. I yield back the balance of my time.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman. I think it is important to note that in fact we have received 184 pages of the submission from counsel for the President related to facts and related to evidence.

I think it is also time to put out here as a matter of public information that members of the minority have heard that there are draft articles of impeachment that have been written by staff counsel to the majority.

I would respectfully suggest that tonight that those draft articles be produced for the President and for minority. If that is not the case, I stand corrected, but at least that is what has appeared in the paper, Mr. Chairman. I am making that request a formal request.

I also want to pick up on something that Mr. Inglis has alluded to during the course of his questioning. He talked about facts and he talked about evidence, and he suggests that after three panels, we haven't heard from any fact witnesses.

He is correct. During the entire course of this committee's work, we have not heard from a single fact witness. Those panels that have been produced here by the committee chair have been very informative, but none of them have contained a single fact witness. So we are now on the verge of making a decision of extreme gravity without having heard from one fact witness, either produced by counsel for the President or produced by the committee.

Again, I want to read something in the record drafted by—it is part of the committee report, and it is drafted by Mr. Schippers, the chief majority investigative counsel. This is his language: "Monica Lewinsky's credibility may be subject to some skepticism at an appropriate stage of the proceedings. That credibility will of necessity be assessed, together with the credibility of all witnesses in the light of all the other evidence."

Well, I wonder what stage Mr. Schippers was referring to, because, as it has been stated here today, we are ready to take a vote at the end of this week. Maybe he was referring to a trial in the Senate. But since this is a House document, I presume that Mr. Schippers was referring to House proceedings.

Now, having said all that, I think what I am hearing, and it is a point, it is a legitimate point from members of the majority side, that in there—in some of the individual members' opinions, they perceive grave damage to be done to the judicial system by what they suggest is perjury and obstruction of justice, despite the fact that we have not heard from any fact witnesses.

At the same time, I think it is important for the American people to understand that those schoolchildren down in Texas that Mr. Smith referred to when he read their letters should be reassured that the President of the United States, if he has violated the criminal code, is still in legal jeopardy. He can be prosecuted if a prosecutor makes that decision, and, depending on the verdict, if it should get to a jury, can be incarcerated. The President of the United States is like every other American citizen.

You know, when we talked about Mr. Starr as a witness, he is certainly not a fact witness, and in fact, I thought it was interesting when Mr. Starr acknowledged to this committee that not only had he not participated during—in FBI interviews, nor had he attended grand jury hearings, but he had never met Monica Lewinsky.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. I thank the chairman. We just received a little while ago this 184 pages, I think, that is the submission by the President's attorneys. This is supposed to be their answer to the facts, even though none of the witnesses here have really addressed the facts, as has been brought up a number of times. But this is supposed to talk about the facts and clear up everything.

On page 77—and I haven't had a chance, and I doubt whether any other member has had a chance to read the whole thing. But on page 77, in the President's attempt to clear up whether he was alone with Ms. Lewinsky, and that he of course had indicated that he couldn't remember, or that he wasn't alone with her—the President's submission indicates, and this is their statement: "The term 'alone' is vague unless a particular geographic space is identified."

That is supposed to clear up the definition of "alone." Let me read that again. "The term 'alone' is vague unless a particular geographic space is identified."

Mr. Ben-Veniste, let me ask you, can our system of justice work at all if witnesses parse words like this, when the commonsense meaning of a word, like "alone", ought to be pretty clear?

Mr. BEN-VENISTE. I agree that there has been too much hair-splitting and too much parsing of language in all of this. But can I say that surely the question of whether the President said he was alone or not alone on a particular day with a particular individual with whom he was having a consensual relationship cannot, in the wildest expansion of the concept of high crimes and misdemeanors, justify the impeachment of the President.

I agree with you in connection with your frustration over this parsing of language.

Mr. CHABOT. I would agree with you, if it was only that one lie about whether or not he was alone with her. But there is a whole series of lies. I only have 5 minutes, so let me get on.

Mr. Hamilton, in your opening you claim that the President's conduct should not be impeachable, and I quote, "because other Presidents have not been candid." Isn't this an argument for impeachment? Don't we want our Presidents to be honest, rather than giving them the opportunity, for example, to lie before a grand jury, or lie to Federal judges?

Mr. HAMILTON. Congressman, I think I said that I don't find the President's conduct impeachable for a variety of reasons, principally because it is not a great and dangerous offense against the State.

But surely we don't want our Presidents to lie or our Congressmen to lie or our Senators to lie. But sometimes they do, and I think the question is, when we find that they have, do we want to initiate impeachment proceedings? I think there is some judgment that comes in here, some proportionality.

Mr. CHABOT. Certainly there does have to be judgment. Let me give the full quote. You said that "Lying to the public and his cabinet and aides is disgraceful, but if we would impeach all officials who lie about personal or official matters, I fear that the halls of government would be seriously depleted. Other Presidents, for example, Lyndon Johnson as to Vietnam, have not been candid in their public and private statements."

Now, the President said, for example, that he would pull the troops out of Bosnia in a year. That was 3 years ago. They are still there. I don't think that is impeachable. But he was not testifying before a grand jury. He hadn't raised his hand and sworn to tell the truth, the whole truth, and nothing but the truth.

That is the whole point here, is that this President apparently lied under oath, committed perjury. That is why many of us are seriously considering whether or not this President should be impeached and removed from office. I yield back the balance of my time.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Florida, Mr. Wexler.

Mr. WEXLER. Thank you, Mr. Chairman. If we have accomplished one thing today, I think we have accomplished something important. That is that many instances today the majority members have talked about the fact that the President has not presented any exculpatory facts.

It has been referred to earlier, but here it is, 184 pages. If I'm getting the sense of it, from page 54 on, the great bulk of the testimony of the President's counsel relates to specific rebuttal, specific factual rebuttal of the claims against the President; that the President did not commit perjury, that the President did not obstruct justice, that the President did not tamper with witnesses.

In analyzing some of the President's counsel's response, I would like to address the issue of perjury, because that is the issue that seems to have captured the imagination of most of the Republicans in the House. Let's talk about what that perjury, alleged perjury, is, at the grand jury.

The President admitted to an inappropriate intimate relationship with Monica Lewinsky at the grand jury that was physical in nature. He acknowledged that his conduct was wrong. What the President denied at the grand jury was having sexual relations

with Ms. Lewinsky, only as that term was defined by the Jones' lawyers and substantially restricted by Judge Wright.

The President failed to go into the details of his encounters with Ms. Lewinsky, and he did testify that he did not have sexual intercourse or sexual relations, as defined by the Jones deposition.

Mr. Schippers, the Republican counsel for the committee, in his presentation to this committee, analyzed that the discrepancy between the testimony of President Clinton and Ms. Lewinsky over the precise nature of the physical contact involved in their relationship—that was the basis for an allegation that President Clinton perjured himself before the grand jury.

I would respectfully submit that the American people understand full well what an affair entails. They understand that it is not going out for coffee. And what the American people need to understand and what I would like Mr. Ben-Veniste, for you to address to the American people and to those so-called moderate Republicans that have yet to make up their minds, what is this perjury before the grand jury about? Do I have it right?

Is it about the discrepancy of the great detail by Ms. Lewinsky as opposed to the admission by President Clinton that it was wrong, that it was a physical relationship, that it was intimate, but he didn't tell us all of the precise details? Is that what the perjury is all about?

Mr. BEN-VENISTE. It seems to be. It seems to be what the perjury is all about, or the claim of perjury is all about. I have to say that if that is what it is, then simply using the word "perjury" does not convey the discrepancy between the remedy we are talking about; that is, to disenfranchise all of the United States in its election of the President, taking away their vote, nullifying it, and saying, he cannot be President anymore because he did not testify to these details in the grand jury. To me, that is mind-boggling.

Mr. WEXLER. Thank you very much.

Mr. SENSENBRENNER. The gentleman from Georgia, Mr. Barr.

Mr. BARR. Thank you. Indeed, that might be mind-boggling, but that is not the situation we are faced with, Mr. Ben-Veniste. You know very well that essentially what we are faced with is not simply a statement about an improper sexual conduct and an argument over the plain meaning of language regarding a court definition, but whether or not it is appropriate for a President to make statements in court for the purpose of either establishing or not establishing a pattern of activity that is deemed relevant to a lawsuit involving the civil rights, the constitutional rights, of a citizen.

So you may, along with your colleagues on the other side of the aisle, keep simply saying that this is about a particular statement, but it really isn't.

Mr. Hamilton, I find, similar to other statements that we have heard here, rather disturbing, where you say in your statement that the President lied, that he unlawfully invoked executive privilege repeatedly, abused power, and so forth; yet these don't rise to the level of an impeachable offense. I'm sure that we could engage in a discussion for the entire remainder of my 5 minutes and I'm not going to convince you otherwise.

It just strikes me as odd that learned attorneys who have extensive experience in representing parties, including the United

States, in court believe that it is appropriate for a President who, not just an average citizen but the President of the United States of America, in your opinion, lies under oath, unlawfully invokes executive privilege, commits abuse of power, yet should remain in office.

Mr. HAMILTON. Congressman, I did not say it was appropriate for the President to lie in office. You are mischaracterizing my statement.

Mr. BARR. The only way we have under the Constitution, Mr. Hamilton, unless you can pull out your copy of the Constitution and show me otherwise, to remove a President is impeachment.

You are arguing that we should not impeach the President. Therefore, you are denying to us—you are saying that the one method we have of removing a President for these things, which you agree he committed, should not be available; then yes, by implications you are saying that that President should remain in office. We don't have any other way of removing a President from office for these sorts of abuses of office. Censure, even if we censured the President in the most horrendous language possible, called him all sorts of names, would not remove him from office. Even if we reprimanded the President in the most horrendous terms, it would not remove him from office.

I would certainly presume that you would agree that the only method in our Constitution, the only method available to us, because we can't control whether a President resigns or not, to remove a President for whatever the behavior is that we believe is impeachable, is impeachment. Is there some other way of removing a President in our constitutional form of government?

Mr. HAMILTON. You have a way if he is disabled.

Mr. BARR. Pardon?

Mr. HAMILTON. If the President is disabled, there is a way.

Mr. BARR. We are certainly not contemplating disabling the President. Maybe you have some——

Mr. HAMILTON. You asked me a question, whether it was the only way. My answer is if the President is disabled there is another way.

Mr. BARR. That is sort of silly. There are provisions in our Constitution that address a President who is disabled. That is not a method of removing a President from office that is available to us. I certainly would never contemplate that, anyway.

What I am saying is it really does strike me as very, very odd for you all—and you are not alone, I know there have been many defenders of the President that have sat in those chairs today and in the prior hearings that we have had, and I'm sure we will have more tomorrow that will sit in those same chairs and admit that the President lied under oath, that he abused office.

I commend you for at least recognizing that he has unlawfully abused the privileges available to him, such as executive privilege. Many of your colleagues won't even admit that. But yet then you say that this President should remain in office. And particularly with somebody with a distinguished career, that has represented the United States of America, both of you, that really does strike me as odd. I think that sends a very, very bad message to the country.

That, I think, Mr. Ben-Veniste, is what does damage to our country's reputation and the ability of our President to conduct foreign affairs, not the fact that we might remove him for those sorts of behaviors.

Mr. BEN-VENISTE. If you have some actual empirical evidence of that, that would be contrary to what I hear when I talk to foreign nationals about what is going on in this country.

Mr. BARR. My empirical evidence is the same as yours, what they tell me.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from New Jersey, Mr. Rothman.

Mr. ROTHMAN. Thank you, Mr. Chairman. I would like to get back, if I may, to what I believe these hearings are all about. We have heard a great deal of conversation from my friends on the other side of the aisle that what these offenses are all about and what we should do about them has to do with whether we are going to enforce the rule of law in America or not, and whether we are going to send the right messages to our children and to others involved in the judicial—in the justice system as litigants or defendants.

I agree that the rule of law is important, critically important to our system of justice and our way of life in a civil society. That is why there are penalties, civil and criminal penalties. I dare say to my friends on the other side of the aisle who trivialize what President Clinton is going through, and think that he might be a model to those who would avoid telling the truth, the following: The President of the United States has just agreed to pay Paula Jones and her lawyers $850,000 for his misconduct during the Paula Jones matter.

Is that an incentive for people to lie in civil litigation? The President did not get away with anything there, did he? The fact that President Clinton is still subject, when he leaves office, to being criminally charged for any of the charges raised by Mr. Starr, and could go to prison for his misconduct, his alleged misconduct, is that an incentive for people not to tell the truth, the whole truth, and nothing but the truth under oath? Of course not. So all of the incentives to uphold the rule of law are there already.

We are not talking about whether we want our kids to respect the truth. It is there already, and will be applied against the President. What we are talking about is what we are responsible for, upholding the Constitution. The Constitution says how the President gets hired, elected, and gets fired: Treason, bribery, and other high crimes and misdemeanors.

We have to decide whether the President's conduct not should be punished, but—it has already been punished and may very well be punished criminally in the future. We are deciding whether, as a Nation, we must remove the President. So I daresay that the arguments about upholding the rule of law, we have already taken care of that discussion.

One could argue that the penalty of impeachment and removal far exceeds the crime, and that censure is a better approach. I have not yet made my mind up on the charges raised by Mr. Starr. The hearing has not been concluded. But I will say to you this, that in my judgment a clear and convincing standard of proof must be met

by those who would seek the President's impeachment and removal, and that it, of necessity, requires fact witnesses when the testimony relied on by Mr. Starr, is equivocal, is ambiguous, is contradictory, and is qualified, as the President's counsel has addressed.

So we have one prosecutor, Judge Starr, saying the witnesses say this and it means this, we have the President's counsel say the witnesses said this and mean this. We are left to decide in the middle.

Let me say that we are founded by a Nation of those who were loathe to take the word of government officials only, and put the burden of proving guilt on the accuser, and did not require the accused to prove his or her innocence. To put the burden of proof on the accused, in this case President Clinton, is not only to subvert the Congress' impeachment power, but 200 years of American justice. I yield back, Mr. Chairman.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Tennessee, Mr. Jenkins.

Mr. JENKINS. Thank you, Mr. Chairman. Gentlemen, I thank both of you for being here. It has been a long day. You are the third panel which has been here, consisting of two very good lawyers testifying—not representing, testifying for the President of the United States today.

As I understand your testimony, both of you think that the President has engaged in wrongful conduct. Is that correct?

Mr. BEN-VENISTE. Yes.

Mr. HAMILTON. Yes.

Mr. JENKINS. Both of you think that the President has violated the law?

Mr. BEN-VENISTE. Perhaps.

Mr. JENKINS. Perhaps?

Mr. HAMILTON. Certainly his testimony is most troubling.

Mr. JENKINS. Perhaps, and the testimony is most troubling. Both of you, in any event, believe that some remedy for this situation is appropriate?

Mr. BEN-VENISTE. Yes.

Mr. JENKINS. Both of you believe that. And you have talked about censure, fines, and reprimands, and perhaps one or two other possible remedies.

Now, to follow up on what Mr. Barr was asking, and I will try to leave time for you to respond to this, but I am concerned, in reading the Constitution, it says that in the event there is a violation, the remedy for that is removal from office. Some people don't like to call it a remedy, some don't like to call it punishment, but whatever you call it, the Constitution provides that removal from office is the appropriate action to take.

Now, I am not directing this at you, but this entire day has reminded me of that lawyer strategy that is used across this land whereby, if the law is against you, you argue the facts; if the facts are against you, you argue the law; if the law and the facts are both against you, then you attack the prosecutor, and certainly the special counsel has been attacked time and again in this room.

Now, the very resourceful Washington lawyers have added a new dimension to that, and in addition to attacking the prosecutor, they have said, well, tell them how bad Watergate was to this country.

So if I ever get back to practicing law, I may use this down in Tennessee.

But my question to you is, do you not have any concern, either of you, for what the Constitution says insofar—and we don't know what is going to happen, it may never get to the point where there is a remedy employed, and that will resolve that question. But in the event that this proceeding gets to the point where there must be some remedial action taken, then do neither of you have any concern for the words of the Constitution that say that removal from office and that additional remedy of not holding public office again, do you not have any concern for that?

Mr. HAMILTON. Congressman, clearly that is a remedy that is set forth in the Constitution. That does not mean that there are not other remedies.

The House is governed by a rules manual. If you look in the first pages of that manual, there is something that is called Jefferson's Manual that was written by Thomas Jefferson when he was the Vice President and was, therefore, the President of the Senate.

In Jefferson's Manual, he says that a resolution is a way that a House can express its opinions, its purposes, and its principles. If you look in the footnote that is written by the Parliamentarian of the House, the Parliamentarian says in modern practice a concurrent resolution is the means by which the Senate and the House express their opinions and their purposes and their principles.

So there is a legitimate way to do it that has been recognized since the time that Thomas Jefferson was Vice President, which was before 1800.

Mr. JENKINS. But that—thank you, Mr. Chairman.

Mr. SENSENBRENNER. The gentleman's time has expired.

The Chair is aware that there are two members who wish to make requests to include material in the record.

The gentleman from Georgia, Mr. Barr.

Mr. BARR. Mr. Chairman, I wish to include a letter I had given to the chairman at the same point as the letter from Mr. Conyers.

Mr. SENSENBRENNER. Without objection.

[Information not available at time of printing].

Mr. SENSENBRENNER. The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. I would like to enter this newspaper article from Sunday's Washington Times.

Mr. SENSENBRENNER. Without objection.

[Information not available at time of printing].

Mr. SENSENBRENNER. Is there any further request to include material in the record?

Mr. GOODLATTE. I would ask that the Wall Street Journal article of today's date be included in the record.

Mr. SENSENBRENNER. Without objection.

[Information not available at time of printing].

Mr. SENSENBRENNER. A further request?

The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. I have two articles, one dated November 1993: House Panel Reportedly Draws up Clinton Impeachment Charges, and one dated November 28, 1998, Impeachment Articles Being Drafted.

Mr. Chairman, I would like to include those.

Mr. SENSENBRENNER. Without objection, they are included.

[Information not available at time of printing].

Mr. SENSENBRENNER. The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE of Texas. Mr. Chairman, I would like to submit in its entirety the Constitution of the United States of America, which does not denote any prohibition on censure.

Mr. SENSENBRENNER. I believe the committee has already printed that.

Mr. BUYER. I object.

Mr. SENSENBRENNER. Does the gentlewoman from California have a request?

Ms. WATERS. Mr. Chairman, I want to take you up on your offer to place my questions to the Chairman in the record about his past comments.

Mr. SENSENBRENNER. You are talking about the real Chairman, not the acting Chairman?

Ms. WATERS. The real Chairman.

Mr. SENSENBRENNER. The Chair will put the question, without objection.

[Information not available at time of printing].

Mr. SENSENBRENNER. For what purpose does the gentlewoman from California——

Ms. LOFGREN. I ask unanimous consent to submit for the record my two letters to Mr. Starr and my letter to the Attorney General relative to the three questions I asked Mr. Starr, and my seeking of answers to those.

Mr. SENSENBRENNER. Without objection.

[Information not available at time of printing].

Mr. SENSENBRENNER. Anybody else? Going once, going twice.

The gentlewoman from California.

Ms. WATERS. I would like to submit the L.A. Times article that I referenced by Mr. Savage relative to 1987, and the comments by our chairman, the real chairman.

Mr. SENSENBRENNER. Without objection.

[Information not available at time of printing].

Mr. SENSENBRENNER. The gentleman from Wisconsin has been very patient, and is recognized.

Ms. JACKSON LEE. Mr. Chairman, I seek a clarification. It was noted that the Constitution is already cited in the record of these proceedings. Is that accurate, Mr. Chairman?

Mr. SENSENBRENNER. I said the committee has already published the Constitution elsewhere.

Ms. JACKSON LEE. I will get a review on this and raise the question again tomorrow. Thank you, Mr. Chairman.

Mr. SENSENBRENNER. Okay. That request is withdrawn, without objection.

The gentleman from Wisconsin, Mr. Barrett.

Mr. BARRETT. Thank you, Mr. Chairman.

Several of my colleagues on the other side of the aisle have been keeping score tonight and have said that this is the third panel where we haven't had a material fact witness on behalf of the President. They are absolutely correct. Now, at the end of 3 months, if you are keeping score, as they have, there have been

zero material fact witnesses to push this investigation and zero material fact witnesses in defense of the President. Again, the score remains zero to zero, which sort of highlights the bizarre nature of these proceedings. We have heard hours and hours of testimony on, talked to ourselves for hours and hours, and still not heard from a single individual who was supposedly involved in this. That points to some of the problems with the impeachment.

I just want to take a minute or two to talk about my perception as to why we are having problems here. I think there are three reasons why the American people are opposed—at least the majority of the American people—are opposed to impeachment.

I am going to advance, first, the one that I hear most often from my Republican colleagues, and that is that the economy is doing well. The stock market is doing well. People are working.

That might be true. I must say I never thought that I would hear my Republican colleagues in Congress being frustrated by a good economy, but certainly I think that that is part of the reason, that the economy is doing well, inflation is low, unemployment is low. Darn it, it was that Democratic president who was in office when that happened.

The second reason, and the one that I hear least often from my colleagues here, is that the American people think there is something wrong here, there is something going on. It can be characterized as attacks on Ken Starr. I frankly prefer to center my attention on Linda Tripp, because I think that she is the one that, in many aspects, is the focal point here.

I don't think it is necessary to hold Ken Starr's office culpable for the mistakes, but when you have a situation where the cooperating witness for the Independent Counsel is also working very, very closely with the attorneys for Paula Jones, there is something wrong here. When we are doing something as grave as talking about setting aside the only national election in this country and there are questions about her role and the role that is being played by the political enemies of the President, in some respects I think that is a greater danger to democracy than anything we are talking about here tonight.

The third reason I think is that many Americans think that these are not impeachable offenses.

I was at home over the weekend. I wanted to buy some hock ham on Sunday. The grocer said to me, "I will tell you, the President screwed up." And his language was much more colorful than that. He said, "The President screwed up. But the question is, was it Bill Clinton the President, or Bill Clinton the man?" He said, "I think it was Bill Clinton the man who screwed up, and we should deal with it. It wasn't Bill Clinton the President."

As you analyze what should be an impeachable offense, if we can take a piece of paper and draw a line right down the middle and on one side you put offenses against the body politic, offenses against our democracy, those that we talked about in terms of Watergate, I think most of us would agree that those are offenses that are impeachable.

On the other side of the ledger, you have offenses that are committed by a person. And I have heard individuals talk about murder. I would think that murder would be an impeachable offense,

even though it is not an offense against the State. That is sort of at the high end, even though it is committed by the person. At the low end would be jaywalking. I don't think anybody would talk about that.

But in the middle you have perjury. You have perjury for things like murder, but then you have people who say that their odometer was wrong when they got a speeding ticket. If that were the case, we would have a lot more malpractice, a lot more product liability suits against odometer makers than we have.

But people are lying there. I think there is a gray area.

So what it comes down to is, what is the best thing to do for this country? There is not a single person that I have yet to talk to who thinks the President is going to be removed from office. So we are going to slap him in the face. We are going to either slap him in the face with censure or impeachment. Impeachment drags this matter out for several months and divides the country. Censure, also a slap in the face. Both have only been done once in this Nation's history.

So, in both instances, we are either going to censure the President for the second time in this country's history or we are going to impeach the President for the second time in this country's history. I opt for censure, which I think is the least divisive or the less divisive of the two.

I yield back the balance of my time.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Arkansas, Mr. Hutchinson.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

I wanted to first make reference to my friend from Virginia, Bobby Scott. He has mentioned twice today a question and a statement that I made to Mr. Craig, the White House counsel, the President's counsel.

I was providing with specificity, at his request, the concerns I have about perjury. So the whole idea was not to bring up a new idea, but it was to be very specific and respond to his requests.

There have been some questions asked about the evidentiary record in this case. I want to make it clear, in my own judgment—and I believe it is clear—that this committee has the burden of proof. There is not any question about that. If the House goes forward, the President has no burden of proof. It is this body that has the burden of proof. And it is not, in my judgment, by preponderance. It should be a high standard, because we are talking about impeachment of the President of the United States.

So as I look at these facts, the burden of proof is on those who wish to go forward with articles of impeachment. We should make that perfectly clear. It should be a high standard.

Now, to the evidentiary record on perjury, I don't know that there is a whole lot in dispute here. It appears to me that there is a growing consensus that the President lied under oath.

Now, there is a debate as to whether this is legally perjury or whether it is simple lying under oath. But I think there is a growing consensus. We don't need to have a lot of witnesses, if any witnesses. The record is clear.

Obstruction is a little bit more difficult. You have to use a lot of common sense. You have to apply other evidence to support the particular witnesses in the case. You have to analyze that more.

Let me go to the questions about perjury. I think this is an extraordinarily serious area. Questions have been raised about Mr. Starr, about Linda Tripp, about other figures in this inquiry.

To me, it comes down to the fact that when the President testified in front of a judge in a civil deposition, a Federal proceeding, he had a choice to make, either to tell the truth or not to tell the truth. Regardless of what has happened in the investigation, when it went to the grand jury, Alan Dershowitz and everyone else was riding him, whatever you do, tell the truth in the grand jury. It could very well cost you your presidency.

He had a choice to make. To blame it now on Starr or Linda Tripp, really, it is not helpful. I think you all would agree as lawyers that you cannot excuse a decision he made, if he made a decision not to tell the truth, on anything else but his own decision. Is that fair?

Mr. BEN-VENISTE. The question, all the way up to the grand jury, there are two things. One, he had another choice, and that was not to respond in the civil deposition and to take an appeal and to take that up.

Mr. HUTCHINSON. That is true.

Mr. BEN-VENISTE. In connection with the grand jury, I again question the materiality and, indeed, the entire basis for claiming that perjury was committed. Because maybe I am missing something, but . . .

Mr. HUTCHINSON. I agree. That is a legal question there that we can debate. That is not conceded. Materiality, all those issues on perjury, you can debate. But the truthfulness, the decision to lie or not, is the President's decision—either answer, don't answer, tell the truth or don't tell the truth.

Mr. BEN-VENISTE. That is true.

Mr. HUTCHINSON. Would you agree, Mr. Hamilton?

Mr. HAMILTON. Yes.

Mr. HUTCHINSON. I am going to run out of time here in just a few minutes.

I want to thank you gentlemen for testifying. Quite frankly, I wanted to hear you because I have a high regard for both of you, but you are put in an awkward situation to help us make a decision, and you have no information that will help us make that decision. But I respectfully receive it.

We are getting down to the "lick log" in this case, as they say on the farm in Arkansas, and we have to make a decision. It is not an easy one. Thank you for testifying.

I wanted to end with a quote from 1974, since we have spent so much time reflecting on that proceeding. This is a quotation from a Member of Congress in his remarks to this committee. "But I am happy to say tonight that most of the people in my own State of Arkansas are law-abiding citizens who believe strongly in the rule of law in this country and that all of the people in this country have an obligation to live by that standard of law and that the leaders of the country have an obligation not merely to obey the law but to set an example of justice and adherence to justice upon

which our free government must be based. There can be no national interest greater than the requirement that the public servants must be bound by the laws that they make and administer."

That statement was made by representative Ray Thornton of Arkansas, who is now on the Supreme Court of Arkansas. I reflected on that last night. I think that is still the attitude of the people of Arkansas. I just wanted to bring that to everyone's attention today.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Indiana, Mr. Pease.

Mr. PEASE. Thank you, Mr. Chairman.

Mr. Ben-Veniste, you discussed earlier in your prepared remarks your suggestion that it would be appropriate and constitutional for the Congress to reprimand the President for his personal conduct. Without getting to the parsing of words again, what do you mean when you say it would be appropriate for us to reprimand the President for his personal conduct?

Mr. BEN-VENISTE. By which I mean to make the distinction between the meaning of high crimes and misdemeanors in the category of treason and bribery, versus the conduct with which you are now struggling. And it seems to me entirely proportionate, reasonable and in the greatest interest of this country to apply a commonsense and moderate approach to the conduct in question and the kind of remedy with which you will deal with that conduct.

And in my view, a reprimand, be it a censure, be it a rebuke, but a formal declaration of disapproval of the conduct is the appropriate remedy.

Mr. PEASE. I understand that. My question still is when you say—let me back up. I'm not interested in us addressing in a reprimand, in a censure, in an impeachment, the President's personal contact, whatever it may have been, with Ms. Lewinsky. I do think it is appropriate for us to address the question of his behavior before judicial proceedings in their various forms. That is the distinction I was getting to.

Mr. BEN-VENISTE. All of that conduct, if I may, flows from his personal conduct. He appeared in his personal capacity before the lawyers and the judge in a deposition in a civil matter. He appeared in his personal capacity before a grand jury. I think that is the distinction.

Were he to have lied about the misuse of power, say he had someone on this committee, Mr. Barr, for example, audited by the IRS, or had his phone bugged by a plumber's unit, or broke into a psychiatrist's office for the purpose of obtaining records, all of those things would indeed rise to a level of scrutiny.

Mr. PEASE. I understand. Thank you.

Mr. Hamilton, in your prepared materials you discussed the issue of abuse of power, and I don't recall that you got into the question of executive privilege, but can you explain for us briefly your understanding of that concept?

Mr. HAMILTON. I did get into it in my prepared statement. There are several types of executive privilege, but one type is what is called the deliberative privilege. When the President speaks with his aides to obtain their advice, that conversation is presumptively

privileged. That, by the way, is what the district court found, that those conversations were presumptively privileged.

The court went on and found that the needs of the criminal justice system outweighed the President's presumptive privilege, so the court ordered the conversations and the information to be turned over. This is essentially what happened, by the way, in the Watergate situation. The Supreme Court found that President Nixon's tapes were presumptively privileged, but the needs of the criminal justice system, in this case the need in a trial, outweighed that.

Mr. PEASE. Thank you. Can you help me understand how on the one hand it can be argued that the President's behavior, his conduct, was purely personal, but yet he asserts executive privilege about behavior that he also contends is purely personal?

Mr. HAMILTON. I was not obviously in the conversations, and some of this information was in a sealed transcript. But I understand that certain of these matters, the Lewinsky matter and all, was discussed in the White House in determining what official actions the President was going to take. It had some ramification. I can't give you any details on that. Maybe that is a good question to ask Mr. Craig tomorrow.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman. I am going to begin by agreeing with my friend, Mr. Barrett, that we actually have a good economy with a Democratic President, and I would like to point out that that fact, the fact that the economy is going well in spite of a Democratic President, is maybe the best case, maybe the best case for not exaggerating the threat of impeachment proceedings to the country.

Now, Mr. Ben-Veniste, did you know that Sam Dash was going to resign before that—from the Office of Independent Counsel before that became public?

Mr. BEN-VENISTE. No.

Mr. CANNON. One of the nice things about being at the end of the panel, besides going through a long process, is that you get to sort of put things together as we go.

I would like to speak to a couple of points made by my good friend, Mr. Rothman, who pointed out first of all that the President is going to be punished to some degree, $850,000, and humiliation; an $850,000 penalty in the Jones case, and that should teach children that perjury is not appropriate. May I just point out that I don't think this is about punishment.

Secondly, in the case of the $850,000, the President may have decided to do that because of the box he is in publicly, but I think that went to settling the base case with Ms. Jones.

Mr. Rothman talked at some length, and I agree with much of this, about the rule of law. Let me suggest that the question here is not the rule of law or not having the rule of law, but rather the kind of weight that we give here to perjury.

There has been a great deal of comment today that we have heard about what happened in the Watergate circumstance, situation. That has established what I would call a very high bar for impeachment. I might say that this bar seems to be a lot more clear

today after 24 years and after having come to a national consensus that what went on was wrong. I recall distinctly during the time how vicious and partisan that all was.

On the other hand, we have a great deal of talk also about an alternative, and that alternative would be some kind of censure. The bar with censure is actually quite low. You may raise that bar a little bit by talking about a penalty, but of course you can't penalize the President unless he agrees. And you may also have him come and stand in the well of the House and abase himself before the House, something that I think would do great damage to the office of the President and not be appropriate.

I find myself at this time really searching for where we ought to go. I think most Americans who care about these proceedings are also looking at some of these same questions. Interestingly, the facts are not really in question. We talked about the zero for zero with the fact witnesses.

But we do have a prima facie case. We have a case that has been made, and many people have acknowledged that, essentially even trying to say that even if true, these actions wouldn't have been impeachable. Both of our current panelists have talked about or acknowledged wrongdoing on the part of the President.

Mr. Owens earlier said that he thought the President had lied to the grand jury and had lied in the civil action about Paula Jones. He also said earlier than that that the facts are pretty clear, by which I think he meant that the President had actually committed perjury.

Those people who support the President have variously called his behavior deplorable, I think is a term Ms. Jackson Lee used, reprehensible is a term Wayne Owens used, sinful is a term that Mr. Craig used, obscene has been used, morally wrong, indefensible, inappropriate, and improper. All these pejoratives from the supporters of the President imply sex rather than perjury.

And I think there is an attempt when we use those kinds of terms to avoid the real issue here, which I believe is perjury.

Frankly in trying to tie these issues up, Mr. Owens looked at the Republicans and sort of blamed us for people becoming aware of some of the President's most lurid actions, when it was in fact the vast majority of all of Congress who voted for the release of the documents that made those actions by the President public.

Professor Drinan pointed out that one of the major differences between this hearing and that of 1974 is that Republicans are in the majority. I would suggest that the fact that Republicans joined Democrats in 1974 says more about Republicans then and Democrats now than it does about the difference between the crimes of President Nixon.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from South Carolina, Mr. Lindsey Graham.

Mr. GRAHAM. Thank you. Where did Mr. Rogan go?

Mr. SENSENBRENNER. Mr. Rogan is ill and went home.

Mr. GRAHAM. I am sorry, I apologize.

Very important, you made some statements that really, Mr. Ben-Veniste—is that right?

Mr. BEN-VENISTE. Yes, it is.

Mr. GRAHAM. I think I understand what you are saying about the type of things that you would want to impeach a President for, and the types of abuse of office that becomes threatening to the public.

If a President focused on a political enemy or someone that could affect the President adversely, and started using the power of the presidency or the power of the government against that small individual, that would trouble you, right; Watergate stuff, is that correct?

Mr. BEN-VENISTE. If he——

Mr. GRAHAM. If he wiretapped an individual, somebody that was a potential threat to their political interests, personal interests, monetary interests—let's just say political interests—or they got the IRS to kind of audit that person, then that really bothers you, doesn't it?

Mr. BEN-VENISTE. I think that is an abuse of power, yes, sir.

Mr. GRAHAM. If I can show a reasonable fact pattern that suggests such an event occurred with Bill Clinton, would you have a different opinion about this as being a little more than about sex?

Mr. BEN-VENISTE. I am certainly willing to listen to your argument, sir.

Mr. GRAHAM. You just need to tune in tomorrow.

Mr. BEN-VENISTE. Oh.

Mr. GRAHAM. Let me ask you this. About his perjury, about the body parts being contacted, I think most of us really believe if that is all there is to this, let's just let it go. Count me in that category. Count me in that category. We will do something to him other than impeach him.

When the President, according to Mrs. Currie, came to her after his deposition testimony and made these statements, do either one of you know what he was trying to do? Here is what she claims he said: "You were always there when she was there, right? We were never really alone? You could see and hear everything?" This is really important. "Monica came on to me, and I never touched her, right? She wanted to have sex with me, and I couldn't do that."

What do you believe the President was trying to do when he made those statements?

Mr. BEN-VENISTE. I don't know.

Mr. GRAHAM. Thank you. I yield back the balance of my time. We will talk about this tomorrow.

Mr. SENSENBRENNER. Finally, last and certainly not least, the gentlewoman from California, Mrs. Bono.

Mrs. BONO. Thank you, Mr. Chairman. I always get the same introduction every time.

Mr. Ben-Veniste, I want to address this to you. We were on a panel together, you were in New York, I was here in Washington. We didn't get to complete our dialogue. I would like to do that now, if I may, without Larry King present.

I am curious which tape you saw first, between the Paula Jones deposition or the videotape of the grand jury testimony.

Mr. BEN-VENISTE. I don't think I have seen any tape of the Paula Jones deposition. I am pretty sure I have not.

Mrs. BONO. All right. So you just read the transcript?

Mr. BEN-VENISTE. I am not sure that I read the entire transcript. I probably did not.

Mrs. BONO. You have read parts of the transcript in the Paula Jones case?

Mr. BEN-VENISTE. I have read parts that were reproduced in the Starr report.

Mrs. BONO. My question is not going to be legal, obviously. These brilliant minds, I leave that up to them to do that argument. By the time it gets to me, Mr. Graham and I have questions that are great and written, and we lose them. And by the end of 37 people, I am stuck with what is left in my gut.

My question for you is if you have read parts of the transcript. I don't know that many Americans have read even that much of the transcript of the Paula Jones testimony. I am wondering if you believe that if the American people saw the testimony of the deposition before the Paula Jones case, if they might feel differently about the perjury case; if they would, when they saw the President lie, if they juxtaposed the two, Paula Jones and grand jury, how would they feel then? Would they be more inclined—would the poll numbers be different than they are?

Mr. BEN-VENISTE. Well, when I saw the President's testimony before the grand jury on videotape and I listened to what people were saying, I think they understood that the President was reacting as a human being who had done something about which he was ashamed, and which was a very human reaction.

I think the idea of not disclosing a personal relationship with an individual with whom he should not have been having that relationship was troubling to him, and I think it is quite clear that he did not want to tell anybody about it in connection with that very highly politicized Paula Jones case. Whatever that case was about, dismissed by the court now, the tangential matter of Ms. Lewinsky, which the court ruled was not central to Ms. Jones' allegations against the President, was something that the President clearly wanted to evade talking about. And I don't think he did it the right way, and I don't think it is appropriate to lie in depositions, but it happens every day.

Every time there is a civil case in which one party says X and the other party says Y, one says black, one says white, usually after all of that happens, the matter goes to a trial, if it is not settled before that, and then a jury decides, was it black, was it white, was it X, was it Y, and then the loser loses, the winner wins, and no one gets prosecuted for perjury.

Mrs. BONO. All right, can I just jump back into my original question, I think it is a good one. If the American people saw the testimony of the President in both situations, would they feel differently, would the polling numbers which are so important to the Democrat side of this aisle, would those numbers be different if they actually saw the President lying to them?

Mr. BEN-VENISTE. I don't think I can answer your question. As much as you have worked on it, it has a lot of parts to it, and I think we will just have to see. And I am thankful that you are the last person to question us this evening.

Mrs. BONO. Thank you very much. We all appreciate your time, and thank you, Mr. Chairman.

Mr. SENSENBRENNER. The gentlewoman yields back the balance of her time. The Chair is about ready to make the most controversial statement of the day. The committee stands recessed until 8 a.m. tomorrow.

[Whereupon, at 8:58 p.m., the committee recessed, to reconvene at 8:00 a.m. on Wednesday, December 9.]

IMPEACHMENT INQUIRY: WILLIAM JEFFERSON CLINTON, PRESIDENT OF THE UNITED STATES, PRESENTATION ON BEHALF OF THE PRESIDENT

WEDNESDAY, DECEMBER 9, 1998

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to call, at 8:12 a.m., in room 2141, Rayburn House Office Building, Hon. Henry J. Hyde [chairman of the committee] presiding.

Present: Representatives Henry J. Hyde, F. James Sensenbrenner, Jr., Bill McCollum, George W. Gekas, Howard Coble, Lamar S. Smith, Elton Gallegly, Charles T. Canady, Bob Inglis, Bob Goodlatte, Stephen E. Buyer, Ed Bryant, Steve Chabot, Bob Barr, William L. Jenkins, Asa Hutchinson, Edward A. Pease, Christopher B. Cannon, James E. Rogan, Lindsey O. Graham, Mary Bono, John Conyers, Jr., Barney Frank, Charles E. Schumer, Howard L. Berman, Rick Boucher, Jerrold Nadler, Robert C. Scott, Melvin L. Watt, Zoe Lofgren, Sheila Jackson Lee, Maxine Waters, Martin T. Meehan, William D. Delahunt, Robert Wexler, Steven R. Rothman, and Thomas M. Barrett.

Majority Staff Present: Thomas E. Mooney, Sr., general counsel-chief of staff; Jon W. Dudas, deputy general counsel-staff director; Diana L. Schacht, deputy staff director-chief counsel; Daniel M. Freeman, parliamentarian-counsel; Joseph H. Gibson, chief counsel; Rick Filkins, counsel; Sharee M. Freeman, counsel; John F. Mautz, IV, counsel; William Moschella, counsel; Stephen Pinkos, counsel; Sheila F. Klein, executive assistant to general counsel-chief of staff; Annelie Weber, executive assistant to deputy general counsel-staff director; Samuel F. Stratman, press secretary; Rebecca S. Ward, officer manager; James B. Farr, financial clerk; Elizabeth Singleton, legislative correspondent; Sharon L. Hammersla, computer systems coordinator; Michele Manon, administrative assistant; Joseph McDonald, publications clerk; Shawn Friesen, staff assistant/clerk; Robert Jones, staff assistant; Ann Jemison, receptionist; Michael Connolly, communications assistant; Michelle Morgan, press secretary; and Patricia Katyoka, research assistant.

Subcommittee on Commercial and Administrative Law Staff Present: Ray Smietanka, chief counsel; and Jim Harper, counsel.

Subcommittee on the Constitution Staff Present: John H. Ladd, chief counsel; and Cathleen A. Cleaver, counsel.

Subcommittee on Courts and Intellectual Property Staff Present: Mitch Glazier, chief counsel; Blaine S. Merritt, counsel; Vince Garlock, counsel; and Debra K. Laman.

Subcommittee on Crime Staff Present: Paul J. McNulty, director of communications-chief counsel; Glenn R. Schmitt, counsel; Daniel J. Bryant, counsel; and Nicole R. Nason, counsel.

Subcommittee on Immigration and Claims Staff Present: George M. Fishman, chief counsel; Laura Ann Baxter, counsel; and Jim Y. Wilon, counsel.

Majority Investigative Staff Present: David P. Schippers, chief investigative counsel; Susan Bogart, investigative counsel; Thomas M. Schippers, investigative counsel; Jeffrey Pavletic, investigative counsel; Charles F. Marino, counsel; John C. Kocoras, counsel; Diana L. Woznicki, investigator; Peter J. Wacks, investigator; Albert F. Tracy, investigator; Berle S. Littmann, investigator; Stephen P. Lynch, professional staff member; Nancy Ruggero-Tracy, office manager/coordinator; and Patrick O'Sullivan, staff assistant.

Minority Staff Present: Julian Epstein, minority chief counsel-staff director; Perry Apelbaum, minority general counsel; Samara T. Ryder counsel; Brian P. Woolfolk, counsel; Henry Moniz, counsel; Robert Raben, minority counsel; Stephanie Peters, counsel; David Lachmann, counsel; Anita Johnson, executive assistant to minority chief counsel-staff director, and Dawn Burton, minority clerk.

Minority Investigative Staff Present: Abbe D. Lowell, minority chief investigative counsel; Lis W. Wiehl, investigative counsel; Deborah L. Rhode, investigative counsel; Kevin M. Simpson, investigative counsel; Stephen F. Reich, investigative counsel; Sampak P. Garg, investigative counsel; and Maria Reddick, minority clerk.

OPENING STATEMENT OF CHAIRMAN HYDE

Chairman HYDE. The committee will come to order. If the panel would be kind enough to turn their nameplates around. You know who you are, we would like to know who you are. Thank you very much. Good morning.

The committee will come to order. Today we will hear from the fourth panel of witnesses. Panel witnesses will each have 10 minutes to make a statement. After the testimony of the witnesses, members will be allowed to ask questions for 5 minutes. I ask that the members please pay attention to their time and be aware that their questions should be asked and answered within their 5 minutes. The reason for that is it takes over 3 hours to cover the members under the 5-minute rule. To make this meaningful, we have to watch our time.

Immediately following this panel, the committee will receive the testimony of White House Counsel Charles Ruff. After his presentation, members will question Mr. Ruff under the 5-minute rule. After the members have questioned Mr. Ruff, the committee counsel may question him.

Thursday morning, tomorrow morning, we will have a presentation by minority chief investigative counsel Abbe Lowell at 9 a.m. and a presentation by chief investigative counsel David Schippers

at 1:00 p.m. Immediately following Mr. Schippers, we will begin consideration of a resolution containing articles of impeachment for our deliberation. We will hear opening statements from all members Thursday evening.

Friday we will begin consideration and debate of articles of impeachment. At this point my thinking is to provide a 10-minute allocation for every member to make an opening—my present thinking is to allow 10 minutes for each member to make an opening statement. I think 10 minutes is adequate and in balance.

I also know that you would like copies of any articles of impeachment that we may have. Let me just suggest to you, they are still works in progress. We think it improper, improvident, to issue any documents until we have heard the testimony. Changes are occurring as we speak. But as soon as we have a document that we feel fairly is a working draft that we can stand behind, we will get it to you.

Mr. SCOTT. Will the gentleman yield?

Chairman HYDE. I certainly will yield.

Mr. SCOTT. As you know, Mr. Conyers and I wrote a letter asking for the specific articles to be available at least 48 hours before we had to take action on them. It would seem to me that if we are going to consider the factual basis and go through the record to determine what the facts are and to propose amendments and to determine whether or not, with specificity, they actually constitute impeachable offenses that we would need some period of time, and 48 hours before we start having to deal with them, I think, is a minimum amount of time. Will we have 48 hours before we have——

Chairman HYDE. The actual amendment process would not begin until Friday morning. We will try to get you something by early afternoon today. But they are still being drafted and I am unwilling to provide working papers and nothing more. We will give you a workable draft, fairly solid in terms of the final product, by early afternoon today. And you won't need the amending process until Friday morning.

Ms. JACKSON LEE. Will the gentleman yield?

Chairman HYDE. Yes.

Ms. JACKSON LEE. I think you answered the question. If there were a desire to amend or to add to or to distract from, detract from this process of working together on these, it is an open process?

Chairman HYDE. You mean, you want to help us draft articles of impeachment?

Ms. JACKSON LEE. In the spirit of bipartisanship, I want to know if the opportunity is open.

Chairman HYDE. Indeed, the amendatory process will permit you to draft them any way you would like and we will give them full consideration.

Ms. JACKSON LEE. Or undraft them?

Chairman HYDE. Oh, yes, undraft.

Ms. JACKSON LEE. The final question, Mr. Chairman, is as you well know, the votes will probably come very late in the day or possibly Saturday. Would we have an opportunity for an explanation of our votes before we vote?

Chairman HYDE. I originally thought 5-minute opening statements and then 5 minutes at the end of the final vote, but I am persuaded by one of your members that a 10-minute opening statement is probably the procedure of choice. So we will all have plenty of opportunity to talk, and a 10–minute opening statement I hope will suffice. And then at the end we can vote and, as the phrase goes, get this behind us.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Mr. FRANK. Mr. Chairman, I think you have done an adequate amount of time. My guess is that by the end, the opportunity we will have to explain ourselves will substantially outpace the interest anyone has in hearing our explanation.

Chairman HYDE. I want to associate myself with the sentiments of the gentleman from Massachusetts.

Mr. SENSENBRENNER. Will the gentleman yield?

Chairman HYDE. Yes.

Mr. SENSENBRENNER. Also in the spirit of bipartisanship, can we get a commitment on the Democratic side that the majority will have copies of amendments in advance so that we can prepare arguments and also any resolution of censure that the Democrats may offer?

Mr. FRANK. Mr. Chairman.

Chairman HYDE. Just a second. First of all, they have to have the documents so they can know how to amend it.

Mr. SENSENBRENNER. I am aware of that.

Chairman HYDE. So that would come first. Then I am sure they would give us their proposed amendments in adequate time for us to study them.

The gentleman from Massachusetts.

Mr. FRANK. Two things. First, I think obviously there is a major resolution that could be done, but I would say, while it may be possible to do some of the amendments, as the gentleman from Wisconsin knows, because he is an able legislator, sometimes you do decide during the process because of the ebb and flow of the argument that you might want to offer an amendment. So I think that is an undertaking I think you can try, but I would never be able to commit——

Mr. SENSENBRENNER. Will the gentleman yield?

Mr. FRANK. Yes.

Mr. SENSENBRENNER. How about a censure resolution? Can we get a copy of that just like you are asking for a copy of our——

Mr. FRANK. I will trade you a copy of it for a vote on it on the floor.

Mr. SENSENBRENNER. I think, if the gentleman will yield further, I think, you know, we have been dealing in good faith in saying that we would give you copies of the proposed articles in advance. I would hope that the gentleman from Massachusetts would seriously consider reciprocating with any proposed censure resolution that the Democrats——

Mr. FRANK. Let me say, first of all, I am speaking in the absence of the Ranking Minority Member, but, yes, if there is a censure resolution ready, I am sure people will——

Chairman HYDE. I have no doubt that we will have mutual exchanges of documents. Mr. Rothman?

Mr. ROTHMAN. Thank you, Mr. Chairman. I am concerned about the response from Judge Starr to the questions raised——

Chairman HYDE. We have written him a letter.

Mr. ROTHMAN. If I may just finish, Mr. Chairman.

Chairman HYDE. I am sorry. I was trying to anticipate your question.

Mr. ROTHMAN. I saw yesterday, it was distributed, a copy of a letter under your signature and Mr. Conyers' signature, asking Judge Starr to answer the questions that had been previously forwarded by the Democratic minority and others. You had indicated that you had hoped that he would have them by the end of the week. I would certainly hope and I am—first of all, I very, very sincerely appreciate the Chair's efforts in getting these answers to these questions. I believe Judge Starr indicated during his testimony that he would be happy to provide them, then he wrote back and said, he was not sure if he would, unless both parties agreed. And now that the Chair and the ranking member have put it in writing, I am hopeful that the Chair will be able to get from Judge Starr these answers before we debate and before we vote.

Chairman HYDE. I understand they are not much help if we have already had the debate and vote. We will attempt to move that process along. I don't like to give deadlines to anybody, but we will do our best.

Mr. ROTHMAN. If I may just finish my—I just want to again repeat my thanks to the Chair for taking that action.

Chairman HYDE. Well, I appreciate that very much. Thank you. Mr. Meehan.

Mr. MEEHAN. The Independent Counsel can probably save time. He doesn't have to prepare the answers. He can just leak them to the press and we will read them.

Chairman HYDE. Very good. Very good.

Are you going to comment on what Mr. Meehan said? Otherwise you are not recognized for that purpose.

Mr. DELAHUNT. Well, speaking of what Mr. Meehan said, I would hope that the Chair would entertain to address the concern of some members in terms of explanation for votes and expand the time period for the filing of concurring or dissenting opinions.

Chairman HYDE. Well, if what you are saying means you want beyond the 10 minutes for the opening statements——

Mr. DELAHUNT. No, I am not talking about that. I am talking after the committee concludes its business.

Chairman HYDE. You have 2 days to file minority views.

Mr. DELAHUNT. Right. I would hope, however, that the Chair would entertain waiving that particular rule.

Chairman HYDE. We don't want to go into the Christmas week, Bill, I don't think. We don't want to put you against the wall, but we have to move ahead, really. Two days, I know you can collect your thoughts in 2 days and express them well.

Mr. DELAHUNT. I need more time, Mr. Chairman.

Chairman HYDE. Consult with Mr. Meehan.

Mr. DELAHUNT. I will consult with Mr. Meehan.

Chairman HYDE. All right.

Mr. SCOTT. Mr. Chairman?

Chairman HYDE. Yes, Mr. Scott.

Mr. SCOTT. Are we going to have a business meeting sometime before the, before—I have a motion pending. I guess based on that explanation, it may not be relevant, but I would like the opportunity to offer it whenever we can get around to it.

Chairman HYDE. All right. We do have some business to attend to. We are waiting for the propitious time to do that. At that point we will consider your motion, too.

Very well.

Mr. SCOTT. Thank you, Mr. Chairman.

Chairman HYDE. Would the witnesses please stand and take the oath?

[Witnesses sworn.]

Chairman HYDE. Thank you. Let the record show the witnesses answered the question in the affirmative. We have a distinguished panel today, as we have had all week. Thomas P. Sullivan is a senior partner at Jenner & Block and has practiced with that firm for the past 44 years. He is a former United States Attorney for the Northern District of Illinois. Mr. Sullivan specializes in civil and criminal trial and appellate litigation and he has served as an instructor at Loyola University School of Law and for the National Institute for Trial Advocacy.

Richard Davis is a partner with the New York law firm of Weil, Gotschal & Manges. He clerked for United States District Court Judge Jack B. Weinstein from 1969 to 1970. He also served as an Assistant U.S. Attorney in the Southern District of New York from 1970 through 1973 and was task force leader for the Watergate Special Prosecution Force, 1973–1975. From 1977 to 1981, he served as Assistant Secretary of the Treasury for Enforcement and Operations.

Edward S. G. Dennis, Jr. is a partner in the litigation section of the Philadelphia law firm of Morgan, Lewis & Bockius. He joined the firm after 15 years with the Department of Justice, during which he held the following positions: Acting Deputy Attorney General, Assistant Attorney General for the Criminal Division, and U.S. Attorney for the Eastern District of Pennsylvania. He is co-chairman of the Corporate Investigations and Criminal Defense Practice Group.

William F. Weld is a former 2-term Governor of Massachusetts. A graduate of the Harvard Law School, Governor Weld began his legal career as a counsel with the House Committee on the Judiciary during the Watergate impeachment inquiry. He then served as U.S. Attorney and as head of the Criminal Division at Main Justice under President Reagan before being elected Governor of Massachusetts in 1990.

Governor Weld is currently a partner in the Chicago law firm of McDermott, Will & Emory and he is also the author of the recently published comic political crime novel, *Mackerel By Moonlight*.

I hope it is not a violation of any rule or regulation to give a plug for the Governor's book.

Ronald Noble is Associate Professor of Law at NYU Law School. He served as Under Secretary of the Treasury for Enforcement, 1994–1996; as Deputy Assistant Attorney General and Chief of Staff in the Criminal Division of the Department of Justice, 1988–

1990; and as Assistant United States Attorney in the Eastern District of Pennsylvania, 1984–1988.

Before recognizing each of you in whatever order you choose to go—although it is probably just as simple to start on my left to the right—I would like to recognize the Ranking Minority Member, John Conyers, for a statement, if he wishes to make one.

Mr. CONYERS. Could I delay my statement, Mr. Chairman?

Chairman HYDE. You surely could.

Mr. CONYERS. Thank you.

TESTIMONY OF THOMAS P. SULLIVAN, ESQ., FORMER U.S. ATTORNEY, NORTHERN DISTRICT OF ILLINOIS; RICHARD J. DAVIS, ESQ., WEIL, GOTSCHAL & MANGES; EDWARD S.G. DENNIS, JR., ESQ., MORGAN, LEWIS & BOCKIUS; HON. WILLIAM WELD, FORMER GOVERNOR OF MASSACHUSETTS; AND RONALD NOBLE, ESQ., PROFESSOR OF LAW, NEW YORK UNIVERSITY LAW SCHOOL

Chairman HYDE. Very well, Mr. Sullivan.

TESTIMONY OF THOMAS P. SULLIVAN

Mr. SULLIVAN. Members of the Judiciary Committee, I appreciate the opportunity to appear before you today to discuss the professional standards for obstruction of justice and perjury. My qualifications to discuss this subject include over 40 years of practice in Federal criminal cases, chiefly in Chicago, but also in other cities. During most of that time I have acted as defense counsel for persons accused of or under investigation for criminal conduct. For 4 years, from 1977 to 1981, I served as the United States Attorney for the Northern District of Illinois. Chairman Hyde and Mr. Schippers are known to me from the practice in Chicago, and I believe they can vouch for my qualifications.

Chairman HYDE. Extraordinarily high.

Mr. SULLIVAN. Thank you, sir.

During the past 35 years, I have taken an interest in but no part in politics. While I am a registered Democrat, I consider myself independent at the ballot box and I have often voted for Republican candidates. I have acted for the Republican Governor of Illinois, a Democratic Senator, and Mayor Harold Washington. I have prosecuted as well as defended Democrat and Republican officeholders. I appear today not as an advocate or partisan for President Clinton or the Democrat Party, but rather as a lawyer of rather long experience who may be able to assist you in your deliberations on the serious and weighty matters you now have before you.

The topic of my testimony is prosecutorial standards under which cases involving alleged perjury and obstruction of justice are evaluated by responsible Federal prosecutors.

In the Federal criminal justice system, indictments for obstruction of justice and perjury are relatively rare. There are several reasons. One is that charges of obstruction and perjury are not substantive crimes, but rather have to do with circumstances peripheral to underlying criminal conduct. The facts giving rise to the obstruction or perjury arise during the course of an investigation involving other matters, and when prosecuted are usually tagged on as charges additional to the underlying criminal conduct.

Second, charges of obstruction and perjury are difficult to prove because the legislature and the courts have erected certain safeguards for those accused of these "ripple effect" crimes, and these safeguards act as hurdles for prosecutors.

The law of perjury can be particularly arcane, including the requirements that the government prove beyond a reasonable doubt that the defendant knew his testimony to be false at the time he or she testified, that the alleged false testimony was material, and that any ambiguity or uncertainty about what the question or answer meant must be construed in favor of the defendant. Both perjury and obstruction of justice are what are known as specific intent crimes, putting a heavy burden on the prosecutor to establish the defendant's state of mind. Furthermore, because perjury and obstruction charges often arise from private dealings with few observers, the courts have required either two witnesses who testify directly to the facts establishing the crime or, if only one witness testifies to the facts constituting the alleged perjury, that there be substantial corroborating proof to establish guilt.

Responsible prosecutors do not bring these charges lightly.

There is another cautionary note, and this I think is very significant here. Federal prosecutors do not use the criminal process in connection with civil litigation involving private parties. The reasons are obvious. If the Federal prosecutors got involved in charges and countercharges of perjury and obstruction of justice in discovery or trial of civil cases, there would be little time left for the kinds of important matters that are the major targets of the Department of Justice criminal guidelines. Further, there are well established remedies available to civil litigants who believe perjury or obstruction has occurred. Therefore, it is rare that the Federal criminal process is used with respect to allegations of perjury or obstruction in civil matters.

The ultimate issue for a prosecutor deciding whether or not to seek an indictment is whether he or she is convinced that the evidence is sufficient to obtain a conviction. That is, whether there is proof beyond a reasonable doubt that the defendant committed the crime. This is far more than a probable cause standard, which is the test by which grand jury indictments are judged. Responsible prosecutors do not submit cases to a grand jury for indictment based upon probable cause. They do not "run cases up the flagpole" to see how the jury will react. They do not use indictments for deterrence or as a punishment.

Responsible prosecutors attempt to determine whether the proof is sufficient to establish guilt beyond a reasonable doubt. If the answer is yes and there are no reasons to exercise discretion in favor of lenity, the case is submitted to the grand jury for indictment which, where I come from and everywhere else I know about, is routine and automatic. If the answer is no, that is, even if the evidence establishes probable cause but in the prosecutor's judgment will not result in a conviction, the responsible prosecutor will decline the case.

Some years ago, during the Bush Administration, I was asked by an independent counsel to act as a Special Assistant to bring an indictment against and try a former member of President Reagan's Cabinet. Having looked at the evidence, I declined to do so because

I concluded that, when all the evidence was considered, the case for conviction was doubtful, and that there were innocent and reasonable explanations for the allegedly wrongful conduct.

Having reviewed the evidence here, I have reached the same conclusion. It is my opinion that the case set out in the Starr report would not be prosecuted as a criminal case by a responsible Federal prosecutor.

Before addressing the specific facts of several of the charges, let me say that in conversations with many current and former Federal prosecutors in whose judgment I have great faith, virtually all concur that if the President were not involved—if an ordinary citizen were the subject of the inquiry—no serious consideration would be given to a criminal prosecution arising from alleged misconduct in discovery in the *Jones* civil case, having to do with an alleged coverup of a private sexual affair with another woman, or the follow-on testimony before the grand jury. This case would simply not be given serious consideration for prosecution. It wouldn't get in the door; it would be declined out of hand.

A threshold question is whether, if the President is not above the law, as he should not be, is he to be treated as below the law? Is he to be singled out for prosecution because of his office in a case in which, were he a private citizen, no prosecution would result? I believe the President should be treated in the criminal justice system in the same way as any other United States citizen. If that were the case here, it is my view that the alleged obstruction of justice and perjury would not be prosecuted by a responsible United States Attorney.

Having said that, I would like to address several of the specific charges in the Starr report. The first has to do with perjury in the President's deposition and before the grand jury about whether or not he had a sexual affair, relationship or relations with Ms. Lewinsky. The President denied that he did, based on his understanding of the definition of the term "sexual relations," adopted by the court in the *Jones* case. That definition, which you have before you in the papers, is difficult to parse, and one can argue either side, but it is clear to me that the President's interpretation is a reasonable one.

Chairman HYDE. Mr. Sullivan, I hate to interrupt, but your time has expired. Do you think in another 3 minutes you could wind up?

Mr. SULLIVAN. Yes.

Chairman HYDE. Very well.

Mr. SULLIVAN. I think I can.

Chairman HYDE. We will continue it for 3 minutes.

Mr. SULLIVAN. Thank you very much, Mr. Hyde.

It is clear to me that the President's interpretation is a reasonable one, especially because the words which would seem to describe directly oral sex were stricken from the definition by the judge. In a perjury prosecution, the government must prove beyond a reasonable doubt that the defendant knew when he gave the testimony that he was telling a falsehood. The lie must be knowing and deliberate. It is not perjury for a witness to evade, obfuscate or answer nonresponsively. The evidence simply does not support the conclusion that the President knowingly committed perjury,

and the case is so doubtful and weak that a responsible prosecutor would not present it to the grand jury.

Let me turn to the issue of obstruction through delivery of gifts to Ms. Lewinsky by Ms. Currie. Some of the evidence on this subject is not recounted in the Starr report, but a responsible prosecutor will not ignore the proof consistent with innocence or which shows that an essential element of the case is absent. The evidence is that, when talking to the President, Ms. Lewinsky brought up the subject of having Mrs. Currie hold the gifts, and the President either failed to respond, or said, "I don't know" or "I'll think about it." According to Mrs. Currie, Ms. Lewinsky called Mrs. Currie and asked Mrs. Currie to come to Ms. Lewinsky's home to take the gifts, and Ms. Currie did so. Ms. Lewinsky testified that Mrs. Currie placed the call to Ms. Lewinsky, but the central point in this is that neither Mrs. Currie nor Ms. Lewinsky testified that the President suggested to Ms. Lewinsky that she hide the gifts or that the President told Mrs. Currie to get the gifts from Ms. Lewinsky.

Under these circumstances, it is my view that a responsible prosecutor would not charge the President with obstruction, because there is no evidence sufficient to establish beyond a reasonable doubt that the President was involved. Indeed, it seems likely that Ms. Lewinsky was the sole moving force; having broached the idea to the President, but having received no response or encouragement, she called Mrs. Currie to take the gifts, without the President's knowledge or encouragement. That is not the stuff of which an obstruction case is made.

Because of time, I am going to skip over my third example and go to my conclusion.

Chairman HYDE. Thank you.

Mr. SULLIVAN. Which was about influencing Mrs. Currie's testimony.

Time does not permit me to go through all of the allegations of misconduct in the Starr report. Suffice it to say that, in my opinion, none of them is of the nature which a responsible Federal prosecutor would present to a Federal grand jury for indictment. I will be pleased to respond to your questions.

Thank you very much, particularly for the extra time.

[The statement of Mr. Sullivan follows:]

Statement of Thomas P. Sullivan
December 9, 1998

Members of the Judiciary Committee, I appreciate the opportunity to appear before you today to discuss the professional standards for obstruction of justice and perjury. My qualifications to discuss this subject include over 40 years of practice in federal criminal cases, chiefly in Chicago, but also in other cities. During most of that time I have acted as defense counsel for persons accused of or under investigation for criminal conduct. For four years, from 1977 to 1981, I served as United States Attorney for the Northern District of Illinois. Chairman Hyde and Mr. Schippers are known to me from the practice in Chicago, and I believe they can vouch for my qualifications.

During the past 35 years, I have taken an interest in but no part in politics. While I am a registered Democrat, I consider myself independent at the ballot box, and have often voted for Republican candidates. I have acted for the Republican Governor of Illinois, a Democrat Senator, and Mayor Harold Washington. I have prosecuted as well as defended Democrat and Republican officeholders. I appear today not as an advocate or partisan for President Clinton or the Democrat Party, but rather as a lawyer of rather long experience who may be able to assist you in your deliberations on the serious and weighty matters you now have before you.

The topic of my testimony is prosecutorial standards under which cases involving alleged perjury and obstruction of justice are evaluated by responsible federal prosecutors.

In the federal criminal justice system, indictments for obstruction of justice and perjury are relatively rare. There are several reasons. One is that charges of obstruction and perjury are not substantive crimes, but rather have to do with circumstances peripheral to underlying

criminal conduct. The facts giving rise to the obstruction or perjury arise during the course of an investigation involving other matters, and when prosecuted usually are tagged on as charges additional to the underlying criminal conduct.

Second, charges of obstruction and perjury are difficult to prove, because the legislature and the courts have erected certain safeguards for those accused of these "ripple effect" crimes, and these safeguards act as hurdles for prosecutors.

The law of perjury can be particularly arcane, involving the requirements that the government prove beyond a reasonable doubt that the defendant knew his testimony to be false at the time he or she testified, that the alleged false testimony was material, and that any ambiguity or uncertainty about what the question or answer meant must be construed in favor of the accused. Both perjury and obstruction of justice are what are known as specific intent crimes, putting a heavy burden on the prosecutor to establish the defendant's state of mind. Furthermore, because perjury and obstruction charges often arise from private dealings with few observers, the courts have required either two witnesses who testify directly to the facts establishing the crime, or if only one witness testifies to the facts constituting the alleged perjury, that there be substantial corroborating proof to establish guilt.

Responsible prosecutors do not bring these charges lightly.

There is another cautionary note: federal prosecutors do not use the criminal process in connection with civil litigation involving private parties. The reasons are obvious. If the federal prosecutors got involved in charges and counter-charges of perjury and obstruction of justice in discovery or trial of civil cases, there would be little time left for the kinds of important matters that are the major targets of the Department of Justice criminal guidelines. Further, there are

well established remedies available to civil litigants who believe perjury or obstruction has occurred. Therefore, it is rare that the federal criminal process is used with respect to allegations of perjury or obstruction in civil matters.

The ultimate issue for a prosecutor deciding whether or not to seek any indictment is whether he or she is convinced that the evidence is sufficient to obtain a conviction -- that is, whether there is proof beyond a reasonable doubt that the defendant committed the crime. This is far more than a probable cause standard, which is the test by which grand jury indictments are judged. Responsible prosecutors do not submit cases to a grand jury for indictment based on probable cause. They do not "run cases up the flagpole' to see how the jury will react. They do not use indictments for deterrence or as punishment.

Responsible prosecutors attempt to determine whether the proof is sufficient to establish guilt beyond a reasonable doubt. If the answer is yes, and there are no reasons to exercise discretion in favor of lenity, the case is submitted to the grand jury for indictment, which, where I come from -- and everywhere else I know about -- is routine and automatic. If the answer is no, that is, even if the evidence establishes probable cause but in the prosecutor's judgment will not result in a conviction, the responsible prosecutor will decline the case.

Some years ago, during the Bush Administration, I was asked by an Independent Counsel to act as a Special Assistant to bring an indictment against and try a former member of President Reagan's Cabinet. Having looked at the evidence, I declined to do so, because I concluded that when all the evidence was considered, the case for conviction was doubtful, and that there were innocent and reasonable explanations for the allegedly wrongful conduct.

Having reviewed the evidence here, I have reached the same conclusion. It is my opinion that the case set out in the Starr Report would not be prosecuted as a criminal case by a responsible federal prosecutor.

Before addressing the specific facts of several of the charges, let me say that in conversations with many current and former federal prosecutors in whose judgment I have great faith, virtually all concur that if the President were not involved -- if an ordinary citizen were the subject of the inquiry -- no serious consideration would be given to a criminal prosecution arising from alleged misconduct in discovery in the Jones civil case, having to do with an alleged coverup of a private sexual affair with another woman, or the follow-on testimony before the grand jury. The case simply would not be given serious consideration for prosecution. It wouldn't get in the door; it would be declined out of hand.

A threshold question is whether, if the President is not above the law, which he ought not to be, is he to be treated as below the law? Is he to be singled out for prosecution because of his office, in a case in which, were he a private citizen, no prosecution would result? I believe the President should be treated in the criminal justice system in the same way as any other United States citizen. If that were the case here, it is my view that the alleged obstruction of justice and perjury would not be prosecuted by a responsible United States Attorney.

Having said that, I'd like to address several of the specific charges in the Starr Report. The first has to do with perjury in the President's deposition and before the grand jury about whether or not he had a sexual affair, relationship or relations with Ms. Lewinsky. The President denied that he did, based on his understanding of the definition of the term "sexual relations" adopted by the court in the Jones case. That definition is difficult to parse, and one can argue

either side, but it is clear to me that the President's interpretation is a reasonable one, especially because the words which seem to describe directly oral sex were stricken from the definition by the judge. In a perjury prosecution, the government must prove beyond a reasonable doubt that the defendant knew when he gave the testimony that he was telling a falsehood; the lie must be knowing and deliberate. It is not perjury for a witness to evade, obfuscate or answer non-responsively. The evidence simply does not support the conclusion that the President knowingly committed perjury, and the case is so doubtful and weak that a responsible prosecutor would not present it to the grand jury.

It may be argued that the definition as given covers the President's conduct if he touched parts of Ms. Lewinsky's body, but here we encounter the firmly established rule that a perjury case cannot be based upon the testimony of a single witness unless there is strong corroboration to prove the falsity of the defendant's statement. The evidence does not meet that standard, because proof that the President and Ms. Lewinsky were alone, or engaged in oral sex, cannot in my judgment provide proof beyond a reasonable doubt that the requisite touching occurred.

Let me turn to the issue of obstruction through delivery of the gifts by Ms. Lewinsky to Ms. Currie. Some of the evidence on this subject is not recounted in the Starr Report, but a responsible prosecutor will not ignore the proof consistent with innocence, or which shows that an essential element of the case is absent. The evidence is that when talking to the President, Ms. Lewinsky brought up the subject of having Mrs. Currie hold the gifts, and the President either failed to respond, or said "I don't know" or "I'll think about it." According to Mrs. Currie, Ms. Lewinsky called Mrs. Currie and asked Mrs. Currie to come to Ms. Lewinsky's home to take the gifts, and Mrs. Currie did so. Ms. Lewinsky testified that Mrs. Currie placed the call to Ms.

Lewinsky. But the central point is that neither Mrs. Currie nor Ms. Lewinsky testified that the President suggested to Ms. Lewinsky that she hide the gifts, or that the President told Mrs. Currie to get the gifts from Ms. Lewinsky.

Under these circumstances, it is my view that a responsible prosecutor would not charge the President with obstruction, because there is no evidence sufficient to establish beyond a reasonable doubt that the President was involved. Indeed, it seems likely that Ms. Lewinsky was the sole moving force, having broached the idea to the President, but having received no response or encouragement, she called Mrs. Currie to take the gifts, without the President's knowledge or encouragement. That is not the stuff of which an obstruction case is made.

The final example I will address is the allegation that the President attempted to influence Mrs. Currie's testimony. The crux of the allegation is that after the President's deposition was taken in the Jones case, the President asked Mrs. Currie a number of leading questions, designed to obtain confirmation that Mrs. Currie was always present when the President was with Ms. Lewinsky. Mrs. Currie has testified that she did not feel pressured to agree with the President, and that she believed his statements were correct and therefore agreed with him: "He would say right and I could have said wrong."

This does not make a case for obstruction. Indeed, based on Mrs. Currie's testimony, which is critical to the case, the trial judge would be justified in dismissing the case at the close of the government's evidence, because Mrs. Currie's testimony establishes affirmatively that there was no effort made by the President to influence her testimony. It is common practice for lawyers to go over witnesses' testimony in a leading fashion, asking that they affirm the accuracy of what the lawyer understands the witness will say on the stand, and it has not been suggested

that in doing so the lawyer has obstructed justice. There should be no different rule when two participants to the same event are involved.

Time does not permit me to go through all of the allegations of misconduct in the Starr Report. Suffice it to say that, in my opinion, none of them is of the nature which a responsible federal prosecutor would present to a grand jury for indictment.

I will be pleased to respond to your questions.

- END -

Chairman HYDE. Thank you, Mr. Sullivan.

This is a formal proceeding, and in this Chamber of Congress, unlike in certain State legislatures, we never introduce people in the family, but this is a special day and we have someone in the audience that I think ought to be introduced. With the permission of the gentleman from Massachusetts, I would like to introduce Elsie Frank, Barney Frank's mother.

Chairman HYDE. Thank you. Mr. Davis.

TESTIMONY OF RICHARD J. DAVIS

Mr. DAVIS. Thank you, Mr. Chairman, Mr. Conyers, members of the committee.

Mr. COBLE. Mr. Chairman, I am reluctant to do this, but in the sense of fairness, do you think that—Mr. Sullivan was afforded an additional 3 minutes—that we should make that offer to the other members of the panel, if it comes to that?

Chairman HYDE. I would rather face that critical decision——

Mr. COBLE. Very well.

Chairman HYDE [continuing]. On a piecemeal basis.

Mr. COBLE. For the remaining four, at least, I tried.

Chairman HYDE. Mr. Davis.

Mr. DAVIS. Thank you. I will try and summarize my longer written statement, which the committee has.

There can be no doubt that the decision as to whether to prosecute a particular individual is an extraordinarily serious matter. Good prosecutors thus approach this decision with a genuine seriousness, carefully analyzing the facts and the law and setting aside personal feelings about the person under investigation. In making a prosecution decision as recognized by Justice Department policy, the initial question for any prosecutor is, can the case be won at trial? Simply stated, no prosecutor should bring a case if he or she does not believe that based upon the facts and the law, it is more likely than not that they will prevail at trial. Cases that are likely to be lost cannot be brought simply to make a point, to express a sense of moral outrage, however justified such a sense of outrage might be. You have to truly believe you will win the case.

I would respectfully suggest that this same principle should guide the House of Representatives as it determines to, in effect, make the decision as to whether to commence the prosecution by impeaching the President. Indeed if anything, the strength of the evidence should be greater to justify impeachment than to file a criminal case.

In the context of perjury prosecutions, there are some specific considerations which are present when deciding whether such a case can be won. First, it is virtually unheard of to bring a perjury prosecution based solely on the conflicting testimony of two people. The inherent problems in bringing such a case are compounded to the extent that any credibility issues exist as to the government's sole witness.

Second, questions and answers are often imprecise. Questions sometimes are vague or use too narrowly-defined terms and interrogators frequently ask compound or inarticulate questions and fail to follow up imprecise answers.

Witnesses often meander through an answer, wandering around a question but never really answering it. In a perjury case, where the precise language of a question and answer are so relevant, this makes perjury prosecutions difficult because the prosecutor must establish that the witness understood the question, intended to give a false, not simply an evasive answer, and in fact did so.

The problem of establishing such intentional falsity is compounded in civil cases by the reality that lawyers routinely counsel their clients to answer only the question asked, not to volunteer and not to help out an inarticulate questioner.

Third, prosecutors often need to assess the veracity of an "I don't recall" answer. Like other answers, such a response can be true or false, but it is a heavy burden to prove that a witness truly remembered the fact at issue. The ability to do so will often depend on the nature of that fact. Precise times of meetings, names of people one has met, and details of conversations and sequences of events, indeed, even if those events are of fairly recent origin, are often difficult to remember. Forgetting a dramatic event is, however, more difficult to justify.

The ability to win at trial is not, however, the only consideration guiding the decision whether to prosecute. Other factors reflected in the Justice Department guidelines include Federal law enforcement priorities, the nature and seriousness of the offense, the impact of the offense on any victim, whether there has been restitution, deterrence and the criminal history of the accused.

Before turning to the application of these principles to the facts at hand, I should say that in my work at the Watergate special prosecutor's office, I was involved in applying these principles in extraordinarily high-profile cases. While we successfully prosecuted a number of matters, we also declined to proceed in a number of close cases. We did so even in circumstances where we believed in our hearts that a witness had deliberately lied under oath or committed some other wrongful act, but simply concluded that we were not sufficiently certain that we would prevail at trial.

I will now turn to the issue of whether, from the perspective of a prosecutor, there exists a prosecutable case for perjury in front of the grand jury. The answer to me is clearly no. The President acknowledged to the grand jury the existence of an improper intimate relationship with Monica Lewinsky, but argued with the prosecutors questioning him that his acknowledged conduct was not a sexual relationship as he understood the definition of that term being used in the *Jones* deposition. Engaging in such a debate, whether wise or unwise politically, simply does not form the basis for a perjury prosecution. Indeed in the end, the entire basis for a grand jury perjury prosecution comes down to Monica Lewinsky's assertion that there was a reciprocal nature to their relationship and that the President touched her private parts with the intent to arouse or gratify her and the President's denial that he did so.

Putting aside whether this is the type of difference of testimony which should justify an impeachment of a President, I do not believe that a case involving this kind of conflict between two witnesses would be brought by a prosecutor since it would not be won at trial. A prosecutor would understand the problem created by the fact that both individuals had an incentive to lie: the President, to

avoid acknowledging a false statement at his civil deposition; and Ms. Lewinsky, to avoid the demeaning nature of providing wholly unreciprocated sex. Indeed, this incentive existed when Ms. Lewinsky described the relationship to the confidants described in the Independent Counsel's referral.

Equally as important, however, Mr. Starr has himself questioned the veracity of his one witness, Ms. Lewinsky, by questioning her testimony that his office suggested she tape-record Ms. Currie, Mr. Jordan, and potentially the President. And in any trial, the Independent Counsel would also be arguing that other key points of Ms. Lewinsky's testimony are false, including where she explicitly rejects the notion that she was asked to lie and that assistance in her job search was an inducement for her to do so.

It also is extraordinarily unlikely in ordinary circumstances a prosecutor would bring a prosecution for perjury in the President's civil deposition in the *Jones* case. First, while one can always find isolated contrary examples, under the prosecution principles discussed above, perjury prosecutions involving civil cases are rare; and it would be even more unusual to see such a prosecution where the case had been dismissed on unrelated grounds and then settled, particularly where the settlement occurred after the disclosure of the purported false testimony.

Second, perjury charges on peripheral issues are also uncommon. Perjury prosecutions are generally filed where a false statement goes to the core of the matter under inquiry. Indeed, in order to prevail in a perjury prosecution, the prosecutor must establish not only that the testimony was false, but that the purported false testimony was material. Here, the *Jones* case was about whether then-Governor Clinton sought unwanted sexual favors from a State employee in Arkansas. Monica Lewinsky herself had nothing to do with the actual facts at issue in that suit. This deposition was about the *Jones* case. It was not part of a general investigation into the Monica Lewinsky affair, and that is important on the materiality issue. Given the lack of connection between these two events under the applicable rules of evidence, a purely consensual relationship with the President half a decade later would, I believe, not have even been admissible at any ultimate trial of the *Jones* case.

While the court allowed questioning in the civil deposition about this matter, the judge did so under the very broad standard used in civil discovery. Indeed, while not dealing with the admissibility issue had there been no Independent Counsel inquiry, after the controversy about the President's relationship with Ms. Lewinsky arose, the court considered this testimony sufficiently immaterial so as to preclude testimony about it at the trial.

Finally, the ability to prove the intentional making of false statements in the civil deposition is compounded by inexact questions, evasive and inconsistent answers, insufficient follow-up by the questioner, and reliance by the examiner on a definition of sexual relations rather than asking about specific acts.

But whatever the ability to meet the standard of proof on this issue as to any particular question, it simply is not a perjury case that would be brought. It involves difficult proof issues as to, at best, peripheral issues where complete and truthful testimony would be of doubtful admissibility in a settled civil case which had

already been dismissed. It simply is not the stuff of criminal prosecution.

Turning to the issue of obstruction of justice involving the *Paula Jones* case, a prosecutor analyzing the case would be affected by many of the same weaknesses that are discussed above. These weaknesses as well as additional problems with such a case are discussed in my written statement, and I will not comment on them orally in the interest of time.

Before concluding, I would like to make two closing observations. I will be, with your permission, just a minute or so.

In August of 1974, prior to the pardon, the Watergate Special Prosecution Force commenced the extraordinarily difficult process of determining whether to indict then former President Nixon. In my 1974 memorandum analyzing the relevant factors which would ultimately affect such a decision, and proceeding in that memorandum on the belief not present here that adequate evidence clearly existed to support the bringing of such criminal charges, I articulated two primary and competing considerations which I believed it appropriate for us then as prosecutors to consider. The first factor was to avoid a sense of a double standard by declining to prosecute a plainly guilty person because he had been President. The second was that a prosecutor should not proceed with even provable charges if they conclude that important and valid societal benefits would be sacrificed by doing so.

In the Nixon case, as articulated in my memorandum, such a benefit was the desirability of putting the turmoil of the past 2 years behind us so as to better be able to proceed with the country's business. I believe today, 25 years later, that it is still appropriate for those deciding whether to bring charges to consider these factors.

Finally, prosecutors often feel a sense of frustration if they cannot express their sense that a wrong has been committed by bringing charges. But every wrong is not a crime, and wrongful noncriminal conduct sometimes can be addressed without the commencing of any proceeding. Apart from issues of censure, we live in a democracy, and one sanction that can be imposed is by the voters acting through the exercise of their right to vote. President Clinton lied to the American people. If they believed it appropriate, they were free to voice their disapproval by voting against his party in 1998 and remain free to do so in 2000, as occurred in 1974 when the Democrats secured major gains.

The answer to every wrongful act is not the invocation of punitive legal processes.

Chairman HYDE. Thank you, Mr. Davis.

[The statement of Mr. Davis follows:]

December 9, 1998

TESTIMONY OF RICHARD J. DAVIS
BEFORE
THE HOUSE JUDICIARY COMMITTEE
CONCERNING ISSUES RELATING
TO THE POTENTIAL IMPEACHMENT OF PRESIDENT CLINTON

Mr. Chairman, Mr. Conyers, Members of the Committee:

I appear here today to discuss issues relating to proposed Articles of Impeachment relating to perjury and obstruction of justice. I do so with the perspective of someone who has been a lawyer for nearly 30 years, who was privileged to serve as a federal prosecutor and as an Assistant Treasury Secretary for Enforcement and Operations during the Carter administration, and who experienced the issues revolving around Watergate as a Task Force Leader in the Watergate Special Prosecution Force. Indeed, as a member of that office I was the principal prosecutor in two perjury prosecutions, one involving testimony by Dwight Chapin before a grand jury and another involving testimony by Howard Edwin Reinecke before the Senate Judiciary Committee.

Before addressing the issues relating to perjury and obstruction of justice, I think it would be appropriate briefly to set forth a perspective on the impeachment process. While you have heard testimony from others on

these issues, a brief summary of my views would, I believe, be useful because they relate in part to some of the specific issues I will address.

To state the obvious, impeachment is, and must be, reserved for the most serious of wrongful acts because its effect is to begin the process to remove from office a person elected to the Presidency by the people at large. For the public, therefore, to view this disturbing of their decision as legitimate the wrongful conduct alleged first needs to be of an unquestionably serious enough nature and to clearly constitute a "high crime or misdemeanor." Second, the proof that the President committed such misconduct needs to be clear and unequivocal. Indeed, while I will discuss today standards applied to criminal prosecutions, the evidentiary burden for impeachment, which creates the basis for a trial in the Senate -- with all the potential for disruption of the processes of government that such a trial would entail -- should be heavier than the burden involved in deciding to bring a prosecution.

In 1974, all of these conditions were met. As to the core charge -- the repeated obstruction of a federal criminal investigation into the break-in of the headquarters of the opposition political party by a White House-created group of clandestine operatives which had previously

burglarized the office of the psychiatrist of a political opponent -- there was no doubt as to the seriousness of what had been done, and there were no meaningful credibility issues since the President could be heard on tape participating in criminal conduct. And most important, the public accepted that the situation justified the President's removal from office. There thus was no sense that Gerald Ford's ascension to the Presidency was in any way illegitimate, and this was true even though he was an appointed, rather than an elected, Vice President.

With this background, let me turn to my assigned topic -- the standards for prosecution in perjury and obstruction of justice cases, and how these standards apply to the instant matter.

There can be no doubt that the decision as to whether to prosecute a particular individual is an extraordinarily serious matter. It forever changes the life of that individual, and can have material collateral effects on family, friends, business colleagues and, in some special circumstances, the public at large. Good prosecutors thus approach the decision as to whether to prosecute with a genuine seriousness, carefully analyzing the facts and law, and setting aside personal feelings about the person under investigation.

Speaking generally, as reflected in the Department of Justice's Manual for United States Attorney's Offices, the initial question for any prosecutor is, can the case be won at trial. See § 9-27.220 of U.S. Attorney's Manual. Simply stated, no prosecutor should bring a case if he or she does not believe that, based on the facts and the law, it is more likely than not that they will prevail at trial. Cases that are likely to be lost cannot be brought simply to make a point or to express a sense of moral outrage, however justified such a sense of outrage might be. You have to truly believe you will win the case. I would respectfully suggest that this same principal should guide the House of Representatives as it determines to, in effect, make the decision as to whether to commence a "prosecution" by impeaching the President.

In the context of a perjury investigation, there are some specific considerations which are present when deciding whether such a case can be won.

First, it is virtually unheard of to bring a perjury prosecution based solely on the conflicting testimony of two people. Indeed, pursuant to the long standing common law two witness rule, applicable to prosecutions under 18 USC § 1621, perjury convictions premised solely on the uncorroborated testimony of a single

witness are precluded. While this rule, as a formal matter, does not apply to false statement prosecutions pursuant to 18 USC § 1623, even under that statute, because of the extreme difficulty of prevailing at trial, prosecutors are reluctant to bring single witness perjury cases. The inherent problems in bringing such a case are compounded to the extent that any credibility issues exist as to the Government's sole witness.

Second, questions and answers are often imprecise. Questions sometimes are vague or use too narrowly defined terms, and interrogators frequently ask compound or inarticulate questions, and fail to follow up imprecise answers. Witnesses often meander through an answer, wandering around a question, but never really answering it. In a perjury case where the precise language of a question and answer are so relevant, this makes perjury prosecutions difficult, because the prosecutor must establish that the witness understood the question, intended to give a false, not simply an evasive, answer and, in fact, did so. The problem of establishing such intentional falsity is compounded in civil cases by the reality that lawyers routinely counsel their clients to answer only the question asked, not to volunteer and not to help out an inarticulate questioner.

This does not mean, of course, that simply by claiming, "I did not understand the question" the witness can, or must, be acquitted. Indeed, in the Chapin case, for example, the Court and jury rejected his after the fact claim that he did not understand the meaning of the word "distribute" when he denied knowing that Donald Segretti had distributed campaign literature of any kind.

Third, prosecutors often need to assess the veracity of an "I don't recall" answer. Like other answers, such a response can be true or false, but it is a heavy burden to prove that a witness truly remembered the fact at issue. The ability to do so will often depend on the nature of the fact at issue. Precise times of meetings, names of people one has met, and details of conversations and sequences of events -- even if fairly recent -- are often difficult to remember. Forgetting a dramatic event is, however, more difficult to justify. For example, testimony that the witness did not remember if he met John Doe may well be true if the evidence is only that John Doe was one of four people at a dinner party two months ago, but is of much more doubtful veracity if there is proof that John Doe gave the witness a $50,000 bribe at that dinner.

The ability to win at trial is not, however, the only consideration guiding the decision whether to

prosecute. The Department of Justice guidelines, for example, identify a number of reasons for not proceeding with a prosecution. These include federal law enforcement priorities (in the real world of non-independent counsel it is not rational to investigate all levels and types of wrongdoing), the nature and seriousness of the offense, the impact of the offense on any victim, whether there has been restitution, deterrence, and the criminal history of the accused.

While I will not review these considerations in detail, application of these principles is one reason why prosecutions of individuals for lying in civil depositions is extremely rare. While in isolated instances such cases have been brought, criminal prosecutions have generally not been used to police veracity in the civil justice system.

Before turning to the application of these principles to the facts at hand, I should say that in my work at the Watergate Special Prosecutor's Office I was involved in applying these principles in extraordinarily high profile cases. While we successfully prosecuted a number of matters, we also declined to proceed in a number of close cases. We did so, even in circumstances where we believed, in our hearts, that a witness had deliberately lied under oath or committed some other wrongful act, but

simply concluded that we were not sufficiently certain that we would prevail at trial.

It is not my intention to review all of the facts which might bear on a prosecution decision, as well as potentially upon the judgment of the House as to whether to proceed to impeach the President. I would like, however, to review some of the major factual issues which I believe would shape what a prosecution decision would be.

I will begin with the issue of whether from the perspective of a prosecutor there exists a prosecutable case for perjury in front of the grand jury. The answer is clearly no. The President acknowledged to the Grand Jury the existence of an improper intimate relationship with Monica Lewinsky, but argued with the prosecutors questioning him that his acknowledged conduct was not a sexual relationship as he understood the definition of that term being used in the Jones deposition. Engaging in such a debate -- whether wise or unwise politically -- simply does not form the basis for a perjury prosecution.

Indeed, in the end the entire basis for a grand jury perjury prosecution comes down to Monica Lewinsky's assertion that there was a reciprocal nature to their relationship in that the President touched her private parts with the intent to arouse or gratify her, and the

President's denial that he did so. Putting aside whether this is the type of difference of testimony which should justify an impeachment of a President, I do not believe that a case involving this kind of conflict between two witnesses would be brought by a prosecutor since it would not be won at trial.

A prosecutor would understand the problem created by the fact that both individuals had an incentive to lie -- the President to avoid acknowledging a false statement at his civil deposition and Ms. Lewinsky to avoid the demeaning nature of providing wholly unreciprocated sex. Indeed, this incentive existed when Ms. Lewinsky described the relationship to the confidants described in the Independent Counsel's referral. Equally as important, however, Mr. Starr has himself questioned the veracity of his one witness capable of contradicting the President -- Ms. Lewinsky -- by questioning her testimony about her interaction with his office, including whether she was asked secretly to tape record conversations with specific individuals, including Ms. Currie, Mr. Jordan and potentially the President. And, in any trial the Independent Counsel would also be arguing that other key portions of Ms. Lewinsky's testimony are false, including where she explicitly rejects the notion that she was asked to lie, and that assistance in her job

search was an inducement for her to do so. Thus at a trial Ms. Lewinsky's credibility would be subject to attack not only by the defense, but by the very prosecutor who seeks to rely on certain parts of her testimony. No, in the real world, whoever the putative defendant was, this is not a case that would be brought.

It also is extraordinarily unlikely that in ordinary circumstances a prosecutor would bring a prosecution for perjury in the President's civil deposition in the Jones case. First, while one can always find isolated contrary examples, with perjury prosecutions involving civil cases being rare, it would be even more unusual to see such a prosecution where the case had been dismissed on unrelated grounds and then settled, particularly where the settlement occurred after disclosure of the purported false testimony.

Second, perjury charges on peripheral issues are also uncommon; perjury prosecutions are generally filed where the false statement goes to the core of the matter under inquiry. Indeed, in order to prevail in a perjury prosecution the prosecutor must establish not only that the testimony was false, but that the purported false testimony was material, i.e., that it would tend to influence the decision in the matter where the testimony occurred or, as

some courts have held in the deposition context, that truthful testimony would lead to admissible evidence.

Here, the Jones case was about whether then Governor Clinton sought unwanted sexual favors from a state employee in Arkansas. Monica Lewinsky herself had nothing to do with the facts at issue in that suit. She did not know Paula Jones; she was not at that hotel room where Paula Jones alleged the misconduct occurred; she had no knowledge about what transpired. The deposition was about the Jones case; it was not part of a general investigation into the Monica Lewinsky affair.

Given the lack of connection between these two events, under the applicable rules of evidence, her purely consensual relationship with the President half a decade later would, I believe, not have even been admissible at any ultimate trial of the Jones case. While the Court allowed questioning in the civil deposition about this matter, the Judge did so under the broad standard used in discovery -- whether the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Indeed, while not dealing with the admissibility issue had there been no Independent Counsel inquiry, after the controversy about the President's relationship with Ms. Lewinsky arose, the Court considered this testimony sufficiently immaterial

so as to preclude testimony about it at the trial. The lack of materiality of the President's relationship with Monica Lewinsky then became even clearer when in dismissing the Jones case the court found that she had not demonstrated any tangible job effect arising from her alleged encounter with the then Governor.

Finally, the ability to prove the intentional making of false statements in the civil deposition is compounded by inexact questions, evasive and inconsistent answers, insufficient follow-up by the questioner and reliance by the examiner on a definition of sexual relations rather than asking about specific acts. But whatever the ability to meet the standard of proof on this issue as to any particular question, this simply is not a perjury case that would be brought. It involves difficult proof issues as to, at best, peripheral issues, where complete and truthful testimony would be of doubtful admissibility, in a settled civil case which had already been dismissed. This simply is not the stuff of a criminal prosecution.

Turning to the issues of obstruction of justice involving the Paula Jones case, a prosecutor analyzing the case would be affected by many of the same weaknesses that are discussed above -- insufficient proof and the reluctance in ordinary circumstances for a prosecutor to invoke

criminal sanctions in connection with conduct in a settled civil case. But there is one other factor which would also make prosecution of such a case extraordinarily unlikely -- the reality that the principal players in this drama, the President, Ms. Lewinsky and Ms. Currie, had relationships and motivations to act wholly unrelated to the Jones case. This seriously complicates the ability of a prosecutor to establish the intent to obstruct some official proceeding which is required to prevail in an obstruction of justice case.

Thus, for example, reasons why such a case would not be brought include:

-- the job search began before Ms. Lewinsky was on the witness list, and there is nothing surprising that someone who had an illicit relationship with a woman would, when it was over, want to help her get a job in another city.

-- Ms. Currie had her own relationship with Ms. Lewinsky.

-- people who have an illicit relationship often understand they will lie about it without regard to the existence of a litigation and, here, it appears that such an understanding was discussed prior to Ms. Lewinsky being identified as a potential witness.

-- the evidence as to the retrieval of the gifts is contradictory, with Mr. Currie and the President offering versions of the events which exculpate the President, and which differs from Ms. Lewinsky's testimony, and Ms. Lewinsky herself provided varying, and sometimes exculpatory, interpretations of these events.

-- the reality that at the time of the President's conversations with Ms. Currie in the immediate aftermath of his civil deposition, Ms. Currie was not a witness in any proceeding and, given the status of the Jones case, there was no reason to believe that she ever would be, and that the President was likely focusing on the potential public relations repercussions from his relationship.

In the end, therefore, I do not believe that a prosecutor would, or should, bring obstruction of justice charges based upon the available evidence.

Before concluding, I would like to make two closing observations. In August, 1974, prior to the pardon, the Watergate Special Prosecution Force commenced the extraordinarily difficult process of determining whether to indict then former President Nixon. In my own recommendation to Special Prosecutor Jaworski, I urged that

any decision be deferred to allow for a cooling off period and the opportunity for a more reflective decision. In analyzing the relevant factors which should ultimately affect such a decision, and proceeding on the belief not present here -- that adequate evidence existed to support the bringing of charges -- I articulated two primary, and competing, considerations which I believed it appropriate for us as prosecutors to consider. The first factor was to avoid a sense of a double standard by declining to prosecute a plainly guilty person because he had been President. The second was that prosecutors need not proceed with even provable charges if they conclude that important and valid societal benefits would be sacrificed by doing so. In the Nixon case such a benefit would be the desirability of putting the turmoil of the past years behind us so as to better be able to proceed with the country's business. I still believe it appropriate for those deciding whether to bring charges to consider these factors.

Finally, prosecutors often feel a sense of frustration if they cannot express their sense that a wrong has been committed by bringing charges. But not every wrong is a crime, and wrongful non-criminal conduct sometimes can be addressed without the commencing of any proceeding. Apart from issues of censure, we live in a democracy, and

one sanction that can be imposed is by the voters acting through the exercise of their right to vote. President Clinton lied to the American people, and if they believed it appropriate they were free to voice their disapproval by voting against his party in 1998, and remain free to do so in 2000, as occurred in 1974, when the Democrats secured major gains. The answer to every wrongful act is not the invocation of punitive legal processes.

This concludes my testimony. I appreciate the Committee's patience and will be happy to answer any questions you may have.

Chairman HYDE. Mr. Dennis.

TESTIMONY OF EDWARD S.G. DENNIS, JR.

Mr. DENNIS. Thank you, Mr. Chairman.

Mr. Chairman, Mr. Conyers, members of the House of Representatives Committee on the Judiciary, I am opposed to the impeachment of President Clinton. My opposition is grounded in part on my belief that a criminal conviction would be extremely difficult to obtain in a court of law. There is very weak proof of the criminal intent of the President. The Lewinsky affair is of questionable materiality to the proceedings in which it was raised. I believe that a jury would be sympathetic to any person charged with perjury for dancing around questions put to them that demanded an admission of marital infidelity; that is, unless the answers were essential to the resolution of a very substantial claim.

On another level, I sense an impeachment under these circumstances would prove extremely divisive for the country, inflaming the passions of those who would see impeachment as an attempt to thwart the election process for insubstantial reasons.

Perjury and obstruction of justice are serious offenses. They are felonies. However, in my experience, perjury or obstruction of justice prosecutions of parties in private civil litigation are rare. Rarer still are criminal investigations in the course of civil litigation in anticipation of incipient perjury or obstruction of justice. In such circumstances, prosecutors are justifiably concerned about the appearance that government is taking the side of one private party against another.

The oath taken by witnesses demands full and truthful testimony at depositions and in grand jury proceedings—excuse me, demands truthful testimony at depositions and in grand jury proceedings. Nonetheless, imprecise, ambiguous, evasive and even misleading responses to questions don't support perjury prosecutions, even though such responses may raise serious questions about the credibility of a witness on a particular subject.

Proof that a witness' testimony is untrue is not sufficient alone to prove perjury, and proof that a witness is intentionally evasive or nonresponsive is not sufficient to prove perjury either.

Courts are rigorously literal in passing on questions of ambiguity in the questions and the responses of witnesses under oath, and generally give the accused the benefit of any doubt of possible interpretations of the questions and the meaning of the allegedly perjurious response. Perjury cases are very difficult to win under the most favorable circumstances.

I believe the question of whether there were sexual relations between the President and Ms. Lewinsky is collateral to the harassment claim in the *Jones* case. The President has confessed to an inappropriate relationship with Ms. Lewinsky. The *Jones* case was dismissed and is now settled. These circumstances simply would not warrant the bringing of a criminal prosecution, and a criminal prosecution would most likely fail. Certainly the exercise of sound prosecutorial discretion would not dictate prosecuting such a case.

The consequences of the impeachment of the President of the United States are far-reaching. These consequences are grave and they impact the entire Nation. Impeachment in my view should not

serve as a punishment for a President who has admittedly gone astray in his family life, as grave as that might be in personal terms. Where there is serious doubt, as there must be in this case, prudence demands that Congress defer to the electoral mandate. Thank you, Mr. Chairman.

Chairman HYDE. Thank you Mr. Dennis.

[The statement of Mr. Dennis follows:]

STATEMENT OF EDWARD S.G. DENNIS, JR.
BEFORE THE
CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

December 9, 1998

Mr. Chairman,

I am opposed to the impeachment of President Clinton. My opposition is grounded in part in my belief that a criminal conviction would be extremely difficult to obtain in a court of law due to weak proof of the criminal intent of the President, the questionable materiality of the Lewinsky affair to the proceedings in which it was raised and the probable sympathy a jury would have for any person charged with perjury for dancing around questions put to them that demanded an admission of marital infidelity, unless those answers were essential to the resolution of a substantial claim. On another level, I sense an impeachment under these circumstances would prove extremely divisive for the country, inflaming the passions of those who would see impeachment as an attempt to thwart the election process for insubstantial reasons.

Perjury and obstruction of justice are serious offenses. They are felonies. However, in my experience, perjury or obstruction of justice prosecutions of parties in private civil litigation are rare. Criminal investigations in the course of civil litigation in anticipation of incipient perjury or obstruction of justice are rarer still. In such circumstances, prosecutors are justifiably concerned about the appearance that the government is taking the side of one private party against another. The oath taken by witnesses demands truthful testimony at depositions and in grand jury proceedings. Nonetheless, imprecise, ambiguous, evasive and even misleading

responses to questions don't support perjury prosecutions even though such responses may raise serious questions about the credibility of a witness on a particular subject. Proof that a witness' testimony is untrue is not sufficient alone to prove perjury, and proof that a witness is intentionally evasive or nonresponsive is not sufficient to prove perjury either. Courts are rigorously literal in passing on questions of ambiguity in the questions and the responses of witnesses under oath and generally give the accused the benefit of any doubt on possible interpretations of the questions and the meaning of the allegedly perjurious response. Perjury cases are very difficult to win under the most favorable circumstances for the prosecutor.

I believe the question of whether there were sexual relations between the President and Ms. Lewinsky is collateral to the harassment claim in the Jones case. The President has confessed to an inappropriate relationship with Ms. Lewinsky. The Jones case was dismissed and is now settled. The circumstances simply would not warrant bringing a criminal prosecution and a criminal prosecution would likely fail. Certainly the exercise of sound prosecutorial discretion would not dictate prosecuting such a case.

The consequences of the impeachment of the President of the United States are far reaching. These consequences are grave and impact the entire nation. Impeachment in my view should not serve as a punishment for a President who has admittedly gone astray in his family life, as grave as that might be in personal terms. Where there is serious doubt, as there must be in this case, prudence demands that Congress defer to the electoral mandate.

Chairman HYDE. Mr. Noble.

TESTIMONY OF RONALD NOBLE

Mr. NOBLE. I, too, will attempt to keep my remarks within 10 minutes, Mr. Chairman.

Mr. Chairman, Mr. Ranking Minority Member, and members of the committee, before I begin my formal remarks, let me extend my thanks to the following people who helped prepare me under these rushed circumstances. My brother, James Noble, is here with me today, a research assistant; Russell Moore, a friend of mine in law school is here with me today; my students in my evidence class, with whom I spent the last two weeks talking about impeachment but not the impeachment of a President, the impeachment of a witness. I have been trying to give them hypotheticals with which or from which they could learn. I told them I will be the best prop they will have today.

I am honored to appear before you today. I will discuss the factors ordinarily considered by Federal prosecutors and Federal agents in deciding whether to investigate, indict and prosecute allegations of violations of Federal criminal law.

I submit that a Federal prosecutor ordinarily would not prosecute a case against a private citizen based on the facts set forth in the Starr referral. My experience which forms the basis of my testimony is as follows: I have served as an Assistant U.S. Attorney, a chief of staff and Deputy Assistant Attorney General in the Justice Department's Criminal Division during the Reagan and Bush administrations, and Under Secretary of the Treasury for Enforcement in the Clinton administration, and I am currently a professor at the New York University School of Law where I teach, as I said, a course in evidence.

When investigating a possible violation of the law, every Federal prosecutor must heed the guidelines of the Department of Justice. DOJ guidelines recognize that a criminal prosecution entails profound consequences for the accused and the family of the accused, whether or not a conviction ultimately results.

Career Federal prosecutors recognize that Federal law enforcement resources and Federal judicial resources are not sufficient to permit prosecution of every alleged offense over which Federal jurisdiction exists.

Federal prosecutors are told to consider the nature and seriousness of the offense as well as available taxpayer resources. Often these resources are scarce and influence the decision to proceed or not to proceed and the decision how to proceed. Federal prosecutors may properly weigh such questions as whether the violation is technical or relatively inconsequential in nature and what the public attitude is towards prosecution under the circumstances of the case. What will happen to public confidence in the rule of law if no prosecution is brought or if a prosecution results in an acquittal? Even before the Clinton Lewinsky matter arose, DOJ guidelines intimated that prosecutors should pause before bringing a prosecution where the public may be indifferent or even opposed to enforcement of a controlling statute, whether on substantive grounds or because of a history of nonenforcement or because the

offense involves essentially a minor matter of private concern and the victim is not interested in having it pursued.

Yet, public sentiment against an otherwise worthy prosecution should not dispel prosecutors from bringing charges simply because a biased and prejudiced public is against prosecution. For example, in a civil rights case, or a case involving an extremely popular political figure, it might be clear that the evidence of guilt, viewed objectively and by an unbiased fact-finder, would be sufficient to obtain and sustain a conviction, yet the prosecutor might reasonably doubt whether the jury would convict. In such a case, despite his or her negative assessment of the likelihood of a guilty verdict based on factors extraneous to an objective view of the law and facts, the prosecutor may properly conclude that it is necessary and desirable to commence or recommend prosecution and allow the criminal process to operate in accordance with its principles.

During the civil rights era, many prosecutions were brought against people for locally popular but no less heinous crimes against blacks. However, prosecutors should not bring charges on public sentiment in favor of prosecution when a decision to prosecute cannot be supported on grounds deemed legitimate by the prosecutor.

DOJ prosecutors are discouraged from pursuing criminal prosecutions simply because probable cause exists, and a number of the witnesses have already addressed this point. Why? Because probable cause can be met in a given case, it does not automatically warrant prosecution. Further investigation may be warranted, and the prosecutor should still take into account all relevant considerations in deciding upon his or her course of action.

Prosecutors are admonished not to recommend in an indictment charges that they cannot reasonably expect to prove beyond a reasonable doubt by the legally sufficient evidence at trial. It is one of the most important criteria that prosecutors must consider.

Prosecution should never be brought where probable cause does not exist, and both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person will be found guilty by an unbiased trier of fact.

Federal prosecutors and Federal agents, as a rule, ought to stay out of the private sexual lives of consenting adults. Neither Federal prosecutors nor Federal investigators consider it a priority to investigate allegations of perjury in connection with the lawful, extramarital, consensual, private sexual conduct of citizens. In my view, this is a good thing. From a proactive perspective, who among us would want the Federal government to initiate sting operations against private citizens to see if we lie about our extramarital affairs or the nature of our sexual conduct? Imagine a rule that required all Federal job applicants to answer the following question under oath: Because we are concerned about our employees being blackmailed about unusual or inappropriate sexual conduct, and because we want to know whether you would be at risk, please name every person with whom you have had a sexual relationship or with whom you have had sexual intercourse during your life. It certainly would be relevant and certainly might lead to blackmail.

Such a question would naturally lead to allegations of perjured responses. Irrespective of constitutional challenges from a public policy standpoint, most Americans would object to Federal prosecutors and Federal agents investigating and prosecuting those cases that came to our attention.

Could we trust our government to make fair, equitable and restrained decisions about how much to investigate any one of these allegations? The potential for abuse and violation of our right to privacy would be great. Indeed, assigning Federal agents to interview witnesses, install wiretaps and insert bugs to learn about the private, legal sexual conduct of U.S. citizens would concern us all. But aggressive prosecutors and agents would do exactly that to make cases against those citizens where prosecutions would garner publicity and thereby act as a deterrent, and in my view the biggest target would be politicians.

As a general matter, Federal prosecutors are not asked to bring Federal criminal charges against individuals who have allegedly perjured themselves in connection with civil lawsuits. As a rule, Federal prosecutors on their own do not seek to bring criminal charges against people who perjure themselves in connection with civil depositions for the reasons that have already been articulated.

In addition, this would open a floodgate of referrals. Parties by definition are biased, and it would be difficult to discount the potential bias. By their nature, lawsuits have remedies built into the system. Lying litigants can be exposed to such and lose their lawsuits. The judge overseeing the lawsuit is in the best position to receive evidence about false statements, deceitful conduct and even perjured testimony. She can sanction violating litigants by initiating civil or criminal contempt proceedings.

Notwithstanding the reasons generally, there are 10 good reasons, taken in combination, which support the view that a career Federal prosecutor asked to investigate allegations like those in the Clinton-Lewinsky matter would not pursue Federal criminal prosecution to the indictment or trial stage.

One, the alleged perjury occurred in a civil deposition and concerned private, lawful sexual conduct between consenting adults.

Two, the alleged perjured testimony was deemed inadmissible by the trial judge.

Three, that evidence arguably was dismissed as immaterial by the trial judge.

Four, in any event, the alleged perjured testimony was at most marginally relevant.

Five, the alleged perjured testimony did not affect the outcome of the case.

Six, the parties settled, and the Court dismissed the underlying civil lawsuit.

Seven, the settlement of the suit prevented the appellate court from ruling on the dismissal and on the materiality of the alleged perjured testimony.

Eight, the theoretically harmed party knew of the alleged perjury prior to settlement.

Nine, alleged, I say alleged, political enemies of the defendant funded the plaintiff's suit.

Ten, a Federal government informant conspired with one of the civil litigants to trap the alleged perjurer into perjuring himself.

Given the above considerations, most Federal prosecutors would not want to use taxpayer dollars, Federal agents and sensitive Federal investigative resources to uncover the most intimate and embarrassing details of the private sexual lives of consenting adults when there is a risk of bias and when there is a judge in a position to address the alleged criminal conduct.

The judgment that a career prosecutor might make about an ordinary person might be very well affected by the knowledge that the alleged perjury was committed by the President. That is to be conceded. Even the most experienced, fair-minded prosecutor will find it difficult not to pursue allegations of criminal misconduct against the President, a Senator, a Governor, any Member of Congress.

The interests in targeting, threatening or in harming the President especially can be explained in part by the power and visibility of his office. Even a prosecutor with exceptional judgment might be tempted by the challenge of bringing down a President. A prosecutor with unchecked power, unlimited resources and only one target might find the temptation even stronger.

Mr. Chairman, I believe I can conclude in 2 minutes with the permission of the Chairman.

Chairman HYDE. Two minutes?

Mr. NOBLE. In 2 minutes.

Chairman HYDE. Very well.

Mr. NOBLE. Thank you, Mr. Chairman.

It is difficult to think of a fail-safe structure that could protect anyone from allegations of bias in the decision to prosecute or not prosecute the President. Not the Attorney General, the Independent Counsel, the Justice Department, the FBI, the Secret Service, the Federal judiciary, the Congress, the Bar, and the Academy can escape some person or act in their background that could create a conflict or an appearance of a conflict. No one for or against prosecution would be safe from attack on the merits or from false personal attacks.

For this reason, a prosecutor or a committee assigned such a case must strive to be objective, knowing that criticism of bias will be unavoidable. In a prosecutorial context, a 13-to-10 vote by the grand jury constitutes enough votes to proceed, but reflects that there must be or might be a serious problem with some aspect of the case. Similarly, a vote for impeachment based on a party line vote or a near party line vote is a signal that something is wrong or may be wrong with the case and that the case may not be worth pursuing. This is particularly true where the overwhelming majority of Americans appear to be well-informed about the allegations and unbiased as a group. Yet they do not want this President impeached.

While indictments and impeachment proceedings are different, they carry at least two similarities. One, most of us know it when we see the clear cases for criminal conviction and for impeachment. Two, public confidence in the rule of law and our system of government would suffer if we regularly indicted cases or impeached Presidents only to have juries or the Senate vote to acquit.

In closing, I believe that the Justice Department got it right and Independent Counsel Donald Smaltz got it wrong. Indictments and impeachments that result in acquittal ought to be avoided where possible. No prosecutor would be permitted to bring a prosecution where she believed that there was no chance that an unbiased jury would convict. Almost no one in this country believes that the U.S. Senate will convict the President on any potential article of impeachment. Members of Congress should consider the impact that a long and no doubt sensationalized trial will have on the country, especially a trial that will not result in a conviction.

In the end, I am confident that you will give the weighty responsibility that you must discharge serious consideration. A vote against impeachment need not be viewed as a vote against punishment. As Professor Steve Saltzburg noted before you earlier this week, Judge Susan Webber Wright retains jurisdiction over the case wherein the allegedly perjured testimony occurred. She can hold civil or criminal contempt hearings. Of all the arbiters of justice in this matter, she is perceived as being the least biased. She can punish the President for false and misleading conduct even if it does not rise to the level of perjury or obstruction of justice. Trust her to mete out the appropriate punishment.

I thank you.

Chairman HYDE. Thank you, Mr. Noble.

[The statement of Mr. Noble follows:]

Statement of Ronald K. Noble*

Associate Professor of Law
New York University School of Law

Former Under Secretary for Enforcement (1994-1996)
U.S. Department of the Treasury

Former Deputy Assistant Attorney General and Chief of Staff (1988-1989)
U.S. Department of Justice

Former Assistant U.S. Attorney, Eastern District of Pennsylvania (1984-1988)
U.S. Department of Justice

Mr. Chairman, Mr. Ranking Member and Members of the Committee:

I am honored to appear before you today. I will discuss the factors ordinarily considered by federal prosecutors and federal agents in deciding whether to investigate, indict and prosecute allegations of violations of federal criminal law. I submit that a federal prosecutor ordinarily would not prosecute a case against a private citizen based on the facts set forth in the Starr referral. My experience, which forms the basis of my testimony, is as follows: I have served as an Assistant U.S. Attorney; a Chief of Staff and Deputy Assistant Attorney General in the Justice Department's Criminal Division during the Reagan and Bush Administrations; an Under Secretary of the Treasury for Enforcement in the Clinton Administration; and I am a professor at the New York University School of Law where I teach a course in Evidence.

I. DOJ Guidelines : Principles of Federal Prosecution[i]

When investigating a possible violation of the law, every federal prosecutor must take heed of the guidelines by the Department of Justice ("DOJ"). DOJ Guidelines recognize that a criminal prosecution "entails profound consequences for the accused and the family of the accused whether or not a conviction ultimately results."[ii] Career federal prosecutors recognize that "Federal law enforcement resources and Federal judicial resources are not sufficient to permit prosecution of every alleged offense over which Federal jurisdiction exists." Federal prosecutors are told to consider the nature and seriousness of the offense as well as available taxpayer resources. Often these resources are scarce and influence the decision to proceed or not to proceed. Federal prosecutors "may properly weigh such questions as whether the violation is technical or relatively inconsequential in nature and what the public attitude is toward prosecution under the circumstances of the case."[iii]

What will happen to public confidence in the rule of law if no prosecution is brought or if a prosecution results in an acquittal? Even before the Clinton-Lewinsky matter arose, DOJ Guidelines intimated that prosecutors should pause before bringing a prosecution where "the public may be indifferent, or even opposed, to enforcement of the controlling statute whether on substantive grounds, or because of a history of non-enforcement, or because the offense involves essentially a minor matter of private concern, and the victim is not interested in having it pursued."[iv]

Yet, public sentiment against an otherwise worthy prosecution should not discourage prosecutors from bringing charges simply because a biased and prejudiced public is against prosecution. "For example, in a civil rights case or a case involving an extremely popular political figure, it might be clear that the evidence of guilt—viewed objectively by an unbiased factfinder—would be sufficient to

obtain and sustain a conviction, yet the prosecutor might reasonably doubt whether the jury would convict. In such a case, despite his/her negative assessment of the likelihood of a guilty verdict (based on factors extraneous to an objective view of the law and the facts), the prosecutor may properly conclude that it is necessary and desirable to commence or recommend prosecution and allow the criminal process to operate in accordance with its principles."[v] During the civil rights era, many prosecutions were brought against people for locally popular, but no less heinous, crimes against blacks.[vi] However, prosecutors should not bring charges based on public sentiment in favor of prosecution when a decision to prosecute "cannot be supported on other grounds" deemed legitimate by the prosecutor.[vii]

II. Reasonable Likelihood of Conviction:

DOJ prosecutors are discouraged from pursuing criminal prosecutions simply because probable cause exists. Because probable cause "can be met in a given case does not automatically warrant prosecution; further investigation may be warranted, and the prosecutor should still take into account all relevant considerations . . . in deciding upon his/her course of action."[viii] Prosecutors are admonished not to "recommend in an indictment charges that they cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient evidence at trial." It is one of the most important criteria that prosecutors must consider. Prosecutions should never be brought where probable cause does not exist, and "both as a matter of fundamental fairness and in the interest of the efficient administration of justice no prosecution should be initiated against any person unless the government believes that the "person will be found guilty by an unbiased trier of fact."

III. Allegation of Perjury with regard to Private, Lawful, Extramarital Consensual Sexual Conduct:

Federal prosecutors and federal agents as a rule ought to stay out of the private sexual lives of consenting adults.

Neither Federal prosecutors nor Federal investigators consider it a priority to investigate allegations of perjury in connection with the lawful, extramarital, consensual, private, sexual conduct of citizens. In my view this is a good thing. From a proactive perspective, who among us would want the federal government to initiate sting operations against private citizens to see if we lie about extramarital affairs or the nature of our sexual conduct? Imagine a rule that required all federal job applicants to answer the following question under oath: "Because we are concerned about our employees being blackmailed about unusual or inappropriate sexual conduct and because we want to know whether you would be at risk, please name every person with whom you have had sexual intercourse and other sexual contact during your life."

Such a question would naturally lead to allegations of perjured responses. Irrespective of constitutional challenges, from a public policy standpoint most Americans would object to federal prosecutors and federal agents investigating and prosecuting those cases that came to our attention. Could we trust our government to make fair, equitable and restrained decisions about how much to investigate any one of these allegations? The potential for abuse and violation of our right to privacy would be great. Indeed, assigning federal agents to interview witnesses, install wiretaps and insert bugs to learn about the private, legal, sexual conduct of U.S. citizens would concern us all. But aggressive prosecutors and agents would do exactly that to make cases against those citizens where prosecutions would garner publicity and thereby act as a deterrent.

IV. Allegations of Perjury against a Party in a Civil Deposition in a Federal Lawsuit:

As a general matter, federal prosecutors are not asked to bring federal criminal charges against individuals who allegedly perjure themselves in connection with civil lawsuits. As a rule, Federal prosecutors on their own do not seek to bring criminal charges against people who perjure themselves in connection with civil depositions. This would open a floodgate of referrals. Parties by definition are biased, and it would be difficult to discount the potential bias. By their nature civil lawsuits have remedies built into the system. Lying litigants can be exposed as such and lose their lawsuits. The judge overseeing the lawsuit is in the best position to receive evidence about false statements deceitful conduct and even perjured testimony. She can sanction violating litigants by initiating civil or criminal contempt proceedings. Notwithstanding the reasons generally, there are 10 good reasons taken in combination which support the view that a career federal prosecutor, asked to investigate allegations like those in the Clinton-Lewinsky matter, would not pursue federal criminal prosecution to the indictment or trial stage.

1. The alleged perjury occurred in a civil deposition and concerned private, lawful, sexual conduct between consenting adults.
2. The alleged perjured testimony was deemed inadmissible by the trial judge.
3. That evidence arguably was dismissed as immaterial by the trial judge.
4. In any event the alleged perjured testimony was at most marginally relevant.
5. The alleged perjured testimony did not affect the outcome of the case.
6. The parties settled, and the court dismissed the underlying civil lawsuit.
7. The settlement of the suit prevented the appellate court from ruling on the dismissal and on the materiality of the alleged perjured testimony.
8. The theoretically harmed party knew of the alleged perjury prior to settlement.
9. Alleged political enemies of the defendant funded the plaintiff's suit. (A concern of bias.)
10. A federal government informant conspired with one of the civil litigants to trap the alleged perjurer into perjuring himself. (A concern of bias.)

Given the above considerations, most federal prosecutors would not want to use taxpayer dollars, federal agents and sensitive federal investigative resources to uncover the most intimate and embarrassing details of the private sexual lives of consenting adults when there is a great risk of bias and when there is a judge in a position to address the alleged criminal conduct.

V. Allegations of Criminal Wrongdoing Against the President of the United States:

The judgment that a career prosecutor might make about an ordinary person might be very well affected by the knowledge that the alleged perjury was committed by the President. Even the most experienced, fair-minded prosecutor will find it difficult not to pursue allegations of criminal misconduct against the President. The interests in targeting, threatening or in harming the President can be explained in part by the power and visibility of his office. Even a prosecutor with exceptional judgment might be tempted by the challenge of bringing down a President. A prosecutor with unchecked power, unlimited resources and only one target might find the temptation even stronger.

It is difficult to think of a failsafe structure that could protect anyone from allegations of bias in the decision to prosecute or not to prosecute the President. Not the Attorney General, the Independent Counsel, the Justice Department, the FBI, the Secret Service, the Federal Judiciary, the Congress, the Bar, and the Academy can escape some person or act in their background that could create a conflict or an appearance of a conflict. No one for or against prosecution would be safe from attack on the merits or from false personal attacks.

For this reason, a prosecutor or a committee assigned such a case must strive to be objective – knowing that criticism of bias will be unavoidable. In the prosecutorial context, a 13 to 10 vote by

the Grand Jury constitutes enough votes to proceed, but reflects that there must be a serious problem with some aspect of the case. Similarly, a vote for impeachment based on a party line vote or near party line vote is a signal that something is wrong with the case and that the case may not be worth pursuing. This is particularly true where the overwhelming majority of Americans appear to be well informed about the allegations and unbiased as a group, yet they do not want this President impeached. While indictments and impeachment proceedings are different, they carry at least two similarities: One, most of us know it when we see the clear cases for criminal conviction and impeachment. Two, public confidence in the rule of law and our system of government would suffer if we regularly indicted cases or impeached Presidents only to have juries or the Senate vote to acquit.

In closing, I believe that the Justice Department got it right and Independent Counsel Donald Smaltz got it wrong. Indictments and impeachments that result in acquittal ought to be avoided where possible. No prosecutor would be permitted to bring a prosecution where she believed that there was no chance that an unbiased jury would convict. Almost no one in this country believes that the U.S. Senate will convict the President on any potential article of impeachment. Members of Congress should consider the impact that a long and no doubt sensationalized trial will have on the country – especially a trial that will not result in a conviction. In the end, I am confident that you will give the weighty responsibility that you must discharge serious consideration. A vote against impeachment need not be viewed as a vote against punishment. As Professor Steve Saltzburg noted, Judge Susan Webber Wright retains jurisdiction over the case wherein the allegedly perjured testimony occurred. She can hold civil or criminal contempt hearings. Of all the arbiters of justice in this matter, she is perceived as being the least biased. She can punish the President for false and misleading conduct --even if it does not rise to the level of perjury or obstruction of justice. Trust her to mete out the appropriate punishment.

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[1] The DOJ Guidelines are just that. Guidelines! They articulate principles, not requirements. They are crafted with the real world in mind – a world with changing priorities and circumstances. Among other things, the U.S. Attorney's Manual guides prosecutors in deciding whether to initiate or decline federal charges. Prosecutors are given the following factors to consider:"Federal law enforcement priorities; the nature and the seriousness of the offense; The deterrent effect of prosecution; the person's culpability in connection with the offense; the person's history with respect to criminal activity; the person's willingness to cooperate in the investigation; the probable sentence or other consequences if the person is convicted."

[8] Id. at 9-27.001

[9] Id. at 9-27.220 2. Nature and Seriousness of Offense

[10] Id.

[11] Id.

[12] Id.

[13] Id.

[14] Id. at 9-27.200

Chairman HYDE. Governor Weld.

TESTIMONY OF HON. WILLIAM F. WELD, FORMER GOVERNOR OF MASSACHUSETTS

Mr. WELD. Mr. Chairman, Mr. Ranking Member, members of the committee, my name is William Weld, and I am sincerely honored to appear before you this morning.

I am no Tom Sullivan, but I have knocked around the criminal justice world a little bit. From 1986 to 1988, under President Reagan, I was the Assistant Attorney General in charge of the Criminal Division in Washington, which is relevant because that's the policy or political appointment charged with ensuring the uniformity of charging decisions, decisions whether to seek an indictment around the country in various districts.

Prior to that, for 5 years, I was the United States Attorney in Massachusetts, and I became familiar in the course of that 7 years with the handbook, the *Principles of Federal Prosecution*, and with the United States Attorney's Manual and, when I was in Washington, with the practices and procedures that also have been developed over the years to try to ensure uniformity in charging decisions.

It so happens that in 1974, for 9 months, I also worked for this committee under Chairman Rodino on the impeachment inquiry into President Nixon, and I worked on the constitutional and legal unit there, which was charged with reading every precedent in Britain, in Hinds, in Cannon, in reported cases in the records of the 1787 debate on the Constitution having any relevance at all to what high crimes and misdemeanors means in the United States Constitution.

Like Mr. Sullivan, like many others, I do not consider myself an advocate here before you. I do have a couple of points of view that I would like to share with the members of the committee, and you can take them for what they are worth. Ordinarily, in a civil context, you don't qualify as an expert on the basis of 9 months' experience, but for whatever they are worth.

I do believe, Mr. Chairman, that under the Reagan Administration, it was not the policy of the U.S. Justice Department to seek indictments solely on the basis that a prospective defendant had committed adultery or fornication, which are not lawful, but it simply wasn't the policy to go there. It was also not the policy to seek an indictment based solely on evidence that a prospective defendant had falsely denied committing unlawful adultery or fornication.

Let me say a little bit about perjury cases. I don't think they are all that rare, and I have prosecuted a lot of them, but I do think that what one or two of the witnesses said is true. There is usually something else involved in a Federal perjury prosecution. There is a pass-through aspect here. You are really going to something else.

I once prosecuted a guy who stated that he was in Florida on November 28th and 29th, 1981. You may say, that's kind of stooping to pick up pins. Why would you prosecute him for that? Well, that was the day the city of Lynn, Massachusetts, burned down, and this guy was an arsonist, and three people made him in the Porthole Pub in Lynn, Massachusetts that day, and we found his fingerprints on a ticket to Florida the next day, after the fire, so we

thought it would be a good idea to bring a perjury prosecution there to rattle the cage a little bit, and we did.

And often we brought them where we were trying to penetrate a wall of silence as in cases of public corruption or narcotics, when you are trying to break through this omerta, everyone has got to dummy up, phenomenon. But there is something else that you are trying to get at there.

Until this year, the policy of the Department of Justice was that in cases of false statements, they would not seek an indictment solely on the basis of somebody denying that they themselves had committed misconduct. This is called the "exculpatory no" doctrine, and it was adopted in a lot of circuits. It was kicked out by the Supreme Court in a decision by Justice Scalia early this year based on bad facts. You had a ranking union official who had taken money from employers in violation of an independent Federal statute, so that's the something else that the prosecution was trying to get at. So a very unsympathetic case for the Court applying the "exculpatory no" doctrine.

In my view, it would have been a handy idea to carve out an exception to the abrogation of that doctrine for cases involving personal misconduct as opposed to a violation of an independent Federal statute such as was involved there. Certainly, a responsible prosecutor could apply that filter in the exercise of his or her discretion.

The last thing, let me just say, on the law of impeachment, I am pretty well convinced that adultery, fornication, or even a false denial, false, I am assuming perjury here, false denial of adultery or fornication, they do not constitute high crimes and misdemeanors within the meaning of the impeachment clause of the U.S. Constitution. They are not offenses against the system of government. They don't imperil the structure of our government.

The remedy of impeachment is to remove the officeholder, get the worm out of the apple. It is a prophylactic remedy. It is not punitive. If any of you are thinking we have got to vote yes on impeachment to tarnish the President, he is already tarnished, and that's really not the purpose of the impeachment mechanism. Nobody is going to forget this stuff. And this is a man who has been elected President of the United States twice, and thus entitled to this office, after allegations very similar to those now before you.

I hate to open old wounds, but you remember back to 1992, and the Gennifer Flowers matter, if there are two people in a room and they both deny that something happened, then you can't prove that it happened. Well, that's very similar to what we are talking about here, and this officeholder was elected President of the United States twice after all of those facts were before the people.

So I come out thinking that the most appropriate result is something other than removing this person from his office, taking his office away from him.

There is a lot of talk about censure. I think personally the dignity of Congress and the dignity of the country demands something more than merely censure here. And I would suggest in conclusion, Mr. Chairman, four things that you might want to think about in addition to censure.

Number one, it is not unknown for grand juries investigating corruption in a city or a county, for example, to issue a written detailed report of their findings. That could easily be done here. It would be entirely proper.

Number two, there could be a written acknowledgment of wrongdoing on the part of the President, and for reasons which will become evident in a moment I would not propose that there be insistence on the use of the word "lie" or "perjury" there, but it is something that could be negotiated to reflect the gravity of what he has done.

Number three, there could be an agreement to pay a fine. This is something tangible, more tangible than censure, and it involves the respondent as well as the moving party, the moving party here being the House, and that would mark the moment. That would mark the solemnity of the occasion. And the agreement would remove any doubt about somebody going to court and saying, there is no basis for this. It would be thrown out on the basis of political question doctrine anyway, I think.

I am not here to say what the fine should be, but if memory serves, Speaker Gingrich had to pay quite a large fine not so long ago because people didn't like either the content or the marketing of a college course that he taught.

The members might wish to consider providing that the fine could not be paid out of the proceeds of a legal defense fund, given all the background circumstances.

Finally, what I am proposing, the final element, would be that the President would have to take his chances with respect to the criminal justice process post his Presidency. I do not agree with those in the media who say that any deal on censure has to protect the President against criminal proceedings after he leaves office. First of all, there doesn't have to be any deal on censure. That's entirely within your power. The White House has no leverage there. Second, the Constitution explicitly says that even if a President or anybody is impeached, convicted and removed from office, they remain liable to trial and indictment. It is very explicit. It is right in the Constitution.

If the objection is that the spectacle of a former President being prosecuted would be tawdry and degrading, it really could not be much more tawdry and degrading than what we have already been subjected to through the constant daily reports of the Lewinsky affair.

Lastly, I agree with everyone who has spoken before about whether a perjury prosecution here really lies. I think there is quite a low risk of that from the point of view of the President.

So that's the suggestion. It is a political suggestion, but this is, in part, a political process; about a five-part deal, if you will, and I think the dignity of the House would be upheld if something like that were to be approached, and everybody could perhaps get on more easily with attending to the public's business.

Thank you, Mr. Chairman.

Chairman HYDE. Thank you, Governor.

[The statement of Mr. Weld follows:]

Statement of William F. Weld
United States House Committee on the Judiciary
Wednesday, December 9, 1998

1. My name is William F. Weld. I have been an attorney at law since 1970. I am a former federal prosecutor (1981-1988) and was a staff attorney for this Committee in its 1974 impeachment inquiry.

2. From 1986 to 1988 I served as the Assistant Attorney General in charge of the Criminal Division of the U.S. Department of Justice, Washington, D.C. The Assistant Attorney General in charge of the Criminal Division is the Presidential appointee responsible for ensuring that uniform standards are applied in the charging decisions of federal prosecutors throughout the United States. He or she must also approve all wiretaps, all formal grants of immunity, and all indictments in certain major categories of cases, in order to ensure uniformity of decision-making.

3. From 1981 to 1986 I served as the United States Attorney for the District of Massachusetts. The United States Attorney is

the Presidential appointee responsible for charging decisions – that is, decisions whether to seek an indictment – in each state or district.

4. During my service in the Justice Department, I became familiar with the departmental handbook Principles of Federal Prosecution, with the United States Attorney's Manual, and with practices and procedures administratively established in Washington which guided the discretion of federal prosecutors at the charging stage of the criminal justice process.

5. From January 1974 until August 1974, I served as Associate Minority Counsel to the United States House Committee on the Judiciary in its impeachment inquiry. The Committee eventually approved three articles of impeachment against then President Richard M. Nixon.

6. I served in the "constitutional and legal" unit of the impeachment inquiry staff. In that capacity I had occasion to review all reported British precedents bearing on the meaning of the

phrase "high crimes and misdemeanors" as it appears in the impeachment clause of the U.S. Constitution, all four volumes of Farrand's Records of the Constitutional Convention of 1787, all accounts relating to U.S. impeachment proceedings in the Congressional Globe, Congressional Record, Hinds' Precedents, and Cannon's Precedents, and all U.S. Supreme Court decisions (as of that date) relating to the so-called "political question" doctrine. I was one of the authors of the 1974 staff report relating to what constitutes grounds for impeachment and removal of a President under the U.S. Constitution.

7. I believe that during the Reagan Administration, it was not the policy of the U.S. Department of Justice to seek an indictment based solely on evidence that a prospective defendant had committed adultery or fornication.

8. I believe that during the Reagan Administration, it was not the policy of the U.S. Department of Justice to seek an indictment based solely on evidence that a prospective

defendant had falsely denied committing adultery or fornication.

9. Until recently, the Justice Department's policy in cases of perjury or making a false statement was that a prosecution should not be based solely on a false denial of wrongdoing by the declarant. This was called the "exculpatory no" doctrine. I believe it was a judicially created doctrine, later reflected in Justice Department practice, which derived from considerations similar to those which underlie the privilege against self-incrimination contained in the fifth amendment to the U.S. Constitution. I believe the "exculpatory no" doctrine was abrogated by the U.S. Supreme Court in 1998 in a case involving a false denial by a union official that he had accepted unlawful cash payments from an employer in violation of a federal statute.

10. I do not believe that adultery, fornication, or a false denial of adultery or fornication constitute "high crimes and misdemeanors" within the meaning of the impeachment clause of the United States Constitution.

Chairman HYDE. Mr. Sensenbrenner.

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

As I am sure all members of the panel know, the last impeachment took place 9 years ago in 1989 against Walter Nixon of Mississippi, and in that impeachment the House of Representatives, by a vote of 417 to nothing, declared that making false statements to a grand jury were impeachable offenses. The Senate apparently agreed with the House's judgment because Judge Nixon was removed from office on a 91-to-8 vote on both of those articles of impeachment.

I am wondering if members of the panel think that the House made a mistake 9 years ago in unanimously declaring that making false statements to a grand jury were impeachable offenses?

Mr. DAVIS. Well, one, I think you have to look at the proof. First of all, I assume there was proof as to the perjury that took place. I assume also that the perjury, as I recall, went to a core issue in the matter in which the perjury took place. So you had certain important factual differences.

I also think that there is an important difference when one is considering the issue of a judge versus the President, since a judge, as others have testified, sits for life subject to good behavior, and so the standard is not precisely the same as would be in removing a President who is elected by the public and sits for only 4 years.

And finally, I think that in terms of perjury, I do think that one has to look a little bit about what the underlying events are, and I do think that since what we are talking about is a private consensual relationship being at the core of it, that that affects the impeachability. But the bottom line is, as I said in my statement, I don't think there is really the proof, particularly as to grand jury perjury.

Mr. SENSENBRENNER. Well, just by way of background, the events that led up to the Judge Nixon impeachment, which is contrasted to the President Nixon impeachment—we have to be very particular here—involved a private affair, a financial affair, where Judge Nixon allegedly accepted an illegal gratuity of a sweetheart deal in an oil and gas lease. He was acquitted of that charge by the jury at a criminal trial.

So here we are seeing that the jury made a determination that Judge Nixon did nothing wrong in terms of entering into the oil and gas lease, but he was convicted by the jury of the two counts of making false statements.

While there are some differences, there are also some similarities in that a private—private misconduct was alleged as a part of the grand jury investigation.

I am concerned with the answer to your question in that you seem to be implying that the standard of truthfulness for the President of the United States is less than for a Federal judge someplace in the country, because the President is elected and the judge is appointed and holds office for good behavior. Am I wrong on that?

Mr. DAVIS. I am not really saying that. I am saying that the standard for truthfulness is really the same. I am saying that here I don't think there is the proof, particularly as to the grand jury, that you can make the case of perjury; and, second, what I am say-

ing is the standard for impeachment, not the standard for truthfulness, but there are differences in the standard of impeachment for a judge as opposed to the President, and I think there is a lot of scholarship on that.

Mr. SENSENBRENNER. Well, yesterday many of the President's defenders were troubled about the alleged false statements to the grand jury, and at least one of the witnesses that the White House brought up here, former Congressman Owens, flat out said that the President lied before the grand jury.

That's what the House found in terms of Judge Nixon, and, you know, I am concerned that if a judge lies to the grand jury, we all agree that it is impeachable, and if the President lies before the grand jury, then there is a huge debate about whether or not that's impeachable.

Now, who is going to stand up for the truth here?

Mr. DAVIS. Well, respectfully, I don't think that the evidence supports the perjury in the grand jury, as I articulate in my statement.

Mr. SENSENBRENNER. Thank you. I yield back my time.

Chairman HYDE. The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Gentlemen, I want to pay my highest commendations to all of you here, because you have now put on the record, once and for all, all of these pestering questions that have been attempted to be dealt with for so many weeks and months now. You should, Ron, feel proud to go back to your evidence class. You can hold your head high. And I thank you all.

Now, the important thing about this was that, unless I missed something, none of you contradicted each other, nobody. And it seems to me that this testimony of you five gentlemen ought to be bound up and delivered, which I would elect to do. I need Pat Buchanan to get a copy of this, Tim Russert, Cokie Roberts, George Will, Sam Donaldson and Miss Buchanan, Pat's sister, not because they object to all of this, but because they are the ones that in the media continue, with many others, of course, this nonsensical debate about obvious legal questions that a first-year law student could dispose of.

So what you have done here is of signal importance, from my point of view. This should be studied carefully by everybody that makes public utterances about the questions of perjury and obstruction and how and when materiality figures into the prosecutorial role.

Now, this question has come up, I think I called it the Scott question: Is there any case on record for a prosecution, based on a case in which it was dismissed, it was an immaterial statement, there was a settlement to boot? I mean, are we going through everything? Has anybody ever heard of a case like this? We need the citation right away if there is, because I will stop making this assertion.

Mr. SULLIVAN. Mr. Conyers.

Mr. CONYERS. Mr. Sullivan.

Mr. SULLIVAN. I can't guarantee you that there is no such case, but I doubt it. The thrust of what I am saying is that the Federal criminal process is simply not used to determine truth or falsity in statements in civil litigation, and it is also even more true when

you take a situation, as you have here, that the testimony is even peripheral to the civil case involved.

The Federal criminal justice system is not designed or intended to enforce a code of moral conduct. That's not what we do, or what I used to do, and what the good Federal prosecutors do. I'm not saying you can't find an errant one somewhere that will bring charges, but so far as I know, it would be totally unprecedented if such a case were brought.

Mr. CONYERS. Thank you.

Mr. Davis, Mr. Noble, Governor, any other comments on this, this matter?

Mr. DENNIS. Well, I agree. I mean, I do not disagree with any of the statements that have been made by my colleagues here on the panel. I have not considered the suggestions that Governor Weld had made with regard to possible political disposition of the matter, but I think that it is fairly clear, and that if a poll were taken of former U.S. attorneys from any administration, you would probably find the overwhelming number of them would agree with the assessment that this case is a loser and just would not be sustained in court.

Chairman HYDE. The gentleman's time——

Mr. CONYERS. Thank you, Mr. Chairman. I think that this is one of the most important panels that we have had before us in the course of these proceedings.

Chairman HYDE. Thank you, Mr. Conyers.

The gentleman from Florida, Mr. McCollum.

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

Mr. Sullivan, have you had an opportunity to review the District of Columbia Circuit Court of Appeals decision regarding the question of materiality in the issue before us, you know, in the question of the Independent Counsel and Lewinsky?

Mr. SULLIVAN. I have read about it in the Starr Report. I don't think I read the opinion.

Mr. MCCOLLUM. Well, the decision just was unsealed and available to us in the last week, and you may not be aware that the District Court of Appeals opinion squarely addressed that issue of materiality, and it found that her false sworn statement would be material for the purposes of perjury law. In other words, a false statement by the President in that case would have been material. So I think we can put that materiality question to rest that Mr. Conyers just raised.

I also want to make a comment to you, Governor Weld. You said that I do not believe that adultery, fornication or false denial of adultery or fornication constitutes high crimes and misdemeanors within the meaning of the impeachment clause of the Constitution of the United States.

I agree with you. But in this case we are not dealing simply with false statements or fornication or adultery. We are dealing with potentially perjury, obstruction of justice, witness tampering, things of that nature, and this is where you and I may differ, and I think it is significant.

Albeit a civil case, Mr. Sullivan, you and Mr. Davis and several others on the panel pointed out how rare you think it is for perjury cases to be brought in Federal court in civil cases, and yet we just

had Mary—Barbara Battalino, I should say, last week as a witness, a very recent case in which a perjury case was brought in a civil suit involving the Veterans Administration psychiatrist, and on August 4, 1998, a former employee of the United States Postal Service, Diane Parker, was sentenced to 13 months in prison and 3 years of supervised release for lying in a civil case regarding a sexual relationship with a subordinate. And that, of course, was a Federal case.

I have got citations for 29 of these cases, at least, sitting right here. There are 115 people minimally, maybe more than that by now, serving in Federal prison today for perjury; as I say, most of those, or a great many of those, for civil perjury. So maybe the policy a few years ago was different, but certainly prosecutors are prosecuting in these sexual harassment-type cases and the type of Battalino and Parker cases that we are seeing more of today than maybe we did back 10 or 15 years ago.

I also want to address the question that, Mr. Sullivan, you raised, and I think, Mr. Davis, you raised, in particular, about perjury with regard to a single witness. Section 1623, as you have pointed out rightfully, does allow prosecution with a single witness, and I dare say that about 90 percent of the cases brought today that have resulted in people going to prison in the Federal system have been brought under that. I have looked at it, and that's who those 115 people constitute.

Now, I will agree with you. I think that your analysis is good, you need corroborative witnesses even though it may not be required. But let me go through here what is in the grand jury case with respect to the perjury charged, and it is the same underlying main issue in the deposition.

You had a situation in which the President of the United States says that he did not commit or have sexual relations with Monica Lewinsky under the definition as given by the court in the Jones case. That court included in its definition explicitly the touching of breasts or genitalia. Now, the President said, I didn't do that. He repeated it very carefully in the grand jury testimony.

Monica Lewinsky said on nine occasions, in her sworn testimony before the grand jury, the President touched her breast, and on four occasions they had genital contact, and that all of this was to arouse.

Now, the issue of corroboration, there are 10 corroborative witnesses. Interestingly enough, strangely enough, Monica Lewinsky talked contemporaneously with family members, friends and relatives about these matters in great detail, and we have 10 of those whose testimony is before us, in sworn testimony. Seven of the ten corroborate the explicit detail with regard to this touching under the definition of sexual relations that Monica Lewinsky describes.

Now, it seems to me that that kind of corroboration is precisely the kind of corroboration that would, in fact, engender a prosecution, would give confidence to a prosecutor to take perjury cases forward, and would, indeed, give a high probability of conviction if this were taken before a court in any case—any court in this land. The jury would be hard-pressed not to convict under those circumstances. So it strikes me as very strange that we are dismissing this.

Nobody, nobody on this panel and nobody yesterday, has mentioned the fact that these corroborating witnesses exist. It seems to be something that the President's advocates simply want to ignore. It is a bottom-line question in here, Mr. Davis.

Mr. DAVIS. I think I did address that.

Mr. SENSENBRENNER [presiding]. The gentleman's time has expired.

The gentleman from Massachusetts.

Mr. NADLER. Mr. Chairman, Mr. Chairman, Mr. Chairman, before the gentleman from Massachusetts, I request recognition for a moment.

Mr. MCCOLLUM. Regular order.

Mr. SENSENBRENNER. For what purpose does the gentleman from New York seek recognition?

Mr. NADLER. Mr. Chairman, the question that Mr. McCollum just asked the witness is perhaps the central question of this case.

Mr. FRANK. I will give him time to answer. I was just about to do that.

Mr. SENSENBRENNER. With yielding to continue on the debate, that's going to mean that we are going to be here until midnight. The Chair will enforce the clock and the rules that were laid down by Mr. Hyde at the beginning of this hearing. If further members down the list want to have questions answered when the time has run out, they can decide to use their time to do that.

The gentleman from Massachusetts is recognized.

Mr. FRANK. Anybody want to answer that question?

Mr. DAVIS. Yes, I would like to answer that.

I think that there are reasons why that prosecution would not win. One is, as I said in my statement, that both witnesses, including Ms. Lewinsky, had an incentive to lie, and she had an incentive to lie not only to the grand jury on this issue, but to her confidants, because otherwise she would be acknowledging an unreciprocated sexual relationship.

But just as important, if you are talking about one witness that Mr. Starr or any prosecutor is going to put forward, Mr. Starr and his prosecutors themselves are going to have to argue in this case that Ms. Lewinsky's testimony on other issues is not accurate. They are going to have to argue that. They are going to be in a position where they are going to have to say she is telling the truth as to this, not telling the truth as to other things.

Also, Ms. Lewinsky in her testimony at various times said she had a similar definition of sexual relations. So I think that if you look at this from the perspective of a trial lawyer in terms of how this would play out, I think this would be really an impossible case to sell.

Mr. FRANK. Mr. Davis, you have convinced me. We will go on to the next issue. I think that's absolutely right. All of those corroborating witnesses corroborate only what Ms. Lewinsky had told them. No one has yet alleged that there was a kind of a Peeping Tom slot outside the Oval Office where they would have made any observation that would have made them in any way relevant to the trial.

We also ought to note, telling the truth was not the most noticeable characteristic of this set of interrelationships. But, I mean, I

think the guy with the lamp in there, he would still be outside looking for someone to talk to as he got involved with all of them.

Ms. Lewinsky was herself threatened with prison, as was her mother, and I know Mr. Starr's penchant for threatening people with prison if they did not say bad things about the President has some credibility relevance.

But I wanted to—just also want to talk about Judge Nixon. I am reading from the majority, and the gentleman from Wisconsin said he perjured himself only about—or he didn't say only. He perjured himself about an oil and gas deal. But I am reading from the majority's report, which the majority issued earlier this year and staff kindly gave to me. On pages 9 and 10, Judge Nixon lied about whether he had discussed the case with the State prosecutor and had influenced the State prosecutor to essentially drop the case.

In other words, the underlying issue here was not simply a private oil and gas deal, but a Federal judge intervening with a State prosecutor to get him to drop the case, and that is why I was particularly interested in Mr. Weld's presentation and others.

One of the arguments we have had here is that looking at the underlying issue in a perjury allegation is somehow to traduce the law and to undercut it. And I would like to ask all of you—because I think this becomes now a central issue in this case—when you are deciding how to deal with allegations of perjury—and I don't believe that anybody would be able to prove grand jury perjury. I do think that with regard to the deposition, it would be easier, and the President did, unfortunately, in my judgment, when he said he couldn't remember being alone, transgressed. But on the question about whether or not you take into account the underlying issue, in the case of Judge Nixon, the underlying issue was talking to a State prosecutor and intervening to get his partner's son's conviction lessened, I think very different.

This is the central case: As prosecutors, all of you, is it wrong to take into account the underlying cause where there is a perjury allegation? Mr. Weld has said that in his experience, perjury is usually a way to get at a broader issue. So let me start with Mr. Weld.

Mr. WELD. Well, I agree, Mr. Congressman. I think the underlying conduct is important. I mean, I would agree in a way on the law with Representative Sensenbrenner, Representative McCollum. I do think that false statements to a grand jury can easily be grounds for impeachment.

I think I had the Judge Nixon case for a while when I was at Justice, and my recollection is that there was clouds of corruption in the background of that.

Mr. FRANK. And in the foreground.

Mr. WELD. And perhaps in the foreground of that case. So I think looking at the underlying conduct, that's another way of saying what Mr. Dennis, Mr. Noble, others have said, that there is a test of substantiality, Mr. Davis said it as well, in assessing the totality of circumstances and making a charging decision whether to go forward in a perjury case. And it is really more a substantiality than a materiality that I think might be the rock you run up against.

Mr. FRANK. Thank you, Mr. Weld.

Let me just say in closing, that is a point I wanted to make, and I was particularly grateful to the former Governor of my State for making it, as a man who understands the broader democratic, with a small "D," implications here. He made a very important point when he acknowledged the President has been tarnished. Bill Clinton is a man who clearly thinks a lot about how he is going to be regarded, and the argument that somehow he will be walking away unpunished if he is censured and has had this and other proceedings, I think, is very inaccurate. I appreciate Mr. Weld bringing that up.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentleman from Pennsylvania, Mr. Gekas.

Mr. GEKAS. I thank the Chair.

Mr. Sullivan, you have repeated today what we have heard in different ways over the months of this controversy, that the President is neither above the law nor below the law, implying, I believe, on your part that if it were an ordinary citizen, not the President of the United States, that this case would have been dismissed out of hand, and therefore the same premise should have been accorded to the President because he is not below the standard or above the standard that you would apply to an ordinary citizen.

I see such a big difference that it is hard for me to articulate it. But suppose the ordinary citizen, in your set of circumstances, had pleaded the Fifth Amendment, you would have undoubtedly honored that, and then we may never have heard of it all, that case, in the body politic. And I would submit that the Fifth Amendment is pleaded regularly across the land, and we never get results from that kind of case. But if the President of the United States had pleaded the Fifth Amendment, you would agree that there would have been headlines across the world, and that there would have been a shaken seat of government in Washington, D.C., or don't you think that would have been as dramatic as I think it would have been?

Mr. SULLIVAN. If the President, instead of testifying in the grand jury, had taken the Fifth Amendment, I am certain it would result in a great deal of publicity, probably adverse. I don't think that it changes the issue of whether he is above or below the law.

Mr. GEKAS. But my point is that you are asserting with me that this high-profile case that would have been a result of the President pleading the fifth amendment makes it a different situation.

It is possible, I believe, that the Congress, that the House, could begin impeachment proceedings if that alone had happened, the pleading of the fifth amendment by the President, as being a political problem, a political affront to the system of government.

Mr. SULLIVAN. Do you think taking the Fifth Amendment is a high crime or misdemeanor?

Mr. GEKAS. No, no, no, no. I am saying that——

Mr. SULLIVAN. The Constitution gives everyone——

Mr. GEKAS. No, no, no, no.

Mr. SULLIVAN [continuing]. The right to assert the Fifth Amendment, and the jury is instructed that they are not to take any inference from that.

Mr. GEKAS. What I am saying to you, sir, is that in pleading the fifth amendment, it becomes a high-profile case.

Mr. SULLIVAN. There is no doubt about that.

Mr. GEKAS. And——

Mr. SULLIVAN. I am sorry if I interrupted you.

Mr. GEKAS. If the President did so, you can't argue that case. You already admitted it is a high-profile case.

Mr. SULLIVAN. Of course, but I don't think it is relevant here.

Mr. GEKAS. Well, I am asking questions concerning it.

Mr. SULLIVAN. Go ahead.

Mr. GEKAS. The fact that it becomes a high-profile case means that when the President of the United States takes some kind of legal action like committing false—or stating falsehoods under oath, that we cannot treat it as just another case, but whether or not the President attacks the system of government that is so important to us.

Governor Weld makes a great deal out of the fact that what the President did, no matter how we couch it, is not an attack on the system of government. Yet, we submit, many of us, that when he undertakes to make false statements under oath, that he is directly attacking two segments of our system of government: One, the rights, the constitutional rights, of a fellow American citizen who has instituted a case in which he, if he did those falsehoods, was trying to destroy that individual's right to pursue a case. That is an attack, some of us might conclude, against our system of government. And, secondly, in affronting the judicial system, the other third branch of government, by directly giving false statements under oath, could be considered, could it not, as an attack on the delicate balance of separation of powers, his disdain for the judicial system?

We have to take that into consideration, do we not, Governor?

Mr. WELD. It could be so considered, Mr. Congressman. Those arguments, while fair on their face, strike me as on the technical side, but I understand what you are saying.

Mr. GEKAS. I thank you. I have no further questions.

Mr. SENSENBRENNER. Okay. The gentleman from New York, Mr. Schumer.

Mr. SCHUMER. Thank you, Mr. Chairman.

First, I want to compliment this panel. I think it was an extremely strong and erudite presentation from all five of you. It was an excellent panel, and I appreciate your putting the time and effort into it.

When I look at where we are headed here, I think there is sort of three levels of argument. The level we addressed yesterday was dispositive for me and for some of us, and that is that even if you assume all of Mr. Starr's facts to be true, and that the President did wrong, however one would define that wrong, it does not rise to the level of high crimes and misdemeanors and doesn't merit impeachment. I think that case was made very well yesterday by the first panel.

The second level of the case would be both—the next two levels relate to you folks, and that is if you assume the opposite, that if Starr's facts are correct, if Mr. Starr's facts are correct, then impeachment is warranted, there are two parts to that. One are the

abuse of power and obstruction of justice charges, which seem to most, myself included, to be at a higher level, and the next go to the perjury charges. So let me ask you about each of those.

First, on the abuse of power charge, which even many on this committee feel went too far, do any of you think there is any merit to that charge being filed, whether it be—well, you can't even make the case to a citizen because it relates to the President being President. Do any of you feel that charge has any merit whatsoever?

Okay. Let the record show that nobody did, and I don't want to spend much time on that.

On the obstruction of justice, there seem to be three specific areas that at least Mr. Starr talked about. One was the finding of—the attempt to find Ms. Lewinsky a job; the second, the discussions between Ms. Lewinsky and the President about what they would say if confronted with their relationship; and the third about Ms. Currie's testimony and so-called being coached about that testimony.

When we examined that, and when I questioned actually Mr. Starr himself about those, and I asked him what greater evidence did he have to the President making a determination that he wished to influence the judicial process as opposed to not having his wife, his friends, his staff, the Nation find out about his relationship, Starr didn't point to any evidence. It was simply surmise.

Would any of you care to comment on that group of charges?

Mr. SULLIVAN. Mr. Schumer, can I answer the one about Mrs. Currie?

Mr. SCHUMER. Mr. Sullivan, yes.

Mr. SULLIVAN. Because that's the one that I didn't allude to in my statement.

Mrs. Currie testified that the President came and asked her some questions in a leading fashion, is this right, is this right, is this right, after his deposition was taken in the Jones case. And she testified that she did not feel pressured to agree with him and that she believed his statements were correct and agreed with him.

The quote is, "He would say right, and I could have said wrong." Now, that is not a case for obstruction of justice. It is very common for lawyers, before the witness gets on the stand, to say now, you are going to say this, you are going to say this, you are going to say this. It doesn't make a difference if you have got two participants to an event and you try to nail it down.

Mr. SCHUMER. Do all of you agree with that, with the Currie matter?

And on the other two, the Lewinsky parts of this——

Mr. DAVIS. I think to some degree——

Mr. SCHUMER. I mean, I don't even understand how they could—how Starr could think that he would have a case, not with the President of the United States, but with anybody here, when it seems so natural and so obvious that there would be an overriding desire not to have this public and to have everybody—to have the two of them coordinate their stories, that is, the President and Ms. Lewinsky, if there were not the faintest scintilla of any legal proceedings coming about. It just strikes me as an overwhelming stretch.

Am I wrong to characterize it that way? You gentlemen all have greater experience than I do.

Mr. DAVIS. I think you are right, and also the problem a prosecutor would face would be that in these cases there is a relationship between these people unrelated to the existence of the Paula Jones case.

Mr. SCHUMER. Correct.

Mr. DAVIS. Not just the——

Mr. SCHUMER. Mr. Weld, do you agree with that?

Mr. SENSENBRENNER. The gentleman's time has expired. I am sorry, Mr. Schumer, your time has expired.

Mr. SCHUMER. Can I just ask for a yes or no answer on that?

Mr. SENSENBRENNER. Can you answer that yes or no, Governor?

Mr. WELD. I think it is a little thin, Mr. Congressman.

Mr. SCHUMER. Thank you.

Mr. SENSENBRENNER. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman.

Good to have you all with us.

Governor Weld, I have a handful of friends who reside in your State, and Democrats and Republicans alike, without exception, speak very favorably of you.

Mr. WELD. Well, I have friends in your State, too, Mr. Congressman.

Mr. COBLE. Do they speak favorably of me, Governor?

Governor, last fall you appeared on the Today Show and alluded to the possibility of resignation of the President. I am quoting in part here. You said, my sort of rule of thumb here, I think it comes down to this, if when the President goes to a high school and colleges and universities, really his strongest point, if he looks out at those kids, those students, and their teachers and sees a sea of signs that says, liar, liar, pants on fire, it is time to go.

Governor, at this late stage of the game, what is your view on the possibility of resignation?

Mr. WELD. Well, in a way I say this with a heavy heart, because I was troubled by the conduct at issue here, but I think that events have overtaken that possibility. I remember saying and thinking that the President would be well advised when he looked in the mirror shaving every morning to say, are people taking me seriously? Are they taking me seriously at home? Are they taking me seriously abroad?

I was concerned that some international events that were happening around then were happening because of a perception of weakness at the core of the executive of the U.S. Government. But, you know, what happens the week after I deliver myself of these wise sentiments, the President goes to the United Nations and gets a standing ovation. Then he goes into the budget negotiation with members of the opposite party and by most accounts gets, you know, better than half a loaf. Then he has the Wye agreements on the Middle East. So it appears to me people are taking him seriously.

Mr. COBLE. Thank you, sir.

Mr. Davis, in a Washington Post interview, you, comparing the impeachment process with Watergate, indicated that we are at an uglier political time now.

Now much has been said about the late President Kennedy's sexual indiscretions that were not publicized, but, however, were commonly known, and many of those same people insist that those indiscretions would be publicized today. And I am not convinced, sir, that we are in an uglier political climate or a political time. I think, rather, the members of the media are probing more thoroughly and probing more consistently, and I think probably that may be why more attention is focused today.

Let me ask you this, Mr. Davis: Would you—I started to say wouldn't you, but I would be speaking for you. Would you acknowledge that this committee's consideration of whether grand jury perjury and civil deposition perjury and potential witness tampering by the President—I am not saying that it happened, but assuming that it did—that it merits impeachment as a legitimate exercise for this committee? Would you acknowledge that?

Mr. DAVIS. I think that it is appropriate for the committee to be conducting a review. I think that there are issues in terms of whether the committee can meet what I believe is the committee's burden, if it is going to decide that there should be impeachment, without really itself satisfying itself as to the credibility of some of the core witnesses like Ms. Lewinsky. But I think that once you received the referral, I think obviously it was appropriate for you to consider that referral and consider it seriously.

Mr. COBLE. Governor Weld, neither am I Tom Sullivan, but, Mr. Sullivan, this has been broached previously, but I want to broach it as well, you indicated that it was your belief that the average citizen probably would not be prosecuted under similar circumstances that are now before us. And it was referred to the—the two average citizens last week, one is a physician, one a basketball coach, appeared to sit where you are sitting now, and they, in fact, were prosecuted. I am inclined to think, Mr. Sullivan, and I am not—by no means am I taking you to task for this, but I think what you said may well be subject to interpretation.

I think perhaps—and maybe it is because of the uglier time or the fact that the media is more focused now. I think probably that you would see more and more average citizens prosecuted for perjury, but I will be glad to hear from you in response to that.

Mr. SULLIVAN. Well, Mr. Coble, I am aware of the fact that there are some few prosecutions for perjury arising out of civil matters.

Mr. COBLE. Mr. Sullivan, I hate to do it to you, but the time is up.

Mr. SENSENBRENNER. The time is up.

Mr. COBLE. Thank you, Mr. Sullivan.

Mr. SENSENBRENNER. The gentleman from California, Mr. Berman.

Mr. BERMAN. Thank you, Mr. Chairman.

Actually, the question I am most curious about is whether, Mr. Davis, if there had been a cooling off period, and if President Ford hadn't issued the pardon, what do you think Mr. Jaworski would have done?

Mr. DAVIS. The answer is, I don't know. Indeed, the reason that in my memorandum I recommended a cooling off period and felt that we should defer that decision was because I thought the emotions at the time were too high, and one would have to balance the factors very carefully, including, as I said in my statement, whether the public interest in saying, we have had 2 years of this, we need to get on to something else, and shouldn't we do that, and that a prosecution would drag things out.

Mr. BERMAN. Well, I agree with the other comments. I think this panel has presented some very compelling testimony on all of the pitfalls in pursuing a perjury prosecution in this situation and raised doubts about whether all the elements of perjury are present in this case. We are not a courtroom. Some people keep trying to make that analogy. I thought the professors yesterday were a political body. This is a political process in many, many ways. The Founding Fathers would have given this process to the Supreme Court if they had wanted a strict legal analysis.

So perhaps your testimony on the question of whether there would be a prosecution for perjury is less relevant to whether there are high crimes and misdemeanors here than it is to the question of whether one of the articles of impeachment should actually assert the conclusion, the legal conclusion, that perjury has been committed. And I would hope the framers of these articles would look at this testimony carefully in making that decision.

The point that does interest me, for those who want to make an analogy to a legal proceeding, is this notion that even if I think, as a prosecutor, that I have probable cause to indict, and I believe that the accused is guilty and that if I know I can't get a conviction from an unbiased jury, I don't bring the case, develop that a little bit more. Is this a formalized process that prosecutors use? Where did you get this from?

Mr. SULLIVAN. I can only speak from my experience as a prosecutor, but I have had situations where, not my assistants, but agents have said to me after discussion about the evidence, and we concluded that we cannot get a conviction or it is likely that we will lose, let's indict him anyway to show him. My response to that is, get out of my office and never come back.

Mr. FRANK. But you might tell that person to become an independent counsel.

Mr. BERMAN. Yes, Mr. Weld.

Mr. WELD. This is written into the Principles of Federal Prosecution, which is the handbook which guides Federal prosecutors, and what it says about the charging stage of the criminal justice process is that the prosecutor has to believe that there is sufficient admissible evidence, admissible evidence, to obtain from a reasonable and unbiased jury a conviction and to sustain it on appeal.

Mr. BERMAN. As I understand, though, there is another provision in the Justice Department guidelines. If you were bringing a case in the South involving civil rights, where certain practices were prevalent, you wouldn't refuse to bring that case alleging crimes against a black victim simply because you had fears in the 1950s or '60s that an all-white jury might never convict? That wouldn't stop you from bringing the case?

Mr. WELD. That is why it says "reasonable and unbiased."

Mr. BERMAN. So you would have to conclude that the United States Senate was somehow not a reasoned and unbiased jury to apply that logic in this situation?

Mr. NOBLE. May I respond? And let me quote you from the Justice Department guidelines because they use precisely that example and they say: "For example, in a civil rights case or a case involving an extremely popular political figure, it might be clear that the evidence of guilt viewed objectively by an unbiased fact-finder would be sufficient to obtain and sustain a conviction if the prosecutor might reasonably doubt whether the jury would convict. In such a case, despite his or her negative assessment of the likelihood of a guilty verdict based on the factors extraneous to an objective view of the law and the facts, the prosecutor may properly conclude that it is necessary and desirable to commence or recommend prosecution and allow the criminal process to operate in accordance with its principles."

Chairman HYDE. The gentleman's time has expired. The gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you. I have an observation and then a question for Governor Weld.

I have to say that I fundamentally disagree with the premise of this panel, which is that the President should be considered "an ordinary citizen." And therefore I disagree with their conclusions. To me, the President has a special responsibility that goes beyond that of an ordinary citizen. He holds the most powerful position in the world. He is the number one law enforcement official of our country. He sets an example for us all. Other people in other positions of authority, such as a business executive or a professional educator or a military officer, if they had acted as the President is alleged to have acted, their careers would be over, and yet they don't hold near the position of authority that the President does.

Let me read a statement from the rules under which President Nixon was tried for impeachment. It says, "The office of President is such that it calls for a higher level of conduct than the average citizen in the United States."

Because of the President's special authority, I think it makes the charges against him more serious; and therefore, in my judgment at least, demands that any punishment be more severe.

Let me go, Governor Weld, to my question to you, and on the way there let me compliment you for offering a well-thought-out alternative to impeachment; and that is not to say I agree with it, it is just a well-thought-out alternative.

I want to read a couple of statements from students at Roxbury Latin School, which I am sure you know is a school in Boston. This is a column that appeared in the Boston Globe that was written by their headmaster, and apparently he conducted a couple of school forums, and this was for students aged 12 to 18, and suggested that they accept the President's statement of regret. He said they would have none of it, and then he generalized their reactions, which I want to read, and these are quotes:

"You've got to be kidding. This wasn't some one-time lapse in the face of sudden and unexpected temptation. The President did this over and over, plotting meetings with Monica Lewinsky in the White House, including one on Easter, just after he was pictured

coming out of church, Bible in hand. Clinton lied passionately, looking us in the eye; then he played word games, but he never told the truth until he was caught.''

''Cheating by students usually results in suspensions. Repeat cheating brings expulsion. Clinton cheated repeatedly. The only difference is that Clinton is a lot older than we are, supposedly a lot wiser, and he holds the highest public office there is.''

''Maybe we are naive, but people our age want to look up to the President. What we see when we look at Clinton is someone who can't control himself and lies to his fellow citizens.''

Governor Weld, aren't those students generally right in their assessments?

Mr. WELD. I don't think that anybody is saying that this is a day at the beach or a walk in the park. This is not a strong outing by the President, and I find those statements as depressing as you do. And as I was discussing with Mr. Coble a moment ago, if that kind of attitude and reaction had persisted in the citizenry at large—

Mr. SMITH. I understand your answer, and I appreciate it. I yield back the balance of my time.

Chairman HYDE. I thank the gentleman.

Mr. Boucher.

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

I would like to join with you and the other members who have congratulated this panel on what I think is a very excellent presentation this morning, and I would like to join in the welcome of these distinguished witnesses.

Mr. Weld, I was very interested in your statement, with which I wholly concur, that the intent of the impeachment power was to protect the public interest and that the standard that Congress should apply in determining whether acts of the President constitute impeachable conduct is the public interest, and your further statement that impeachment should not be deemed to be a punishment for individual misconduct or the punishment can occur in the court in the regular course. You cited the constitutional provision that says that for any crimes that are committed during the tenure of the presidency, the President can be indicted and tried just as any other American.

I gather, however, from the thrust of the testimony of this panel of witnesses that perjury prosecutions in civil actions are rarely undertaken. I gather also that perjury prosecutions generally, while undertaken on occasion, are not the first resort of prosecutors in most cases. But in this particular instance, there is yet another avenue in which the President potentially could be sanctioned for any misconduct that may have occurred in his testimony under oath. And that is in the U.S. district court in Arkansas which had jurisdiction of the *Jones* case, it is—it has been suggested by a number of witnesses before this committee that that judge retains jurisdiction even though the case itself has now been formally dismissed by the 8th Circuit Court of Appeals, and that if she decides it is appropriate to do so, that she could impose sanctions based on any misconduct that may have occurred in the deposition that was taken in her court.

I would like the opinion of these witnesses with regard to whether or not that is an accurate statement of the jurisdictional posture

of that case, does she have the jurisdiction to do that? And based on your very extensive experience with regard to criminal prosecutions, do you think there is a probability or likelihood, or how would you rate the chances that if she deems that misconduct occurred there, that she might be led to impose sanctions? That might be the more probable way in which some sanction occurs as opposed to a criminal prosecution.

Mr. SULLIVAN. There is under the United States Supreme Court decisions, inherent power in the District Court in civil cases to impose sanctions for misconduct occurring before the court. There is no question about that. That case was decided several years ago.

Your second part was what would happen if she were to do that. Not having brought my crystal ball with me, I can't tell you. But she does have that power to pursue that, so far as I know. I do not know whether the dismissal of the case terminates that power. That is an issue I really haven't looked at.

Mr. BOUCHER. Does anyone else have a comment on that issue?

Let me ask this additional question.

Mr. Noble, I was very interested in your saying that this Congress should consider, in deciding whether or not to vote articles of impeachment, the effect that the House voting articles of impeachment and the Senate being put to trial would have on the country, the further polarization that would occur, the diversion of the President and the Congress from their real responsibility which is attending to our national agenda, the potential immobilization of the Supreme Court while the Chief Justice presides, the lowering of the standard of impeachment in future years. I am concerned that in fact some Members of this Congress, not fully having considered those effects, may have decided to apply a lower standard to determining whether or not articles of impeachment should be approved and believe perhaps the House should act as a grand jury and simply vote on probable cause.

Do you agree that there ought to be a higher standard than probable cause for us to consider this weighty matter?

Mr. NOBLE. Yes. This follows on Mr. Smith's comment. It is clear that before the public, the President is not an ordinary citizen. It is clear that before Congress, the President is not an ordinary citizen. It is clear that any rational criminal investigator or Federal agent investigating an allegation of perjury by a President of the United States is not going to treat it like an ordinary case. It is clear based on everything that we have heard, that most of us believe, without looking at specific evidence, that the President either did perjure himself or didn't perjure

himself.

Chairman HYDE. The gentleman's time has expired.

Mr. NOBLE. I will wait.

Chairman HYDE. Thank you. The gentleman from California, Mr. Gallegly.

Mr. GALLEGLY. Thank you, Mr. Chairman. Thank you for being here this morning, gentlemen.

Mr. Sullivan, do you believe that the knowing and willful misleading of a judge or Federal grand jury represents an effort to thwart the judicial system from discovering the truth?

Mr. SULLIVAN. It sounds like what you said is correct, if I understand it.

Mr. GALLEGLY. The evidence indicates that the President and Ms. Lewinsky had three conversations about her testifying in the Jones case within 1 month before his deposition. When the President was asked, "Have you ever talked to Ms. Lewinsky about the possibility that she might be asked to testify in this lawsuit," he answered, "I'm not sure."

Governor Weld, you know the President pretty well, do you think it's reasonable to believe that the President completely forgot about these three conversations?

Mr. WELD. I really don't know, Mr. Congressman.

Mr. GALLEGLY. Thank you, Governor.

When the President was asked, "At any time were you and Monica Lewinsky together alone in the Oval Office," he answered, "I don't recall." The evidence indicates that he was, in fact, alone with Ms. Lewinsky on many occasions, including the time that he exchanged gifts less than 20 days before the deposition.

Mr. Sullivan, for this not to be perjury, the President must have genuinely forgot his numerous encounters with Ms. Lewinsky, for it not to be perjury, is that correct?

Mr. SULLIVAN. Evidence in a perjury case requires proof beyond a reasonable doubt that the defendant not only made a false statement, but knew it was false at the time it was made; that is correct.

Mr. GALLEGLY. And the test would be that he genuinely forgot in order for that not to be perjury?

Mr. SULLIVAN. That is my understanding.

Mr. GALLEGLY. Thank you very much, Mr. Sullivan. The President's action of being less than truthful has caused and continues to cause serious problems. I am concerned that his lying affects the ability of the American people to trust the highest elected official in the land. One of my constituents called me yesterday, a constituent by the name of Les Savage. I have never met this gentleman before, but his question was very sincere: How do we know when the President is telling the truth, and how do leaders of other countries around the world know when President Clinton is telling the truth?

President Clinton has had many occasions to come clean, and to date I don't believe he has. The President's failure to present any substantive evidence is consistent with his obvious lack of concern about how serious the offense of lying under oath truly is.

Mr. Chairman, I yield back.

Chairman HYDE. The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman. Before my 5 minutes begin, I have a parliamentary inquiry.

Chairman HYDE. State your inquiry.

Mr. NADLER. Thank you. A few weeks ago when Mr. Starr was here in answer to a question I asked, he referred to a court case which was then under seal, and I was not able to characterize his—I felt myself unable to characterize the accuracy of his statement about that case lest I be accused of violating the seal.

A few moments ago Mr. McCollum referred to the same court case, which is no longer under seal but which is within the posses-

sion of this committee in executive session. Would I be violating the confidentiality rule if I were to state that Mr. McCollum misquoted and misstated what the court found and that the court did not conclude that the President's testimony about Lewinsky was material to the Jones litigation, but rather found that the truthfulness of Monica Lewinsky's affidavit was material enough to her motion to quash her subpoena in that case to justify the OIC's issuance of a grand jury subpoena to her lawyer, and that this is a distinct issue from whether the Jones deposition was material to that case? And if I were not permitted to state that, why is Mr. McCollum permitted to quote this case?

Chairman HYDE. You will be provided with a copy of the opinion.

Mr. NADLER. Am I permitted to state this?

Chairman HYDE. I am told that you have mischaracterized Mr. McCollum.

Mr. NADLER. Since that——

Chairman HYDE. You can say anything that you want, but I am suggesting that you will get a copy of the opinion very shortly, and I am suggesting that you read it before you make statements about it. But that is up to you.

All right, now your 5 minutes start.

Mr. NADLER. Thank you, Mr. Chairman.

Mr. Chairman, I should note that I have written to the Attorney General, asking that Mr. Starr be disciplined for breaking the confidentiality of that case when he mischaracterized it 2 or 3 weeks ago.

Let me ask Mr. Davis, I think, starting off, you have stated very carefully and clearly in your testimony that really no prosecutor would prosecute a perjury case on the basis of the evidence that we have before us from the Starr referral; that there are holes and there is no likelihood that a jury would convict. You have said, for example, that you wouldn't bring a prosecution of perjury based on two conflicting statements of two witnesses, one of whom disagrees with the other, that the alleged corroboration that Mr. Starr cites from Monica Lewinsky's testimony is not corroboration at all because that corroboration that she told 10 or 11 friends and relatives of hers the same thing; that she had a motive to falsify or embellish the statement; and in fact I think law school tells us that such a statement would be inadmissible in a court as hearsay and prior inconsistent statements in any event.

First of all, do I characterize your testimony correctly?

Mr. DAVIS. Generally, yes.

Mr. NADLER. Thank you. Secondly, some people on the other side here have talked about the President being impeachable not only for perjury but for a lesser crime; if perjury isn't a high crime and misdemeanor and a great offense threatening the safety of the Republic, maybe false statements under oath are. Would the same or similar constraints prevent a successful prosecution under these circumstances with this evidence of false statements under oath as would prevent the successful prosecution for perjury?

Mr. DAVIS. Yes. The false statement under oath section of the U.S. Code, while it formally eliminates the so-called two witness rule, the same prosecutorial judgment would come into play in which you would have to assess can you win the case. And for the

reasons that I articulated before, it seems to me that with the one-on-one testimony and with the fact that Mr. Starr would have to disassociate himself and criticize Ms. Lewinsky's testimony and say that it is not true in various regards would make such a prosecution, in my view, doomed to failure.

Mr. NADLER. For false statements under oath as well as for perjury?

Mr. DAVIS. That is correct.

Mr. NADLER. And again to summarize, Ms. Lewinsky is a weak witness because the special prosecutor would have to point out that she lied under oath in some other place?

Mr. DAVIS. In the grand jury context, she is the witness as to the core perjury.

Mr. NADLER. And it is further weakened by the fact that the alleged corroboration witnesses would be inadmissible in any court as hearsay?

Mr. DAVIS. They would probably be inadmissible. There may be some arguments that they could come in at some point, depending on cross-examination, but the point is whatever motive she had to falsify in the grand jury, the same motive would exist.

Mr. NADLER. So in other words if I want to falsify or embellish my statement or have a fantasy or lie, the fact that I lied to 12 people doesn't make it any less of a lie than if I lied to only one person?

Mr. DAVIS. That is correct.

Mr. NOBLE. Can I talk about that for just a minute, because it is very important? A good prosecutor is going to try this case with the defense theory in mind, which is going to be can I prove that the President did what she said that the President did. She is going to be impeached for every prior inconsistent statement she has, but the person is not going to cross-examine her, and make it seem as though her testimony was recently fabricated because that way she can bring in every prior statement. All of us ought to worry about someone lying about us to a thousand people and having that come in as admissible evidence, making what we lied about the first time was true if the motive to lie began in the very beginning. So for that reason—

Mr. NADLER. And her motive did begin at the beginning?

Mr. NOBLE. And her motive did begin at the beginning.

Mr. NADLER. And that applies to false statements under oath as well as to perjury?

Mr. NOBLE. That applies to false statements under oath as well as perjury. I tried a false statement case. I convicted it at the jury level. It was reversed on appeal because of a literal truth defense, the same defense that would apply here.

Mr. NADLER. Mr. Smaltz, the special prosecutor in the Espy case, said an indictment is as much a deterrent sometimes as a conviction, so you might as—

Chairman HYDE. The gentleman's time has expired. The gentleman from Florida, Mr. Canady.

Mr. CANADY. I want to thank all of the members of this panel for being here today. You have done a good job in presenting what I believe are some of the best arguments in defense of the Presi-

dent. I understand that is why you are here, and we appreciate your perspective on this.

I have agreed with some of the points that have been made, obviously I disagree with some of the others, but when we talk about prosecutorial discretion and the question that a prosecutor has to ask about whether he can have some expectation of winning before a jury, I think that is right. I think that is an appropriate way for a prosecutor to view the case.

My judgment about the facts of this case differ from yours based on what I have seen to date, because I think there is compelling evidence here that points to the conclusion that the President engaged in a pattern of lying under oath and other misconduct. But on the standard for prosecution, I think you have raised some good and valid points, but I want to quarrel a little bit with the application of that in this context. The argument has been made that in essence we in the House should, in carrying out our responsibility, look to the Senate and make a guess about how the proceedings would turn out in the Senate to determine how we exercise our responsibility under the Constitution. I would suggest to you I don't think that is a proper way for us to proceed. I believe that we have an independent responsibility under the Constitution to make a judgment concerning the conduct of the President and whether he should be impeached or not, and it would be in derogation of our constitutional responsibility to attempt to count noses in the Senate. But I will have to say that it is a very difficult thing to count noses in the Senate anyway, and in a proceeding like this it is hard to predict the outcome. I don't think that this is a proper undertaking for us to be involved in.

I would also point out that the very structure of the Constitution indicates that in the Constitution the framers provided that the House could impeach with a simple majority. They provided that conviction in the Senate would have to be by a two-thirds majority. I would suggest to you that that structural feature of the Constitution suggests that the framers would have contemplated circumstances in which the House might very well impeach but the Senate would not convict, and I think that is obvious on the face of the documents.

Some of these arguments have to be brought to the text of the Constitution and evaluated in that light.

On the issue of prosecutor discretion, let me pose a scenario here which I think is very analogous to what we have before us. Suppose the chief executive of a Fortune 500 corporation, a major national corporation in the United States, was accused of sexual harassment and the corporation had been sued, and in the course of the discovery in that case, the chief executive of that major national corporation lied under oath to impede that civil rights action. Now, I believe that the fact that the chief executive of a major national corporation was engaged in that conduct would be a relevant consideration for the prosecutors who were evaluating the case and whether to bring it, because of the impact of that conduct.

I do believe that bringing prosecutions have a deterrent impact, and that is one of the considerations that has to be factored into prosecutorial discretion. So I think if we step back from this situation, and again we can argue about the weight of the facts and I

understand that you disagree with the evaluation that some of us may have made about the weight of the facts here, but if the President of the United States did engage in obstruction of justice and committed multiple acts of lying under oath, I think that we have to look at that conduct in light of the consequences that it has and the message that it sends, just as we would look at the conduct of the chief executive of a major national corporation who was the defendant in a civil rights case brought against that corporation. I think that is something to look at.

There is really not time for you to respond, but do you disagree that this sort of high-profile case has to be evaluated in light of those circumstances?

Mr. DENNIS. The analogy isn't quite there. If you were looking at the President of a Fortune 500 corporation, you would be talking about a suit that was brought by someone prior to them taking that position and——

Mr. CANADY. No, absolutely not. He could have been guilty of that in the course of his conduct as chief executive.

Mr. DENNIS. The issue of materiality has been discussed here, and that is where the nub of it is. The Jones matter was prior to the President becoming President of the United States. We are not talking about issues of how the President deals with subordinates in that respect. That makes a huge difference in terms of how that person should be perceived insofar as these kinds of charges.

Chairman HYDE. Thank you. Mr. Scott.

Mr. SCOTT. Mr. Sullivan, in your prepared testimony you said no serious consideration would be given to a criminal prosecution arising from alleged misconduct in discovery in the *Jones* civil case having to do with alleged coverup of a sexual affair with a woman or the follow-up testimony before the grand jury; it simply would not have been given serious consideration for prosecution, it wouldn't get in the door; it would be declined out of hand.

Are you aware that we are not straight as of now as to all of the allegations, specific allegations of perjury; that even yesterday the gentleman from Arkansas specified a different statement that he believed to be perjurious? ABC News said that the Republicans—on December 7 said that the Republicans might shy away and come up with new charges than the grand jury.

Is it fair to have an accused respond to a perjury charge without stating with specificity what the statement is that was false?

Mr. SULLIVAN. No.

Mr. SCOTT. Thank you.

Mr. Noble, in fact-finding, is there a problem using conflicting grand jury testimony, copies of FBI interview sheets, and prior consistent statements in order to make a case against an accused?

Mr. NOBLE. I believe there is a problem using only those bases for making prosecutorial decisions, yes.

Mr. SCOTT. Why is conflicting grand jury testimony and copies of FBI interview sheets inherently unreliable as testimony?

Mr. NOBLE. Because our system of justice is based on testing the testimony of someone under oath in front of the finder of fact, subject to cross-examination, in a grand jury that doesn't exist. For that reason, prosecutors at the very least interview the principal witnesses themselves, try to test that witness as much as they can

in terms of deciding whether or not he or she can withstand cross-examination; otherwise you just have hearsay.

Mr. SCOTT. And because of that unreliability, you can't make a case just using grand jury testimony to make a case against someone?

Mr. NOBLE. I say this with all due respect. Only a foolish or inexperienced prosecutor would attempt to indict and convict someone based on hearsay grand jury testimony.

Mr. SCOTT. Thank you.

Mr. Davis, in your testimony, on page 13 of your prepared testimony, right at the top, you didn't have time to go through the specifics of why the obstruction of justice case could not be made. Could you start at the top of page 13 where it says ''but there are''——

Mr. DAVIS. Yes.

''Another complicating factor in the obstruction of justice case which makes this such a difficult case to bring is the reality that the principal players in this drama, the President, Ms. Lewinsky and Ms. Currie, had relationships and motivations to act wholly unrelated to the *Jones* case. This kind of thing would seriously complicate the ability of a prosecutor to establish the intent to obstruct some official proceeding, which is required to prevail in an obstruction of justice case. Examples: The job search began before Ms. Lewinsky was on the witness list, and frankly there is nothing surprising that someone who had an illicit relationship with a woman would, when it is over, be willing and want to help her get a job in another city.''

''Ms. Currie had her own relationship with Ms. Lewinsky.''

''People who have an illicit relationship often understand that they will lie about it without regard to the existence of litigation, and here it appears that such an understanding was discussed prior to Ms. Lewinsky being identified as a potential witness.''

''The evidence, you know, about retrieval of the gifts is contradictory, with Ms. Currie and the President offering versions of the events which exculpate the President and which differs from Ms. Lewinsky's testimony. Ms. Lewinsky herself provided varying and sometimes exculpatory interpretations of these very events in terms of her testimony.''

These are the kinds of things that make winning a case——

Mr. SCOTT. Can you read the next paragraph?

Mr. DAVIS. The reality at the time of the President's conversation with Ms. Currie in the immediate aftermath of a civil deposition: Ms. Currie was not a witness in any proceeding, and given the status of the Jones case, there was no reason to believe that she ever would be, and that the President was likely focusing on the likely potential public relations repercussions of his relationship.

Also in response to an earlier comment, it is not a question of counting votes in the Senate. The issue is in thinking through the standard of whether to proceed at the House level, whether you think you have adequate evidence to prevail. You are making that judgment.

Chairman HYDE. The gentleman's time has expired.

The Chair will declare a 10-minute recess and I mean it, that is 10 minutes. Please come back. Thank you.

[Recess.]

Chairman HYDE. The committee will reconvene. I must say that the panel looks refreshed. That's good.

Mr. NOBLE. On behalf of the panel, thank you, Mr. Chairman.

Chairman HYDE. All right, Mr. Inglis is next.

Mr. INGLIS. Thank you, Mr. Chairman, and I want to thank the panel for being here. Mr. Sullivan, if this case, the facts of this case ever resulted in a prosecution of Bill Clinton after leaving the White House, would any of what we have heard this morning be admissible as a fact in a case involving a prosecution of Bill Clinton, a private citizen? Any of your testimony, would any of that be admitted as a fact in that case?

Mr. SULLIVAN. No, absolutely not.

Mr. INGLIS. Would anything that anyone else has said here this morning be admitted as a fact in that case?

Mr. SULLIVAN. Absolutely not.

Mr. INGLIS. I am keeping score, Mr. Chairman, as you know. So, Mr. Chairman, this makes panel 4, the fourth panel, Mr. Craig, no facts. And Mr. Craig said yesterday to us, in the course of our presentation today—that was yesterday—and tomorrow—that's today—we will address the factual, underlined, factual and evidentiary issues directly.

The score now is zero to 4. Zero panels, zero witnesses dealing with facts. Everybody that we have heard from in these four panels has given conclusions, has given legal opinions. Not a single person has presented a fact.

Mr. Sullivan, would a memorandum of law be considered a fact in a trial?

Mr. SULLIVAN. Not unless—normally no, unless the issue arose out of that; but no.

Mr. INGLIS. If the memorandum of law was an issue, then it would be a fact?

Mr. SULLIVAN. Correct.

Mr. INGLIS. So this 184-page document which really I think can only be described as a memorandum of law, possibly a brief, contains no facts, no facts in the case before us today.

Mr. SULLIVAN. It is similar to the Starr report in that regard. They are about equal. They do deal with the facts, but there are no witnesses that you've heard to testify directly about the facts; whereas in a trial, the people would have to appear and give their testimony personally.

Mr. INGLIS. Of course the difference, which you have to concur with me, is that the Starr report is based on sworn testimony gathered by an independent counsel, which is the same facts that are discussed here; it is just that there you have a direct quotation of those facts and a summary of those facts; is that correct?

Mr. SULLIVAN. Yes. I think that the White House submission, although I have not read all of it, I have read part of it, the part I read did deal in great detail with a lot of the facts, including a lot of the facts not highlighted in the Starr report.

Mr. INGLIS. But none of those are facts in the case. And the point that I am making is that again Mr. Craig yesterday made a very high bar for him to get over, and the thing that I find wonderful about these proceedings is really it is a rare opportunity to bring

accountability to the White House spin machine. What happens, I think, with the spin machine is that the reporters get worn down, they get tired of trying to pursue it and they just accept it. But here we have accountability. Yesterday Mr. Craig said, in the course of the presentation we will address the factual evidentiary issues directly.

The score is zero to 4. Zero of these panels, Mr. Craig, have addressed facts. All of them are doing what the other panels have done in times past. In other words—here again, very helpful discussion and I appreciate the time of all of these witnesses, but there is nothing new here. No new facts, no new evidentiary issues which have been addressed directly. And once again, though, we do have that the President had personally instructed you not to obscure the simple moral truth, but all this 184-page document is is more of the hair-splitting, more of the legal technicalities that are so maddening in what the President has to say to us. That is what the 184 pages is.

Chairman HYDE. The gentleman's time has expired. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. We got a 445-page referral from Independent Counsel Starr. Is there anything in those 445 pages in those form that would be admitted in a criminal case?

Mr. SULLIVAN. No.

Mr. WATT. So I suppose what Mr. Inglis has been talking about is what we have been talking about, we keep waiting on some facts to be developed here; and without that development, the score remains zero to zero, I take it, with the presumption of innocence being in favor of the President.

Mr. Noble, you had a response?

Mr. NOBLE. Yes, I would like to respond to the previous Congressman's comments.

Mr. WATT. Before you go there——

Mr. NOBLE. And in direct response to your comment, and that is, if it was a trial and the prosecution presented no admissible evidence, zero, not guilty, there would be no defense case.

Mr. WATT. That's right. Now that brings me to the point that I wanted to make, because I got a call—everybody seems to be getting calls from constituents—and I got mine last week from a constituent who started out by saying that the President was engaging in a legal attempt to distinguish what he had said in some way, and I reminded the caller that this in fact is a legal proceeding that we are involved in. Is there anybody on this panel that disagrees with that?

Okay.

So the standards that are applicable in a legal proceeding, Mr. Sullivan, you refer to that as—on the first page of your testimony, you said, "The topic of my testimony is prosecutorial standards under which cases involving alleged perjury and obstruction of justice are evaluated by responsible Federal prosecutors."

I take it that you are equating this panel to responsible Federal prosecutors. And what you are saying, I guess, I take it from your testimony this morning is, if a responsible Federal prosecutor wouldn't prosecute this case, then we ought not be moving it along

to the Senate or to the House floor; is that—is that the essence of where you come down?

Mr. SULLIVAN. I am not sure that I would presume on the issue of what your responsibility is.

I am only saying that since your judgment here is high crimes and misdemeanors, that is the test, in my opinion a responsible Federal prosecutor would not bring a case based on these charges in the Starr report. Now, you can draw whatever conclusions you wish politically from that conclusion.

Mr. WATT. Mr. Noble, what would be your response to that, and in the context of what some of my Republican colleagues on the committee have suggested ought be the standard under which we are evaluating this evidence?

Mr. NOBLE. I believe, and I am not—I was not elected by anyone, not by prosecutors or citizens, to comment; but my best advice is that there is a lesson to be learned from the Justice Department. The parallels are quite striking. In the Justice Department before bringing a criminal prosecution, the hurdle is very low: probable cause. However, before getting a conviction, you need proof beyond a reasonable doubt.

Here, in order for it to get voted out of this House, you'll need a majority. However, for a conviction to occur, you need two-thirds of the Senate. I believe you ought to look and think about what a rational fair-minded Senator would do, how he or she would vote. If you conclude that they would not convict, think about the precedent you would have set if after 2, 3, 4, 5, 6, 7 impeachments and no convictions. You would not restore public confidence. If anything, you would undermine public confidence in the impeachment proceeding.

Chairman HYDE. The gentleman's time has expired. The gentleman from Virginia, Mr. Goodlatte.

Mr. Goodlatte, would you yield to me for just a question?

Mr. GOODLATTE. Sure.

Chairman HYDE. Thank you. Maybe Mr. Sullivan——

Mr. WATT. Mr. Chairman, on whose time are we operating?

Chairman HYDE. Pardon? I'm sorry. I ask staff to do that, and sometimes they forget; they are so enchanted by my question.

Mr. WATT. Thank you.

Chairman HYDE. The question I was going to ask: When someone is granted immunity, as Ms. Lewinsky was, is it customary—and of course we can get the answer by looking at the immunity agreement—but is it customary that they are obliged to tell the truth thereafter; and if they lie or tell a falsehood about some substantial issue, that they forfeit their immunity? Is that the custom?

Mr. SULLIVAN. There are two kinds of immunity, but the normal immunity, and I have not seen her agreement, is what is called "use immunity," which means that any testimony that she gives which is not truthful could be used against her in a subsequent perjury prosecution.

If she gets transactional immunity, she is entirely free, but that is not normally the case. It is usually use immunity. However, in my experience when the Federal prosecutors give use immunity to a witness, I don't like to say never happens, because that is usually

wrong, but I just don't know of a case in which they have brought a prosecution——

Chairman HYDE. I think the thing to do is see what the agreement held.

Mr. SULLIVAN. Right. Generally the agreement requires truthful testimony, and you are subject to perjury prosecution if you do not give truthful testimony.

Chairman HYDE. Thank you, Mr. Sullivan.

I thank you, Mr. Goodlatte.

Mr. GOODLATTE. Governor Weld, when you were Governor of Massachusetts, if you were convicted of a felony that was serious, that included jail time, what would happen to you as Governor of the State of Massachusetts?

Mr. WELD. I think you are out automatically, but I never got close enough to the border to focus on that question.

Mr. GOODLATTE. We hope not.

But the point is I think that is true not only in Massachusetts but in virtually every State in the country if the chief executive is convicted of a felony, that he or she is automatically removed from office; and I do have the annotated laws of Massachusetts here in front of me, and that is exactly what they provide.

In addition, it is my understanding that you would not be exempt from prosecution during the time that you served as Governor. In other words, the prosecution could go forward, you could be tried and convicted during that time, unlike the prevailing opinion with regard to the President of the United States?

Mr. WELD. Sure, I think that is true.

Mr. GOODLATTE. If that were to occur, that would be a serious disruption of your duties as Governor of Massachusetts, to go through what conceivably could be a lengthy trial; but nonetheless the laws of that State and virtually every other State provide for that to be done to protect the public trust and the interest of the public in not having someone with a serious charge and subsequently a felony conviction serving in the office of highest trust of that State; is that correct?

Mr. WELD. That's right. Actually one of the reasons that I resigned in 1997 was because the Mexican ambassadorship was taking up so much of my time, I didn't think that it was fair to the people to continue drawing a full salary. So a lengthy criminal proceeding would be problematic also.

Mr. GOODLATTE. If the judgment against the Governor is reversed at a later time, the Governor can be restored to that position unless it is so expressly ordered by the terms of a pardon. The President of the United States has the power to pardon, and the prevailing opinion is that the President can pardon himself. Are we all in agreement that the likelihood of any kind of subsequent prosecution of this case, regardless of your opinions of the merits, is not going to take place because of the reality of the circumstances that either for practical reasons after the President leaves office or because he could bestow a pardon upon himself, that that would take place?

Mr. WELD. I cannot imagine the President pardoning himself. When I said that I thought that the post-term risk was low, that is because of my assessment of the merits of the prosecution case.

Mr. GOODLATTE. Nonetheless, he has that power and the Constitution is very explicit about the one exception to the use of that power, and that is in circumstances where the President is impeached. He cannot then pardon himself and restore himself to office as a result of an impeachment.

Mr. Noble, in my last question, would you be able to keep your job as professor of law at New York University if these charges were brought forward before you and made known to your employer?

Mr. SENSENBRENNER [presiding]. Mr. Noble, you don't have to answer that because time is up.

Mr. CONYERS. Could he answer it if he wanted to?

Mr. SENSENBRENNER. I think so.

Mr. NOBLE. I can't even imagine being accused of anything——

Mr. GOODLATTE. Professor Noble, I can't imagine you being accused of anything as heinous as this either, but nonetheless I think you would agree that you would not be able to hold that position.

Mr. SENSENBRENNER. The gentlelady from California, Ms. Lofgren.

Ms. LOFGREN. I believe the issue before the Congress is whether the behavior of the Chief Executive is so severely threatening to our constitutional system of government that it requires us to undo the popular will of the people and remove the executive and go through that trauma. That is the issue that faces us. However, not every person is analyzing this in the same way, the appropriate way. There are some who say that lying about sex, although deplorable, is not enough to impeach, but it is the crime of perjury that causes them to think that there ought to be an impeachment. Unfortunately for the President, there is no forum to address the issue, to defend against allegations of crime. People say those are technicalities, but that is what the criminal law is all about.

I have been thinking about my late professor, Graham Douthwaite, my criminal law professor, who thought that in order to convict of a crime you had to prove every element of a crime, and that necessarily becomes technical. And in the case of perjury you have to have the person under oath, it has to be a statement about a material fact in the case, it has to be an unambiguous question, it has to be a knowingly false answer, it has to be actually false, and there must be competent evidence for all of those elements to get a conviction.

For example, I recently—and I am not arguing this case—read an article in the Legal Times and also in the American Lawyer Today that points out that the President was probably not actually under oath when he testified before the grand jury because the oath was administered by an officer who did not have the capacity to administer the oath; to wit, a prosecutor.

There is a case on that, *U.S.* v. *Doshian*, which requires that in such a case, the case must be dismissed. If it was John Smith in court, any court in America, that case of perjury would have to be dismissed. It is a technicality, but that is what the criminal law is about.

I went home this weekend and asked a friend who is a deputy district attorney whether a conviction could be had in this case, and the answer I got was "no way." This could never yield a convic-

tion if it were John Smith. And so I am wondering, Mr. Sullivan, could you help the American people, most of whom have the benefit of not going to law school, to understand and to appreciate why we have these technicalities and why it could be possible, if it was John Smith in court, to say something that was obviously misleading but that would not actually yield a criminal conviction? How could that be, and what is the point of that, Mr. Sullivan?

Mr. SULLIVAN. The law has raised very, very high barriers against any citizen being convicted of a crime. The presumption of innocence, we have it in the United States, it is not common throughout the world, but we are really very privileged in many ways, and this is one of them. In perjury cases, you must prove that the person who made the statement made a knowingly false statement.

Where I think the defect in this prosecution is, among others—and I don't think it would be brought because it is ancillary to a civil deposition—is to establish that the President knew what he said was false. When he testified in his grand jury testimony, he explained what his mental process was in the Jones deposition. And he said that the two definitions that would describe oral sex had been deleted by the trial judge from the definition of sexual relations, and I understood the definition to mean sleeping with someone. I don't want to get too particular here.

Ms. LOFGREN. Thank you.

Mr. SULLIVAN. That is where this case, in my opinion, wouldn't go forward, even if you found an errant prosecutor who would want to prosecute somebody for being a peripheral witness in a civil case that had been settled. So that is my answer to that.

Ms. LOFGREN. Mr. Noble, you are an evidence professor. My time is up. Perhaps someone else can ask you about hearsay. I yield back.

Mr. SENSENBRENNER. I thank the gentlewoman from California for watching the red light.

The gentleman from Indiana, Mr. Buyer.

Mr. BUYER. I would like to respond to this frivolous argument about the oath that we just now heard.

The President's deposition oath was administered in a civil deposition by Judge Susan Webber Wright, according to the court reporter who recorded the deposition.

Federal Rule of Civil Procedure 28 specifies three types of persons before whom depositions may be taken within the United States: before an officer authorized to administer oaths by the laws of the United States, or of the place where the examination is held——

Ms. LOFGREN. Would the gentleman yield?

Mr. BUYER. No, I will not. Or before a person appointed by the court to administer oaths and take testimony. There is no dispute that Judge Wright has the authority to give the oath in a civil deposition. Note, also in addition, 5 USC 2903 provides, "An oath authorized or required under the laws of the United States may be administered by the Vice President or an individual authorized by local law to administer oaths in that State, district or territory, or possession of the United States where an oath is administered."

Now before the grand jury, rule 6(c) of the Federal Rules provides that the foreperson of the grand jury, "shall have the power to administer oaths and affirmations and shall sign all indictments." This does not mean that the foreperson is the only person who can administer oaths in the grand jury. In the District of Columbia, a notary public can administer a oath, an affirmation. In the President's grand jury testimony, the oath was administered by the court reporter/notary public, who is authorized to administer oaths by the Federal law in the District of Columbia. The District of Columbia Code provides that a notary public shall have the power to administer oaths and affirmations. That is Chapter 8, D.C. Code 1–810.

Mr. SCOTT. Mr. Chairman, was he reading off a document?

Mr. SENSENBRENNER. The time belongs to the gentleman from Indiana, Mr. Buyer.

Mr. SCOTT. If he was reading off a document, we would like to see what he was reading.

Mr. SENSENBRENNER. The time belongs to the gentleman from Indiana.

Mr. BUYER. Mr. Noble, with regard to prosecutorial discretion, I was pleased to hear some of your testimony. I am referring here to the Principles of Federal Prosecution. I have a couple of questions that I would like to ask. Prosecutors end up having to exercise discretion a lot of times, because sometimes there is more crime that occurs and you have less resources, and so you have to exercise good judgment; is that correct?

Mr. NOBLE. That is correct.

Mr. BUYER. And there are many different factors that you need to take into consideration, and that is also why you have these guidelines in the Federal sector?

Mr. NOBLE. That is correct.

Mr. BUYER. One of the factors that you talked about today is the strength of evidence?

Mr. NOBLE. That's right.

Mr. BUYER. Another factor is the gravity of the offense?

Mr. NOBLE. That's correct.

Mr. BUYER. Another is deterrence, the deterrent effect?

Mr. NOBLE. Correct.

Mr. BUYER. By prosecuting or not prosecuting?

Mr. NOBLE. That is correct.

Mr. BUYER. In this case when I refer to the guidelines, under the section of the Nature and the Seriousness of the Offense, I think it is somewhat informative. It says here, "The public may be indifferent or even opposed to the enforcement of a controlling statute, whether on substantive grounds or because of the history of nonenforcement or because the offense involves a minor matter of private concern." And that is what some of you have tried to articulate here today.

Mr. NOBLE. I believe I quoted that in my prepared remarks.

Mr. BUYER. If you go down further it reads, "While public interest or lack thereof deserves the prosecutor's careful attention, it should not be used to justify a decision to prosecute or to take other action that cannot be supported on other grounds. Public and

professional responsibilities sometimes require the choosing of a particularly unpopular course.''

Do you agree with that?

Mr. NOBLE. Again, I have quoted most of what you have said, yes.

Mr. BUYER. We have had other panels come in and testify, and they like to cite public opinion polls, and they say, you need to listen to public will here and exercise sound public discretion here and go with the polls. But as in the prosecution of cases, you don't have that luxury, do you?

Mr. NOBLE. I believe that what one is supposed to do is try to make one's best judgment in terms of what an unbiased decider of fact would decide, and if the public polls are deemed to be based on unbiased opinions, then that should be considered. But if they are deemed to be based on bias, then I think they should be ignored.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. I thank the Chairman very much. I think it is important, as these days come to a close, to make all of ourselves clear. Let me again clearly state that I find the President's behavior unacceptable and morally wrong. But I take issue with my colleague from South Carolina who continues to restate the premise that there are no new facts.

Unfortunately, what I would offer to say is there has been no new thinking in this room, because as I read the provision, treason and bribery and other high crimes and misdemeanors, I do not hear the claim treason and bribery and unfit morally. So we are discussing in actuality apples and oranges for the American people. That confusion causes the divide and the inability for us to come together in a collaborative and bipartisan manner.

I would offer to say that maybe the panel that is missing here are spiritual leaders who might address the question of the schoolhouse in Texas, to be able to talk about redemption or the fact that, no, liars are not excused, and it is wrong; to teach parents how to teach their children, church houses and synagogues and parishes how to lead America morally. For the impeachment process is not a spiritual process, it is a process in fact that we must deal with, one, the framers' intent, and as these gentlemen, who I applaud for your presence, your intellect and your experience, have come to answer concerns as put forward by the President's defense.

So I would like to get to what you are here for, to present information that is relevant to the impeachment question. That is not a spiritual question. It is not a moral question, though we condemn morally the behavior of the President.

Now, my friends say there is no new evidence. If they would turn to page 93 in the President's presentation, there is a statement that says, there is no evidence that the President obstructed justice in connection with gifts. But the point is, the Independent Counsel Mr. Starr said, the President and Ms. Lewinsky met and discussed what should be done with the gifts subpoenaed from Ms. Lewinsky. Here, the answer; here is Ms. Lewinsky's testimony not ever put forward: He really didn't, he really didn't discuss it. And so you

have it where there is an absolute new fact of which my friends seem to reject.

Another point is in the Paula Jones deposition Mr. Bennett objected to the definition. This is the sexual relations or sexual affairs. He was on the record saying, I think this could really lead to confusion. I think it is important that the record is clear. I do not want my client answering questions, not understanding exactly what these folks are talking about.

Another codefendant, Danny Ferguson's lawyer said, frankly, I think it is a political trick definition, the definition, and I have told you before how I feel about the political character of this lawsuit.

Let me ask, Mr. Sullivan, Mr. Davis and Mr. Noble, as my time eases on, one, Mr. Davis, give the American people, most of whom have not been charged with a crime, never been inside of a grand jury, as to what it is like, whether it ends there with the probative value of that.

Mr. Sullivan, if you would, if you could remember the question, so I could quickly get it answered, you mentioned the fact that it is unlikely to prosecute for these issues of perjury. Say that again for us quickly.

Mr. Noble, do we have the authority in this proceeding not to go forward if we don't think we have a case?

Mr. Davis, inside the grand jury room.

Mr. DAVIS. The grand jury is really the instrument of the prosecutor. While they may ask some of their own questions, their agenda really is the agenda of the prosecutor. And what it is not is a vehicle for getting an assessment of the credibility of witnesses that appear there. There is no cross examination. It is the prosecutor's presentation and really it is not sufficient to determine what ultimately will happen in a trial.

Ms. JACKSON LEE. Mr. Sullivan.

Mr. SULLIVAN. The reason I think a perjury prosecution on the sexual relations issue would fail is that the President has clearly explained in detail and repeatedly in his grand jury testimony what his understanding of the term meant when he gave his testimony in the Jones case. And I do not think in light of that obscure definition, and in light of what happened, that it can be said that there is proof beyond a reasonable doubt that he did not honestly have that interpretation.

Mr. SENSENBRENNER. The gentlewoman's time has expired. The gentleman from Tennessee, Mr. Bryant.

Mr. BRYANT. I thank the Chair. I thank the distinguished panel. I always want to remind those that might be watching that this is the President's defense, and the witnesses who have been testifying the last 2 days are all called by his lawyers to testify in his favor.

I want to commend Mr. Craig for the outstanding strategy he has presented today. He is truly a very fine lawyer. He has brought a defense to us today that this President should not be impeached because he almost committed perjury, obstructed justice, tampered with witnesses, caused someone to file a false affidavit. But because he didn't actually cross that line exactly, then he should not be impeached. This extraordinarily talented wordsmith, or the extraordinarily talented wordsmiths and people who can make those extremely sharp distinctions for the President, allow him to rede-

fine such words as "sexual relationships," the word "is," the word "alone" and defend this cover-up story with such statements that—actually, in this 184-page report, that the cover story for Monica could be that she was delivering papers, and that is because she did maybe two times of the numerous times that she went there. And she said there was a lot of truth in there.

Well, there were also a lot of lies in there in addition to that truth. But again, this is good wordsmanship. Again, I have to commend again the counsel for the President for the defense that has been crafted so carefully and say it is consistent with the President's statements so far.

Summarizing, though, I would say that the defense of today that he almost did these things is like saying, close only counts in horseshoes. I don't think, though—let me say, I think, like Mr. Canady and so many others in this committee, the proof is there that he didn't almost commit those offenses, that in fact he crossed that line. There is compelling evidence of that.

But for those who don't agree, who might accept your view, I want to remind the people of the other witnesses who have said that you don't have to have a crime to impeach. I think that is unanimous among all the experts who have testified. And as the Congress, if we accept your view, I think we have to be careful that you don't box us in to the Nixon standards or that you don't box us in that there has to be a crime and that a technical defense would escape impeachment.

I think what we have to look at—what is so important to me is Mr. Craig's statement yesterday, the admission on the part of the President that the President, under oath, the chief law enforcement officer, the President who appointed all of us as U.S. attorneys, who appoints the Attorney General, the Commander-in-Chief evades the truth, gives incomplete answers to the truth, gives misleading testimony, and, he says, it is maddening, it is maddening.

I think it is sickening. I think it is sickening that the President does this. And for us to allow this President to do that and do damage in a civil rights lawsuit I think is improper. And for Congress to turn the other way and look away. I don't think we can do that.

Now, we all in the end have to vote our conscience, but we should not continue to hear about Nixon is the standard, is the threshold. That is not the case.

But in the end, I do want to thank you for your able presentation, you have done again what you were supposed to do as part of this presentation. I think you have done a good job at it. But again, I think I would address my colleagues, let's don't get boxed in to this idea that he almost did it, in your view, and we can't impeach. I also again would give the disclaimer that I do believe he committed these crimes, and I think the evidence is there to show that. I thank you again.

Mr. SENSENBRENNER. The gentleman's time has expired. The gentlewoman from California, Ms. Waters.

Ms. WATERS. Thank you very much. I would like to thank our panelists for being here today. I am extremely impressed with the way that they have used the very limited time, and I am extremely frustrated. I would like to see each of you take one aspect of these allegations and present a summation about why they are not im-

peachable. But this process doesn't allow for it, and you are not able to do what you have shown you could do so well because you don't have the time.

You are sitting here with so-called legal minds and lawyers talking about they want to impeach the President because they are sickened by his actions. They feel his actions are reprehensible. They don't—they feel they are unacceptable. We keep trying to make the case they have a right to feel anything they would like to feel, but just because they are sickened by his actions does not mean they are impeachable. I don't know how we are going to get that message through.

I think you did a fine job, Mr. Sullivan, of talking about the state of mind of the President and why he could rationally say that he did not have sexual relations based on the definitions and his belief. He did not consummate the sexual act that he thought was central to sexual relations. And simply because he got on television and said, I did not have sexual relations, somehow these would-be lawyers on this committee think that he has done something that is impeachable.

Let's move on to the gifts, Mr. Davis.

Betty Currie did not say that she was instructed to go get gifts and burn them up or dump them in the river. If she wanted to obstruct justice, do you think she could not have found a better hiding place than putting them under her bed? Would you illuminate on that as obstruction of justice for us?

Mr. DAVIS. I think there would be both a better hiding place, and in terms of obstruction of justice, I think there is also the significant issue as to the lack of evidence as to the President's real role in that whole process even when you look at a lot of Ms. Lewinsky's testimony, Betty Currie's testimony and the President's testimony.

Ms. WATERS. Mr. Dennis, this business about bribery, somehow there is an attempt to make the case that because there were discussions about jobs, that Ms. Lewinsky was trying very much to get a lot of help from anybody she could get it from to get a job, that somehow there is some bribery involved here and obstruction of justice because they would like to make the leap that there was an exchange of some kind of information or communication that said, if you give me this job, I will not; or an offer, if I get you a job, will you not.

Will you help us with that?

Mr. DENNIS. Two things I recall, one from President Clinton's grand jury testimony which was not challenged, I don't believe, that issues related to her employment were taken up long before she became a witness in the case. It is also my understanding, excuse me, that Ms. Lewinsky herself denied that there was any attempt to use help with her employment in order to get her to testify one way or the other. I would think that that would basically close the whole issue.

Ms. WATERS. Exculpatory information that was never presented to us——

Mr. DENNIS. It is right in the record. That is correct.

Ms. WATERS [continuing]. In this so-called case.

In addition to that, there was some discussion about conversations with the President and Ms. Currie about trying to remember what was said or what took place. Is there anything in that exchange that would cause us to move toward impeachment because the President said, were we ever alone, do you remember? Give us—would you illuminate on that somewhat, Mr. Noble?

Mr. NOBLE. Again, it is a specific intent crime. The question is what was President thinking when he said this. We can look at his words and try and analyze his words. But Ms. Currie says that she didn't believe he was trying to influence her, and that if that she had said something different from him, if she believed something different from him, she would have felt free to say it. For that reason, I believe you just don't have the specific intent necessary to prove obstruction of justice with regard to the comment that you just asked me.

Ms. WATERS. Thank you very much.

Mr. Weld, someone offered that there were other people serving time for perjury, and they gave these piddling little numbers, despite we have the kind of population that we have in the country. They did not give you the facts in the case of the woman who came before us, Dr. Battalino I think is her name. And I think it was not fair to use that and say, you see, she was prosecuted; how can you not say the President should be prosecuted. Do you know the facts of that case? If so, can you illuminate on them?

Mr. SENSENBRENNER. The gentlewoman's time has expired.

Governor, you got a quick answer to that one?

Mr. WELD. Saved by the bell, Mr. Chairman.

Mr. SENSENBRENNER. The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Mr. Dennis, in your statement you said, and I quote, I sense an impeachment would prove extremely divisive for the country, inflaming the passions of those who would see impeachment as an attempt to thwart the election process for insubstantial reasons.

I can assure you that there are many citizens who feel just as passionately that this President deserves to be impeached. Would you acknowledge that that is true?

Mr. DENNIS. I am sure that passions do run in both directions, high in both directions.

Mr. CHABOT. Thank you.

Mr. Davis, let me quote from your opening statement as well. You said, and I quote, prosecutors often need to assess the veracity of an "I don't recall" answer. The ability to do so will often depend on the nature of the facts at issue. Precise times of meetings, names of people one has met and details of conversations and sequences of events, even if fairly recent, are often difficult to remember.

Let me ask you this: In your experience, is it common for people to forget things such as whether or not they had sex with somebody or whether or not they were alone with someone? Just yesterday we were presented with the President's 184–page defense report and were told that the word "alone" is a vague term unless a particular geographic space is identified.

Do you find that sort of legal hair-splitting defense helpful? Don't you think that we ought to at least be able to agree that alone means you are by yourself, not with anybody?

Mr. DAVIS. I think alone in essence means that you are by yourself. But I think that while you don't forget that you had sex with somebody, I think you have to go back and look at the confusing nature of the answers. Basically what was going on, there is no question the President was trying his best to avoid and was playing word games in his deposition. He shouldn't have been doing it, and he was doing it. The issue is what is the legal consequences now, and that is what we are all struggling with.

Mr. CHABOT. Thank you.

I think the President should set a standard for all the citizens in this country. I think we all ought to be able to agree on what the word "alone" means.

Mr. Sullivan, in your opening statement in discussing how much evidence a prosecutor should have before he brings a case to a grand jury, you stated that they should not run cases up the flagpole to see how a jury will react. Do you think it is responsible for a President to take a poll to in a sense run something up a flagpole to see whether he ought to tell the truth or lie?

Mr. SULLIVAN. No.

Mr. CHABOT. Thank you.

Mr. Noble, in your statement you said, Members of Congress should consider the impact of a long and no doubt sensationalized trial, what effect that will have on the country. Should we also consider what the impact a President committing perjury, obstructing justice, tampering with witnesses and getting away with it might have on the country, particularly when that President is the chief law enforcement officer, and is sworn to uphold the laws in this country, and, in fact, is sworn and took an oath himself that he would uphold the laws?

Mr. NOBLE. I believe you ought to consider whether or not you could prove those allegations that you have just made. From my review of the evidence, I don't believe you could prove any of the allegations that you just articulated in front of a jury, and I think you ought to take that into account in deciding whether or not you want to base your impeachment, as I have read, on perjury. You can base your impeachment on whatever you want, but it if is on perjury, I believe you would not be able to sustain a conviction for perjury before a jury in this country.

Mr. CHABOT. Thank you very much.

In the final time that I have here, I think, as Mr. Bryant just said, it is very important for all of those folks that may be watching the testimony today not to forget that these witnesses were sent here, and I think they have done a very good job, but they are witnesses on behalf of the President, not impartial witnesses. They are advocates.

I think that the President should set a standard that our kids in this country ought to be able to look up to, and we ought to know that the chief law enforcement officer, the President of this country, is somebody that we can respect and who actually tells the truth.

I yield back the balance of my time.

Chairman HYDE. The gentleman's time has expired.

The gentleman from Massachusetts, Mr. Meehan.

Mr. MEEHAN. Thank you, Mr. Chairman.

Mr. Chairman, Mr. McCollum earlier referred to a case from the United States Court of Appeals in the District of Columbia Circuit and seemed to indicate that that case, the ruling in the case, which had been sealed, put to rest the issue of whether or not the President's testimony was material in the *Paula Jones* case. Well, it just so happens that I got a copy of that ruling that was under seal, and this is not a ruling on that at all. This is a ruling on a motion to quash by Ms. Lewinsky's attorney because Ms. Lewinsky didn't want to testify. This ruling in no way, shape or manner says that the President's testimony was material to the underlying civil case in the Paula Jones filed lawsuit. So just to set the record straight, I would ask that this be submitted for the record, that Members might want to read it.

Chairman HYDE. Without objection, so ordered.

[Information not available at time of printing].

Mr. MEEHAN. Thank you Mr. Chairman.

In any event, I am delighted to see the former Massachusetts Governor here, back in the public arena on the right side. I heard my friend from South Carolina, Mr. Inglis, talk about the high bar over the last few days, the high bar, that Mr. Craig has to make sure that he gets over that high bar because it is a very high bar.

They are prepared to vote for impeachment of the President of the United States on Saturday. It is the second time we will have a trial in the United States Senate if the full House goes along with it. And he is talking about the high bar that Mr. Craig has to pass to get witnesses before this committee to prove the President's innocence.

Now, Governor Weld, you are a former prosecutor. I am sure that you have heard many on the other side say that this is sort of like a grand jury proceeding. Now, have you ever had a case where you as the prosecutor appeared before a grand jury and gave your presentation as to why you thought a defendant had committed a crime, yet called no material witnesses, no witnesses, yet nonetheless you got an indictment? I don't subscribe to this theory, but let's assume we are in the grand jury system.

Mr. WELD. I have had cases where the case went in through an agent at the grand jury, and a lot of the agent's testimony would be hearsay. He would be a cumulative witness.

Mr. MEEHAN. But you have never had a case where you didn't present basically a prescient case; you never went in and said, we should indict this person?

Mr. WELD. I don't think you get too far that way, Mr. Congressman.

Mr. MEEHAN. Apparently though, Governor Weld, you do—here is the point. Because we haven't heard from a material witness yet, and I hear the other side saying, wait a minute, the Democrats, the President, they haven't brought a material witness here. They should prove the President's innocence. Isn't the fact of the matter in the judicial proceeding, any judicial proceeding, that the prosecution or the person seeking to pass that high bar has the obliga-

tion to provide the material witnesses? Mr. Sullivan, isn't that the way our system works?

Mr. SULLIVAN. Yes.

Mr. DAVIS. It clearly works and must, and, indeed, I think that the burden to proceed with impeachment should have a higher evidentiary threshold than the burden for a prosecutor to bring a criminal case because the consequences of impeachment are much more important nationally.

Mr. MEEHAN. Let me go on to another instance. There is all of this talk of obstruction of justice that is being thrown around here as if we had a case of obstruction of justice. And there is a talk about who initiated the events relative to the gifts, who transferred the gifts. Betty Currie testified before the grand jury that Ms. Lewinsky called her and asked her to come over and pick up the gifts. Monica Lewinsky claimed that Ms. Currie made the initial phone call.

Now, I know this is probably hard to believe, but one of the articles of impeachment is going to be an obstruction of justice. But this committee has never called either one of them to try to determine what the truth is.

Mr. Sullivan, have you ever heard of drafting an article of impeachment where there is a conflict in the facts like on this particular instance and we didn't call either one of the witnesses to try to correct what the grand jury testimony says?

Mr. SULLIVAN. Well, no. But let me——

Chairman HYDE. The gentleman's time has expired.

Can you answer briefly?

Mr. SULLIVAN. Yes, I can, Mr. Hyde.

Even if you take what Ms. Lewinsky said, when she talked to the President about what to do with the gifts, you wouldn't have a case because she says that he said, "I don't know, or let me think about it." That is all. That is the total sum of what Ms. Lewinsky said Mr. Clinton said.

Mr. MEEHAN. Thank you, Mr. Sullivan.

Chairman HYDE. The gentleman from Georgia, Mr. Barr.

Mr. Barr, would you yield to me just briefly?

Mr. BARR. Certainly.

Chairman HYDE. Mr. Davis, in law if you have a prima facie case, the burden then shifts to the other side to come forward with some evidence; does it not?

Mr. DAVIS. Well, not really. The burden in a criminal case always remains on the prosecutor to show proof beyond a reasonable doubt, and that burden stays with the prosecutor from beginning to end.

Chairman HYDE. Well, I understand that. But can you be critical of not producing witnesses when you have 60,000 pages of under-oath testimony, deposition testimony, grand jury testimony; are you not entitled to take that into consideration, and then, if you reject that, if you think that's wrong, don't you have some obligation to come forward yourself with a scintilla—by the way, what is a scintilla?

Mr. DAVIS. A scintilla is very little. But I think——

Chairman HYDE. Don't you think you have an obligation to come forth with a scintilla of evidence invalidating the 60,000 pages that the Independent Counsel has developed?

Mr. DAVIS. It is not a question of the number of pages. The real issue is whether those pages continue uncontradicted facts as to which there is no factual issue. The problem here is——

Mr. BARR. Mr. Chairman, I have to reclaim my time. I have some—with all due respect.

Mr. ROTHMAN. Mr. Chairman, let the witness finish his answer, please.

Mr. SCOTT. Mr. Chairman, I would ask unanimous consent that the witness be allowed to finish his answer.

Mr. BARR. Could we restart the clock then? If they want to give this gentleman time to answer the questions, let him answer, and then restart the time.

Chairman HYDE. Please, please. On nobody's time but the Chair's time, the gentleman may finish his answer, and then we will start again with Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman.

Chairman HYDE. I want to be fair, and I really intruded on his questioning.

Go ahead, Mr. Davis.

Mr. DAVIS. I think it does depend upon what is in those 60,000 pages. If there are conflicts that are revealed so that there are factual issues, the issue then becomes credibility, and credibility is important. And even as Mr. Starr recognized, he didn't want to give immunity to Ms. Lewinsky unless he saw her. Of course, actually, he didn't see her. He wanted his office to see her. So if you are going to make credibility judgments, and as to a number of these issues there are credibility issues, that is when it becomes important for the person with the responsibility for making the decision, and that is, in this case, this committee, in my view, to actually test the credibility of the witnesses.

Chairman HYDE. Of course, where there is no conflict, that isn't an issue; isn't that so?

Mr. DAVIS. If there is no conflict, then it is a question of the significance of what is said and understanding that.

Chairman HYDE. Thank you.

Now, forgive me, Mr. Barr, I won't do that again. You will start all over.

Mr. BARR. Mr. Chairman, if you can ask questions and then start the time for me, you can do that any time you want.

Thank you, Mr. Chairman.

I know Mr. Craig is here, and I don't know whether he is delighted or dismayed by the panel today, because after promising us yesterday that we would not be hearing technicalities and legalities, that is all we hear today. That is fine. We have a panel of very distinguished criminal attorneys here, and that is the essence of criminal law, finding a clever way to parse words and definitions and so forth and determine why certain principles don't apply, and I understand that.

But we really have gone, Mr. Chairman, today from the technical to the absurd. From the technical we have lawyers here that would apparently agonize greatly over a definition of sexual relations that

is very, very broad; uses terms that are deliberately broad to encompass a whole range of activities, using the term "any person." Now, to Mr. Sullivan, any person may not mean any person, but I think to the average person of common sense it would.

So we still have this legal technical parsing over definitions and words that really leaves us precisely where we were before Mr. Craig made a promise yesterday that we would have no more technicalities and legalities to hang our hats on. We have gone then to the absurd, Mr. Chairman, and that is the preposterous presumption or scenario that the President, in talking with Ms. Currie the day after he gave his grand jury testimony or his testimony in his deposition before the court, was really acting as her attorney because, according to Mr. Sullivan, it is entirely proper for an attorney to go over somebody's testimony in advance of that testimony to make sure that it fits.

I don't think the President was contemplating serving as her attorney, nor do I think that Ms. Currie was contemplating hiring the President for that purpose. Therefore, we would have to look elsewhere, and the elsewhere is that he was trying to coach her, and that fits within the definition and the statute of tampering.

For those on this panel, all of whom have tremendous and very noted experience in dealing with criminal law, many including dealing with very serious drug cases, I would ask them rhetorically, since they seem so enamored of the propriety of evasive and crafty answers being the tools in trade of an attorney, why they would find it interesting, or maybe they wouldn't, that the Acting Deputy Administrator of the Drug Enforcement Administration, for whom I would presume you would all agree it is important to have agents testifying in court, testify truthfully, why that Deputy Administrator believed it necessary on September 15 of this year in a memo to all DEA personnel admonishing them—and I have never seen a memo like this before—admonishing them, quote, that evasive or craftily worded phrases, testimony or documents designed to omit or distort key facts are similarly unacceptable and will not be tolerated. Making false statements in any matter or context is completely unacceptable and will not be tolerated.

That, I think, Mr. Noble, and I noticed you did not answer this specific question put to you by I think it was my colleague and another former U.S. Attorney Mr. Bryant, that is why this case is so important, not necessarily that we know for a fact that there are DEA agents out there developing crafty or evasive answers to be used in court, but apparently the head of one of our preeminent law enforcement agencies, because of the President, the chief law enforcement officer, using crafty and evasive answers in court before judges, because that sets a certain standard, that is why it is important that we are here today.

That is why it is important why we are here today, not to argue over the technicalities, niceties and legalities of whether or not a specific case of perjury can be made, but because of the damage that is already being done to our law enforcement by having a President who excels at evasive and crafty answers that in the case of the average DEA agent would be unacceptable, would get them thrown out of court and probably cashiered from the government. That is why this is important.

And, Mr. Craig, shame on you for putting together a panel here of technicalities and legalities when you promised us yesterday there would be no more of that.

Chairman HYDE. The gentleman's time has expired.

The Chair would appreciate no demonstrations, although we have had them, but we can get along better without them.

Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman.

You know, I want to speak to the issues of technicalities and legalities and what have you, because I think it is important, when we speak about the rule of law, oftentimes we are talking about technicalities and questionable legalities because it is embedded in our Constitution that there are certain standards and requirements. Is that a fair statement, Mr. Sullivan?

Mr. SULLIVAN. Yes.

Mr. DELAHUNT. This is not about technicalities.

Mr. SULLIVAN. It is, in response to what Mr. Barr said, in somewhat——

Mr. DELAHUNT. Mr. Sullivan, I am just going to speak to you, because I have wanted to help——

Mr. SULLIVAN. It is interesting to me because in my experience, persons who make such statements, when they become the subject or the object of investigation, are the first ones to get the mantle of the constitutional protection and wrap it around them, and insist on their rights. You don't hear that kind of a speech from them anymore, when they hire me on to defend them, I can guarantee you that.

Mr. DELAHUNT. Thank you.

Let us talk about perjury. To evade is not to perjure, is it, Mr. Sullivan?

Mr. SULLIVAN. No.

Mr. DELAHUNT. To obfuscate is not to perjure.

Mr. SULLIVAN. No.

Mr. DELAHUNT. To be nonresponsive is not to perjure either.

Mr. SULLIVAN. No.

Mr. DELAHUNT. It is not a crime, is it?

Mr. SULLIVAN. No, it is not. The definition of perjury and the proof required to prove perjury is very specific, very technical, and properly so.

Mr. DELAHUNT. However, it might be maddening, it might be frustrating, it might not be right, it might very well be immoral, but it is not a crime.

Mr. SULLIVAN. The Criminal Code is not enacted to enforce a code of morality.

Mr. DELAHUNT. You know, I was listening to my friend from Tennessee Mr. Bryant, and I thought his comments were interesting, you know, the almost did it theory. You know, I don't think he and I disagree all that much. I do think, however, that there are ways to deal with a President who has evaded, who has been nonresponsive, and who has obfuscated the truth. I suggest that there are alternatives that are open to this Congress to deal with that particular issue.

You know, I think it was Mr. Chabot who raised the issue about recollection and forgetfulness. You are all experienced trial law-

yers. We know as human beings that memories—people can answer in good faith and memories can fail. Is that a fair statement, Mr. Sullivan?

Mr. SULLIVAN. Of course, it is.

Mr. DELAHUNT. Well, I just want to submit this for the record, because hearing the issue being raised yesterday, several days ago, I went back to the testimony that was provided by Kenneth Starr, and, according to my review, the Independent Counsel expressed difficulties in recalling information at least 30 times during the course of his testimony. And it is fully detailed here, and I want to submit it, Mr. Chairman, for the record.

Chairman HYDE. Without objection, it may be received.

[The information follows:]

MEMORANDUM

TO: ~~BD~~ Mr. Delahunt
FROM: ~~MDA, JLK~~ Mark Agrast
DATE: December 1, 1998
RE: Starr Testimony

According to our review of the transcript, Independent Counsel Starr expressed difficulties in recalling information at least 30 times during the course of his testimony, as detailed below.

1. Well, my best recollection is no. I know Richard Porter, I have had communications with him from time to time, but in terms of a specific discussion with respect to what the law firm may be doing or may not be doing, I am not recalling that specifically, no. Starr to Lowell, Transcript of Judiciary Committee Hearing of November 19, 1998, at 120.

2. I am not sure. I had had conversations with them, just as I had conversations with others, including them, and I think the record of these proceedings should reflect that. Starr to Lowell, Transcript at 120-21.

3. You said six conversations, and you made a very specific point, and I am not trying to interrupt you, but you made a specific point, and I think it is only fair to say I don't know whether there were six conversations, and it never ripened -- I am talking about with Mr. Davis -- and it never ripened into an arrangement, an agreement, to the best of my recolleaction, to do anything because of the circumstances that then occurred. Starr to Lowell, Transcript at 122.

4. Yes. We made -- it is my understanding that we made the Deputy Attorney General aware that there was a reporter from Newsweek. We had not known about that initially when the information first came to us, but it became very quickly apparent that there was, in fact, a Newsweek reporter who was on the story, unbeknownst to us. So, yes, we said to the Deputy Attorney General, this is another factor, this is another consideration, and I believe -- I don't know, but I believe that that was brought to the Attorney General's decision [sic]. Starr to Lowell, Transcript at 127.

5. Well, I would have to double-check to see exactly what we did tell her, but, no, what I am trying to make as clear as I possibly can is what we were saying to Ms. Tripp, you have given us this remarkable information, allegations. Starr to Lowell, Transcript at 132.

6. No. Well, I shouldn't be so quick. I did not represent ever Ms. Jones or even seriously contemplate anything other than a role with respect to the constitutional immunity issue. But I believe, and I can check this, so, but I will just give you my belief, that my firm did, in fact, represent the Independent Women's Forum. Starr to McCollum, Transcript at 169.

7. Mr. STARR. It is not a date certain. We have no information with respect to--

Mr. FRANK. I will take a date ambiguous. Give me an approximate.
Mr. STARR. First of all, there is an investigation that is continuing, and as of this date of reporting, we do not have any information-- Transcript at 177.

8. The answer is, partially -- I would want to review the facts because I want to be fair, but there was not, shall we say, a ready willingness to allow, for example, public access to the executive privilege hearings and so forth. Starr to Smith, Transcript at 199.

9. Mr. STARR. I am not familiar with that specific item.
Mr. WATT. You take my word it is in the information you sent over.
Mr. STARR. I am not quarreling with that. Transcript at 235.

10. I do not have a recollection of that, but I am happy to now search my recollection and to go back in light of the specificity of your question and to provide the committee with information. Starr to Lofgren, Transcript at 246.

11. I am unable to answer that question without -- I will have to -- you are saying any information relating to any. I would have to search my recollection. I am prepared today for questions that go to this referral, so I will have to search my recollection. Starr to Lofgren, Transcript at 247-48.

12. I have two representations. One was an appeal on a class action, which was in the time frame, Congresswoman Waters, of 1995 and 1996, and prior to that time, I believe it was 1994, I would have to reconstruct this, I took on a specific representation, again an appeal, which, as you may know, is what I typically do. Starr to Waters, Transcript at 264-65.

13. I cannot recall of the top of my head whether we conducted that particular interview or not. I will say this, and I can check and again get back to the committee, but my evaluation and assessment, based on the professional prosecutors who carried this out, is that it was thorough, but I have to check to that [sic]. Starr to Barr, Transcript at 281.

14. Before I engage in an admission or denial I would want to see the question, and I would be delighted to receive the question, and then I would then give you a written admission or denial. Starr to Wexler, Transcript at 294.

15. Three of the questions went -- and if you ask me in writing, I will be happy to follow up. Starr to Wexler, Transcript at 295.

16. I do not -- I know what Ms. Lewinsky has said. I would have to conduct an interview with my agents to know what the position of the office is. Starr to Wexler, Transcript at 297.

17. Well, it was put in terms of a right to counsel, and there apparently are issues with respect to the orders. I am doing my best to recall the judge's order, and the judge, in fact, determined that there was no violation of a constitutional right. That is my best recollection. But the order will speak for itself. Starr to Hutchinson, Transcript at 297.

18. I have not reviewed the Linda Tripp letter in advance of this, but it is my understanding that it does not contain this. But that is my -- that is my understanding, and that is my best recollection. Starr to Barrett, Transcript at 311.

19. I think that is right. I need to reflect on some of the Secret Service matters, but I think you are correct that I was not actually present for any of the depositions themselves, including the Secret Service officers. Starr to Kendall, Transcript at 339.

20. With respect to the Travel Office, I would frankly have to search my recollection to see exactly where we were and when we were there. Starr to Kendall, Transcript at 343.

21. You are now asking me about FBI interviews, and you talked about how many witnesses there were, and now you are asking me specifically was a specific question asked of a particular witness. I will be happy to find that out, if it seems to be relevant to this committee. Starr to Kendall, Transcript at 346.

22. That probably sounds about right, but I would have to do the count. Starr to Kendall, Transcript at 348.

23. Mr. KENDALL. At the time of that Time article, you denied Mr. Ginsburg's charge, did you not?

Mr. STARR. I believe that we did, but I am just not recalling specifically how we did it.

Mr. KENDALL. You certainly denied it--

Mr. STARR. We have had a number of charges, so you will have to remind me of where my rebuttal is. Transcript at 365.

24. You are asking me in connection with this letter did I have a conversation with one of my colleagues, and I would have to review notes and so forth. Starr to Kendall, Transcript at 366.

25. I believe that is right in terms of the timing, but I would have to reconstruct in terms of the actual timing of the mailing. I am sorry, I would have to double-check that. Starr to Kendall, Transcript at 368-69.

26. I think we have had questions about that, I have been asked that, and I am searching my recollection. But let me say this: If you are talking about Monica Lewinsky, and I don't know that you are, you didn't use her name, but the first I knew, to the best of my knowledge and recollection, of Monica Lewinsky was in January of 1998. Starr to Kendall, Transcript at 371.

27. Now, I had questions, and they seemed to me to suggest that there is some information with respect to information that may have come to me in November of 1997 with respect to tapes. And it was all very vague and shrouded in mystery, and I said I will be happy to respond if I get some additional information.

But with respect to Monica Lewinsky, which is what I assume we are here to talk about, I did not know anything about Monica Lewinsky, to the best of my recollection. I

don't think I ever had occasion to meet her or otherwise hear about her until January of 1998. Starr to Kendall, Transcript at 371.

28. I know Richard [Porter]. I am not aware of what his role was. I have since read about what his role was, but I did not in any way have any involvement whatsoever or participation in any way with whatever he did, and I have not conducted an investigation. There may be facts of which I am unaware that I should be aware in terms of before I formulate a complete response. Starr to Kendall, Transcript at 372.

29. Well, you have just brought this to my attention. But I do not know. I don't have a recollection of something being brought -- you are talking about to my attention. No. Starr to Kendall, Transcript at 375.

30. I don't believe that we have. I would want to check, and if I have additional information I would provide it to the committee. But as I sit here this evening I am not aware of any suggestion tha there is exculpatory evidence, other than the discussion we have had here today with respect to what one individual witness may have said. Starr to Schippers, Transcript at 388.

Mr. DELAHUNT. You know, I think it is important to also note that credibility is an issue here, Mr. Davis. It is a real issue. And I think it is important to note, too, that the Majority, represented by Mr. Schippers, has acknowledged that in their report to this committee.

I am going to read to you his statement: Monica Lewinsky's credibility may be subject to some skepticism. At an appropriate stage of the proceedings, her credibility will, of necessity, be assessed together with the credibility of all witnesses in the light of all the other evidence.

Would you suggest that it is an obligation of this committee to make that assessment before we proceed?

Mr. DAVIS. I believe it is, because you are the people who have to be comfortable that there is sufficient evidence to establish what is put in a piece of paper.

Mr. DELAHUNT. Ms. Lewinsky has on numerous occasions lied, if you have read—if you accept the—if you accept the transmittal by Mr. Starr.

Mr. DAVIS. I think Mr. Starr's transmittal references that.

Mr. DELAHUNT. And early Mr. McCollum talked about nine corroborative witnesses. My memory of the Starr communication is that she told different stories to different people.

Mr. DAVIS. I think there is set out there, and, as I said before, it is also the same if she had a pre-existing motivation to tell false statements to the grand jury, it was the same with those people in any event.

Chairman HYDE. The gentleman's time has expired.

The gentleman from Tennessee, Mr. Jenkins.

Mr. JENKINS. Thank you, Mr. Chairman.

Let me say to this panel, thanks. Mr. Chairman, I regard this as a very able panel. And I suppose you saved, Mr. Craig, the best for last. I feel like I would be unarmed to get engaged in any mental gymnastics with any member of the panel.

But you have all announced that you are here as witnesses, not advocates. You are advocates, in a sense, as witnesses, and I suppose the tendency for all of us who have practiced law or been judges is to get back in the arena. The last two or three panel members, I think, have gone in a direction that we need to continue to go in. They have talked about getting away from legalistics, talked about getting away from lawyer talk, and talked about discussing things that the American public would understand. I have got a question along those lines I would like to ask Mr. Sullivan.

Mr. Sullivan, you testified that you had read from the President's deposition that he had denied that he had sex with somebody based on the interpretation of sex.

Mr. SULLIVAN. In the grand jury testimony, the grand jury testimony about his deposition testimony.

Mr. JENKINS. And you commented that you thought the President's interpretation was reasonable.

Mr. SULLIVAN. Yes, I think it is a reasonable interpretation. He insists that that is his interpretation. And it seemed to me, given the necessity of proof beyond a reasonable doubt that he thought

he was telling a lie, that you could not make a criminal case against him.

Mr. JENKINS. Well, now, this is a solemn matter, and I want to keep it that way, but for those people across this land who are viewing this now, I want to ask you, you have come down here and testified, and, actually, I see what it comes down to this, when you pull the shuck back and look at the corn, what you are asking the American people to believe is that we have got a guy down at 1600 Pennsylvania Avenue who is smart enough to get himself elected, who is smart enough to serve as President of the United States, and he doesn't know what sex is.

Mr. SULLIVAN. No, I am not suggesting that at all. That is absolutely not what I am saying. I have said it three or four times. The judge in the Jones case gave a specific definition of the term ''sexual relations.'' She deleted two sentences that specifically read on, as the patent lawyers say, oral sex. The President says in his mind that took oral sex out of it, and that what was left was what we would call normal sexual intercourse. And he said that is the definition I was responding to.

Now, you can say that is silly, that is ridiculous, I don't believe it, but that is what he says. And it seems to me that if you were to bring this as a criminal case with that background in mind, and what was left in that definition, you can't make a case. That is all I am saying.

Mr. JENKINS. Well, you and Mr. Noble have both indicated that you don't believe, and perhaps, I guess, other panel members have indicated——

Mr. NOBLE. I would like to respond to two points you made. One is——

Mr. JENKINS. I haven't asked you to, Mr. Noble. Wait just a minute, and I will try to give you an opportunity. I am about to burn up all the time I have.

But do you know anything, Mr. Sullivan, about the Battalino case, the lady who came here and testified?

Mr. SULLIVAN. Just what I have read in the newspapers about it. I did not witness it.

Mr. JENKINS. You are not able to compare——

Mr. SULLIVAN. Well, I could compare it this way. In the cases that have been referred to, I have not heard of any in which it is analogous to this case, where the witness' testimony was peripheral to the issues in the case, where the alleged perjury was not dealing with the specific facts like of the Jones case, but of some other peripheral case that might not even be admissible in evidence.

Chairman HYDE. The gentleman's time has expired.

Mr. Wexler.

Mr. WEXLER. Thank you Mr. Chairman.

Mr. Sullivan, I was very struck by your testimony in terms of your examination of the allegations against the President because it seems to me one of the most critical elements against the President and the President's lawyers' performance in this process is that they have engaged in legal hair-splitting, and they have been condemned for it, and in some cases maybe appropriately so. But as you analyzed the nature of the case against the President with respect to perjury, what struck me was it seems that in order to

make that same very case against the President, you have to engage in legal hair-splitting to do so, because when it all comes down to that very essence of the case against the President on perjury, it comes down to a discrepancy, a discrepancy between the testimony of the President and Ms. Lewinsky over the precise nature of the physical contact involved in their relationship.

The President on the one hand to the grand jury says, I had an intimate relationship, an inappropriate intimate relationship with Ms. Lewinsky that was physical in nature. And he goes on to say, it was wrong. And then, of course, as you have pointed out here today on several occasions, he denied in essence having sexual relations as it was defined by the judge.

Ms. Lewinsky on the other hand, in response to the Independent Counsel's several questions, goes into graphic detail in recollection of her encounters with the President. That is what it seems the perjury is all about.

Let's take the advice of the members on the other side. Throw away the legal technicalities. Throw away the requirements that the law provides we prove for perjury. Forget all about that. Tell the American people what is the false statement that the President allegedly made to the grand jury? Forget the consequences, forget the law. What is the false statement?

Mr. SULLIVAN. Well, could be one of two. It could be when he denied having sexual relations, and I have already addressed that, because he said, I was defining the term as the judge told me to define it and as I understood it, which I think is a reasonable explanation. The other is whether or not he touched her or touched her breast or some other part of her body, not through her clothing, but directly. And he says, I didn't. And she said, I did. So it is who shot John. It is a one on one.

The corroborative evidence that the prosecutor would have to have there, which is required in a perjury case—you can't do it one on one, and no good prosecutor would bring a case with, you know, I say black, you say white—would be the fact that they were together alone and she performed oral sex on him. I think that is not sufficient under the circumstances of this case to demonstrate that there was any other touching by the President, and therefore he committed perjury.

Mr. WEXLER. Mr. Sullivan, I only hope that a vast majority of Americans have heard your answer right now. What this is about at its worst is the President making false statements about sexual relations and about where he touched Monica Lewinsky. That is what the perjury, the alleged perjury, is about. I hope I am not misstating what your answer was.

Mr. SULLIVAN. No, you are not. What the other side is saying is that perjury in any regard is so important that the President oughtn't to engage in it. We can all probably agree with that. The issue for you is whether or not it justifies impeachment.

Mr. WEXLER. I agree. I agree. So it is about sexual relations, and it is about touching, and now we are about to impeach a President because we think he gave false answers about sexual relations and about touching. How many times does it have to be said, how many times do we, the Congress of the United States, have to now set up a standard that says the President may have falsely told us an

answer about sexual relations and about touching, and now we are going to impeach him?

Chairman HYDE. The gentleman's time has expired.

The gentleman from Arkansas, Mr. Hutchinson.

Mr. HUTCHINSON. This investigation was opened because of concerns about attempts to obstruct and suborn perjury in a civil proceeding in which a plaintiff who had a right to bring a suit, who the courts determined had a right to bring a suit, was pursuing. And our review is looking into these allegations of obstruction of justice and perjury.

There are questions about whether Monica Lewinsky is truthful or not. I think that is a legitimate question that can be raised, but I think she does have an incentive for telling the truth. I have here before me the immunity agreement, which I have seen before and these witnesses have seen before as well. It says that if Ms. Lewinsky has intentionally given false, incomplete or misleading information or testimony, she would be subject to prosecution for any Federal criminal violation. And so certainly she has immunity, would you agree, Mr. Sullivan, but if she does not tell the truth, then she will be subject to prosecution?

Mr. SULLIVAN. If that is the standard use immunity agreement, that is correct.

Mr. HUTCHINSON. Now, I believe, Mr. Sullivan, going to your testimony, you suggested that prosecutions for perjury are relatively rare, difficult to prove, and the United States does not do it generally in pursuit of civil litigation. We have the statistics for Federal prosecutions.

I think Governor Weld mentioned this, that he didn't believe that they were that rare, and, in fact, in 1993, there were more Federal perjury prosecutions by a United States attorney than there were kidnapping prosecutions. I don't think that means that kidnapping is not significant. In '94, the same fact was true. There were more perjury prosecutions, in fact 93, than there were kidnapping prosecutions. And the same is true in '95. It is really a pattern that goes back to the 1960s.

And I wish I could give credit to all of my staff who did such great work, but talking about the United States attorneys prosecuting perjury in civil litigation, here is a stack of cases. I could go through them, but I only have 5 minutes. I found an impressive arena of cases in which U.S. attorneys prosecute perjury in civil cases across the country.

Now, I agree with your point that sometimes there is a history behind the case. But I think there is a history here in this case as well. There is an investigation of obstruction of justice.

Now, Mr. Sullivan, you mentioned that it was in a peripheral matter, am I correctly——

Mr. SULLIVAN. Yes.

Mr. HUTCHINSON. Has anyone on this panel ever represented a woman as a plaintiff in a sexual harassment case? If you have, raise your hand. No one?

All right. Well, I have. And the most difficult thing in a sexual harassment case is proving who is telling the truth. Many times you have to go to a pattern of conduct because there is a denial. So if you try to prove a pattern of conduct, you have to ask ques-

tions in a deposition as to what has happened in the past. And I don't think that is a peripheral matter. I don't think you can build sexual harassment cases if you do not ask those questions.

When the President in that deposition denied ever having in his lifetime sexually harassed a woman, is that a material statement in the civil deposition? I invite your answers.

Mr. DAVIS. Well, I think the issue is—I don't believe it is, because——

Mr. HUTCHINSON. The question is, is it material?

Mr. DAVIS. No, I don't think it is material because you are entitled to ask the question under the broad discovery rules. But the question is, if a truthful answer here would have revealed the true facts, would it have been admissible in that Jones case. Actually, the truth is, it would not have been because it would not have been admissible in the Jones case.

Mr. HUTCHINSON. Does anyone disagree that it would be a material statement? Do you disagree, Mr. Noble?

Mr. NOBLE. I am sorry. Maybe I misunderstood the question, and I don't know the record to reflect this question, but if your hypothetical question is in a sexual harassment suit, if a person is asked, have you ever sexually harassed someone, would that be material, I believe it would be material.

Mr. HUTCHINSON. Would anyone else agree with Mr. Noble, who gave a very straightforward answer? I know you all haven't handled sexual harassment cases. Perhaps this is a little bit of a disadvantage.

I thank you for your testimony.

Chairman HYDE. The gentleman's time has expired.

The gentleman from New Jersey, Mr. Rothman.

Mr. ROTHMAN. Thank you, Mr. Chairman. Let me start off by saying that with respect to my colleagues on the other side of the aisle, I do not think it aids the search for truth to demonize the White House counsel. Mr. Craig said that he was going to be presenting us with some factual rebuttal to the factual arguments made by Mr. Starr. As I have read the 184 pages of the White House submission, there are pages 70 through 89 and pages 93 through 182 which address each and every one of the factual charges made by Mr. Starr.

So what we now have is Mr. Starr, who was a witness to no facts, making his statements, 450 pages in writing and in 2½ hours in his initial testimony, and we have Mr. Kendall, who made several written rebuttals, and then now this 184-page rebuttal to all the facts, neither of which are admissible in a court of law, as we all know and have accepted, the testimony of these experts. And we are left without one single fact witness to help us clarify when Monica Lewinsky was telling the truth and when she wasn't, because Mr. Starr said that sometimes she was telling the truth, and sometimes she wasn't. But no fact witnesses have yet been called to aid us in the finding the truth.

But we all agree that there is a basic fundamental American notion of due process and fairness, that those bringing charges must bear the burden of proof. And in this instance, it is a clear and convincing standard of proof, yet not one single fact witness has yet

been presented. That will be telling unless it is remedied, my friends.

But I understand that my colleagues on the other side of the aisle, despite the fact that these distinguished prosecutors have said they would never bring a criminal indictment on these matters, my colleagues say that even if it was not a crime, it is a pattern of lying. It is not right.

Well, I am not sure that the standard is treason, bribery, high crimes, misdemeanors, evasiveness and lack of respectability. Although some might argue that the constitution should say that, it does not say that.

With regard to the rule of law, we have said many times President Clinton will pay an $850,000 fine, or settlement this case for $850,000, in the *Jones* civil case. That is not an incentive to lie in a civil case. He can be prosecuted criminally once he leaves office and go to prison if the charges against him are proven true. That is certainly not an incentive to anyone to lie under oath in any proceeding. And the rule of law is upheld because the President is not above the law. He can be sued civilly and criminally, and our kids know that, and this whole process has demonstrated that.

The question for our committee and for all of America is to decide if no reasonable prosecutor would bring these matters up for a crime, how could it be a high crime or misdemeanor. Say the founders got it wrong, that they should have added evasiveness as a high crime and misdemeanor, or lack of respectability as a high crime and misdemeanor. Some might argue yes; some might argue no. What we have to be aware of is the consequences to our Nation if we expand on that definition when we already know the President can be punished civilly, as he has been in the settlement, and criminally by going to go to prison if the charges are proven against him.

I yield back the balance of my time.

Chairman HYDE. I thank the gentleman. The gentleman from Indiana, Mr. Pease.

Mr. PEASE. Thank you, Mr. Chairman. I have a few questions and then an observation.

I wanted to—first of all, let me say, I have found this panel very helpful on the questions dealing with criminal prosecutions. I understand that there is a difference between criminal prosecutions and impeachment, but on the questions of criminal prosecutions and the parallels that may be argued, I am grateful. I wanted to be certain—let me back up.

I especially, without diminishing the work done by any of you, I especially want to thank Mr. Noble, whose presentation was most helpful to me, and I had some follow-up questions I wanted to ask you, based on questions that you were asked by other panelists but didn't get the chance to conclude.

The first deals with questions from Mr. Boucher on the standards that are used in assessing when to prosecute cases where there is a high-profile potential defendant. Can you share with us the standards in the Department of Justice in those cases?

Mr. NOBLE. I must say, I am humbled to answer this, because on my left was the Assistant Attorney General from the Criminal Division when I was Assistant U.S. Attorney, and on my right is

a U.S. Attorney and the Assistant Attorney General for the Criminal Division, so I will see if I learned anything from these two wise fellows.

As soon as you get an allegation that there is a political figure who has engaged in criminal activity, as a U.S. attorney or as a prosecutor, one of the first things you will think about is, will people have confidence that my office's investigation of this will be deemed independent and unbiased? You ask yourself that, before you do anything. Can my office handle this? Or should I send it to the criminal justice—or to the Justice Department's Criminal Division in Washington and have Mr. Weld or people from Public Integrity handle it?

Then you want to know, who is the person bringing it? Does he or she have a bias, a stake in the outcome of this matter? And if it is a matter involving parties that are already involved in a dispute, you have got to worry about that.

And how did this person become aware of this information? If in the case of someone cooperating with you, one of your informants giving information to someone and having that information lead to possible criminal activity like a perjury trap, all of the considerations, so that after all is said and done, a rational citizen who is looking at you—I can't help the fact that I was asked by the Democrats to be here; if the Republicans had asked me to come, I would have come willingly—but that a rational, independent person would say, yes, I can look at the evidence and see why this prosecution is brought; no rational seasoned prosecutor would bring any criminal prosecution against any person for perjury or obstruction of justice based on the evidence I have seen, and I am thankful of that, and we should all be thankful of that because if you want to prosecute me, prosecute me for something I did but not for something you thought I did.

If I have got a weird thought process, don't process me criminally for it. Say that I am a weird person and disassociate yourself from me.

Mr. PEASE. Thank you, Mr. Noble. I appreciate your efforts to be concise.

I don't know if this question was directed to you or to the panel, but Mr. Boucher was getting into the question of whether dismissal of a case terminates the authority of a court to sanction parties or witnesses. And I don't know that that was addressed, and I would appreciate it if someone could.

Mr. SULLIVAN. I addressed that. I said that there is inherent power under the Supreme Court decision, and that I do not know whether or not the dismissal of the case terminates that.

Mr. PEASE. That's my question. So you do not know?

Mr. SULLIVAN. I do not know.

Mr. PEASE. Does anybody else have a response or a thought on that?

Mr. WELD. I believe that she does not lose jurisdiction to investigate and recommend a prosecution, hold criminal contempt hearings for anyone that might have engaged in criminal conduct during the time period that she had this matter.

Mr. PEASE. I also, as I began, want to thank all of you. Your presentation has been very helpful in understanding the issues sur-

rounding charging and conviction in criminal matters. I am concerned, though, that we not assume that either the standards in a criminal prosecution or the burden of proof or the procedures employed are the same as those which face this committee.

A criminal prosecution is not the same as an impeachment, and we should not succumb to an argument that because a criminal prosecution might not succeed, Congress is unable to act under its constitutional obligation regarding impeachment. No matter my eventual conclusion on the matters before us, I am not prepared to say that the expected standard of conduct for an American President is simply that he or she may not be indictable.

I yield back the balance of my time.

Chairman HYDE. I thank the gentleman.

The gentleman from Wisconsin, Mr. Barrett.

Mr. BARRETT. Thank you, Mr. Chairman.

Mr. Sullivan, you indicated in your testimony that you did not think that this would be a case that would be brought by a United States attorney for perjury. We have heard many witnesses and many members saying that the President, when he leaves office, is open to criminal prosecution. The sense of the American people, I think, remains that the President did something wrong, that he should be held accountable for his actions, and that he should not be impeached. So in your discussion, where is the justice?

In this case, in the civil suit, since every one of us would deplore not telling the truth, or lying, where is the justice in your analysis here?

Mr. SULLIVAN. Well, we live in an imperfect world, and justice is not always achieved in this world. We sometimes have to wait and hope. But all I am saying is that you have to follow the law. If the law provides that the President can be indicted after he leaves office, and if some prosecutor wants to take this up, who has jurisdiction over it, they may reach a different conclusion than I do.

I doubt that a responsible prosecutor would bring a perjury case against the President on these facts.

Mr. BARRETT. Okay. Now let's——

Mr. SULLIVAN. Now, I think that the justice—I mean, look at what the man has already gone through, though. We are sitting here, the third time in the history of the country that they are considering removing a President from office, it seems to me that there has been terrible retribution on this man for what he did.

Mr. BARRETT. Let's take the President out of it and let's leave it as a civil case where a person has lied. Where does the justice system work in this case? If a person in a civil case has lied under oath or misrepresented themselves or obfuscated the facts, tell me where the justice comes into this system if there is not going to be a perjury prosecution? There has to be justice. We can't just say, well, that's the way it goes.

Mr. SULLIVAN. Well, we are talking about the Jones civil case?

Mr. BARRETT. Yes.

Mr. SULLIVAN. And in that case, after the President made his disclosures, and Monica Lewinsky made her disclosures, and the case had been dismissed, but before it was decided by the court of appeals, Ms. Jones settled the case. So it seems to me it is washed away, because she then knew, at the time she settled, that if that

evidence was going to be admissible, you know, she would take that into consideration in determining the amount of her settlement.

The case was thrown out, as I understand it, for reasons entirely different; that she couldn't demonstrate that there was any connection between what may have happened and the detriment to her in employment.

Mr. BARRETT. Do you think that the amount of the settlement reflects some of that?

Mr. SULLIVAN. Well, I think that Ms. Jones voluntarily took that settlement in light of all the facts, including the facts that we are now talking about today.

Mr. BARRETT. Okay.

Mr. Weld, you offered some interesting observations, I think, one of which was the notion of a fine. I have had commentators talk about a plea bargain or a deal. I bristle when I hear those words, because I do think that this is a vote of conscience and that every member on both sides of the aisle should be listening to their conscience and be guided by that.

I also am mindful of the fact that we cannot impose a fine on the President of the United States, that there are bill of attainder problems. How conceivable do you think it is that the President, if we were to censure him, would come forward and say, I recognize that as part of the healing process I should reimburse the Treasury for part of this investigation?

Mr. WELD. Well, politically, I guess I had anticipated that all of that might be the subject of negotiation before the votes were taken. I was trying to think of things that would mark the solemnity of the occasion, do justice to the dignity of the House and its role, having the sole power of impeachment, and would say to the American people, there has been justice here; this person, this President, has paid a penalty here, short of being removed from office, which I think we have kind of slid by that one.

But the fine, the written acknowledgment of wrongdoing and the exposure to future criminal prosecution, as well as a censure and as thorough a report as the committee or the House wished to put on the record in perpetuity, those are the five things that I could think of to mark the event.

Mr. BARRETT. Okay.

Thank you, Mr. Chairman.

Chairman HYDE. The gentleman's time has expired.

The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman.

I would like to begin by thanking this panel today. This is an important issue, and I think your presence has added weight to the issue. And I appreciate your comments and testimony.

I would also like to just point out at the very beginning that without any parsing of words or equivocation, I agree with my friend, Mr. Delahunt, and with the comments by Mr. Sullivan, that the essence of the rule of law lies in the technicalities, and the technicalities are very, very important for us here.

Now I would like to refer to some of the things that my good friend, Ms. Lofgren, commented on earlier. Ms. Lofgren and I are on two subcommittees of this committee together and I have the

greatest respect for the way she thinks. She said or pointed out that perjury about sex is relevant essentially—and I am paraphrasing here—is relevant to this side because it is a crime, and then went on to point out some of the technical elements of the crime that may in fact be missing here. And the first was the suggestion that the person who administered the oath to the President may not have been authorized to do so. I think that was rebutted fairly effectively by Mr. Buyer, and I agree with his responses.

Second, she said that the question must be unambiguous. Now, I don't read the statute as requiring an unambiguous question, but I think the perjury ultimately has to be quite clear.

Later, Mr. Sullivan, I think, in response to some of this questioning, suggested that the President can defend on the basis that the definition was changed, that is, the definition of sex, and that the new definition may somehow have excluded a certain act or type of sex.

Let me just suggest in response to that that I have read that definition very carefully, as I think many of the members of this committee have. The President pointed out that he answered the question very carefully because he answered the question in the context of the definition that he read very carefully, and obviously minds can disagree on this sort of thing, but I just don't see how you could exclude that particular act from the definition that remained after the striking of the two sentences.

Now, a lot has been said about whether or not the President can be prosecuted for this crime, whether these technical defenses may be relevant. But I think the real potential for understanding the likelihood of a criminal prosecution actually lies in the President's own actions. He refuses to acknowledge or deny the underlying facts of the case, and it is like there is an allergy to the "L" word.

Mr. Craig yesterday said in answer to a question, no, he deceived, he misled, but he did not lie; later, no, he was technically accurate, but he did not disclose information.

I think all the commentators in the editorial pages have pointed out that the President is caught between the Fifth Amendment and coming clean with the American public, and I think it is his actions, the fact that he won't deal with the facts of the case, that make it clear to me that there may actually be in another context, rather than this one, a criminal problem that he is concerned about.

But unlike Mr. Wexler, who says that this is about lying about sexual relations and touching, let me suggest that I believe that this proceeding is really not about crime; I believe that it is about the government's ability to secure—I have to protect my mike from my compatriot on this side. This is about the government's ability to secure the rights of the governed.

John Jay was quoted yesterday. Let me just repeat part of that quote: "If oaths cease to be sacred, our dearest and most valuable rights become insecure."

Now, Mr. Weld, you have actually governed and you are a person for whom I have the greatest respect. Would you mind responding? What do you think those rights are? And if you can be very particular, because my time is almost up, what are those rights that Mr. Jay is concerned about keeping secure?

Mr. WELD. I think it is the rights to life, liberty, property, and the pursuit of happiness.

Mr. CANNON. Thank you. I view property and the pursuit of happiness as the same right—life, liberty and property.

Since my time is gone, I would love to hear a little bit about that. I believe that John Jay was right. What this panel is doing is maintaining for Americans, for generations and centuries to come, the security of those basic rights of life, liberty and property, or the pursuit of happiness. That's what we are about here.

And I yield back the balance of my time, Mr. Chairman.

Chairman HYDE. The gentleman from California, Mr. Rogan.

Mr. ROGAN. Thank you, Mr. Chairman.

I join my colleague from Utah in welcoming the panel, and particularly in welcoming the distinguished former Governor of Massachusetts, whose service to our country I have long admired, and thank him for it to this day.

Gentlemen, let me start off by saying that I have noticed a recurring theme among most of the panelists over the last few hours. The first one, with the exception of Governor Weld, is that perjury generally is a crime not prosecuted. The second one is the claim made over and over that somehow the statements made by the President were not material, even if they were lying under oath. I must tell you, I take exception to both of those claims.

The federal government since Bill Clinton became President, and according to the Federal Sentencing Guidelines table, has convicted and sentenced almost 700 people for perjury in Federal court. In my own State of California, since Bill Clinton became President, some 16,000 perjury prosecutions have occurred. And so I just don't know where this novel claim comes from that perjury is a crime that is ignored by the courts. The record simply does not reflect that.

A couple of members raised the case of Dr. Battalino. There were some blank stares by witnesses unfamiliar with her case. Let me share with you briefly the story of Dr. Battalino. She was here a week or so ago and testified before this committee. She was a doctor who worked for the Veterans Administration. She is also an attorney. In her capacity as a VA physician, she had a one-time consensual sexual relationship with a male patient of the hospital, but not her patient.

He later sued the hospital for a sexual harassment claim and named her in the claim. She was asked in a civil deposition whether she ever had a sexual encounter with this patient. Out of embarrassment and out of concern for her job and her career, she denied it.

The civil case was later dismissed. The gentleman's case against the hospital and the doctor was later dismissed. Despite that dismissal, the Clinton Justice Department filed perjury charges against her. She is now precluded from practicing law as a result of her conviction; she lost her medical license, and she is under incarceration. She appeared before us with an ankle bracelet, because she is under house arrest.

You might imagine that Dr. Battalino has some grave concerns over the incredible double standard. Her loss of livelihood and the shame that she has had to face as a result of the Clinton Justice

Department prosecuting her perjury does not square with the claim now being proffered by some of the President's supporters that tlying under oath about consensual sex is much ado about nothing.

I must say that I take exception to some of my beloved colleagues on the other side who keep insisting to the American people that this is simply about sex. That just is not true. Governor Weld is absolutely right. Fornication and adultery not only are not impeachable offenses; they clearly and patently are not the business of the House Judiciary Committee. But that is not what is at stake here.

The President was a defendant in a Federal sexual harassment civil rights case, and as a result of that case, a Federal judge ordered him to tell under oath whether in his capacity as Governor or President he had ever had sexual relations with subordinate female employees. And the judge specifically found that was relevant to show a pattern of conduct. That's how sexual harassment cases are proven.

So this idea among some folks is that if they just state the false premise over and over; if their histrionics, drama, and theatrics are enough; if their volume is raised sufficiently, then somehow we can reduce this to being just a case just about sex. This conduct may play well for the talk show circuit, but it doesn't play well for the truth.

I thank the Chair and I yield back my time.

Chairman HYDE. The gentleman from South Carolina, Mr. Lindsey Graham.

Mr. GRAHAM. Thank you, Mr. Chairman.

I have a couple of observations and some questions for the panelists here. I, too, have appreciated you being here.

Please understand that when I vote, I will look at it in a very legal sense. I don't believe, due to the nature of what is going on, that we should send a case forward that doesn't meet certain legal standards. And I just happen to disagree with you about whether or not this is a provable case of perjury. I think this is a very clear case of perjury, and it is not just about intimate touching. It goes much further, and I can't explain all that in 5 minutes.

I have seen the President's deposition in Paula Jones where he testified. I saw Mr. Bennett wave the affidavit of Monica Lewinsky in front of the President. I saw the President's eyes follow the affidavit, his head nod, and I believe his grand jury testimony, where he said he wasn't paying any attention, is a lie, and I believe I could convict him with fair-minded people.

But this is really more than just about the law. It is about the national interest. I am a politician and there is a unique political aspect to this case that is probably good. I have said before, impeachment without outrage should be difficult, and it should be in a democratic society. But let me tell you the mood of my district to let you know a little bit about what I am up against here.

The Washington Post sent apparently four reporters to the four corners of the country and they happened to pick my district to figure out how people feel about the President and his misconduct. There is a portion of my district, very good friends of mine, who want to get this over with; and I understand, in their minds, it

doesn't rise to the level of overturning an election. That's a real dynamic: very nice, rational people, but that's the minority people.

You can take the polls and reverse them. The reporter said, I think I need to come home now, because he never got out of the clothing department of Wal-Mart to figure out what people thought about the President. It wasn't good. Being evasive, deceptive, immoral and nonresponsive are not resume builders in my district. Forget about perjury.

So I am a Congressman that comes from an area of the country who has got no use for this kind of stuff, but I have publicly said that we are going to play it straight with the President; we are not going to take our emotions and our political disagreements and try to use that in an impeachment process, and I am going to stand by that. I have said to Mr. Craig and others, I believe the President committed serious crimes, but if he would reconcile himself with the law, so that we could end this thing on a note of honor, I may consider a different disposition than impeachment.

But if he continues to flout the law, I don't think he should be the President for the next century. I stand by that statement.

But there is another aspect of this that I think we need to talk about. Ms. Waters, who I really do—have gotten to know my colleagues on this side and we do get along pretty well. She says, well, it is really silly to believe the President would have his secretary hide gifts under her bed. Well, that sounds silly, but the day that people stop doing silly stuff is the day all of us as lawyers go out of business. I think it is silly to fool around with an intern while you are being sued. But those things happen, and they happen to smart people like Bill Clinton. And if we impeach people for being silly and doing inappropriate things, we will wipe the Congress out.

So I am not saying that those type of things ought to be the reason we get rid of the President. But don't underestimate what people can do that really is inappropriate and defies understanding, and I believe that's a lot of what Bill Clinton's problems really are at the end of the day.

If I have got to cast my vote based on knowing what the Senate is going to do, I would never vote in the House because I can't tell you what they are going to do half the time. And I think what they ought to do is wait until they get a case before they decide it; and everybody in Congress ought to let this committee do its work, whether you like us or not, before you decide what you are going to do. Because the day you start deciding the case before the case is over is the day we lose a lot in this country.

Governor Weld, hypothetically, you are the governor. There is a person out there that possesses damaging information about you. You are in a consensual relationship that's wrong. That person, you know, if asked to testify, could hurt you legally and politically. If you used the resources of the governorship, if you got people in your office to plant lies, falsehoods, malicious rumors and tried to use your office as governor to trash that potential witness against you, what should be your fate?

Mr. WELD. Well, in a clear enough case, my fate should be, out of here.

Mr. GRAHAM. Thank you. I yield back the balance of my time.

Chairman HYDE. The gentlelady from California, Ms. Bono.

Mrs. BONO. Thank you, Mr. Chairman. And to the panel, thank you first and foremost for your patience.

I woke up this morning and I thought what do I get to do today? Question five of the top attorneys in the entire country. What a great way to start off my day.

I want to ask a question to Governor Weld to begin. It is a follow-up to something that Congressman Coble had asked earlier on. You discussed how you had changed your position. Your initial reaction in February was that you said the President should resign, and you indicated that you changed your thinking because of events during the past year and the general reaction to the President.

As a Congresswoman, I also sit on the National Security Committee. Issues concerning our military readiness and standing around the world greatly concern me. Earlier this year, the United States engaged in some military activities. Many people accused the White House of following a "Wag the Dog" strategy.

It troubles me that the President may be, in some ways, hamstrung to lead and act decisively and swiftly on the international military stage without the complete trust of the American people. In other words, if the office of the President does not enjoy the complete public trust, this might affect our national security.

So, Governor, if there is new evidence that the President does not have the trust of the international community or of our armed forces—and I am not talking about polls, but more specific evidence from leaders around the world—would you revisit your February advice that the President should resign for the good of the country?

Mr. WELD. Yes. I think actually it was September, Madam Congresswoman. And as I indicated, there are—or alluded to earlier, one of the things I was troubled by in September was we had had, frankly, some acts—some bombings and similar actions abroad which coincided with the Lewinsky matter really coming to a head, and that's precisely what I was worried about. So I think, you know, anybody on an ongoing basis has got to ask themselves the question, can I do the job? And if you can't do the job, you shouldn't do the job.

Mrs. BONO. Will your opinion vacillate, though, depending on what is happening with attacks on us or the economy is strong?

Mr. WELD. Well, we don't have a parliamentary system here. We have Presidents who are mighty unpopular. Harry Truman was mighty unpopular even when he was—by and large, you know, in retrospect, people think—doing the right thing on a lot of stuff. So I don't think it should be following the public opinion polls. It is a question of ability to discharge the duties of the office. And I will confess that I was somewhat surprised at the alacrity with which all seemed to be forgiven and forgotten in terms of people saddling up and doing business with the President and taking him seriously.

Mrs. BONO. Well, my point, here is that you know the public trust, though, is something we also have to anticipate. It is easy to have it now today while the economy is strong, the stock market is great—although some of us still can't get Furbies, it is not strong enough—but how about tomorrow? Will we have it tomorrow? Will the public trust be there tomorrow?

It cannot change. It is something that we can't—we have to guess, will it be there? I am hearing, as you are saying, too, here today and gone tomorrow.

We on this committee cannot have that. We have to decide will the public trust be there a month from now when Osama Bin Laden rears his ugly head again?

Mr. WELD. I don't think you want to go the removal route because of a concern that the trust might not be there. It would have to be a little bit more solid than that.

Mrs. BONO. There is a concern. Right. Thank you.

I guess—I still have a green light. This is a miracle.

I have a question based on Mr. Sullivan's testimony, but I will leave it open to the whole panel. But first I want to just comment briefly.

Mr. Sullivan, We are here because of the President's dancing on the head of a pin, as Lindsey would say, over the definition of sex. "Oral sex" was omitted from the description before the Paula Jones testimony. But then here in this room you have changed it to sleeping with somebody. And I know you were trying to elude references to salacious materials again, but isn't that what got us in this whole mess?

Now you are changing the wording—and I am not a lawyer, so I am getting used to listening to every word we are saying—and you did the very thing that got us in this whole mess to begin with.

Thank you, Mr. Chairman.

Chairman HYDE. Thank you very much.

We are going to take a break. I will yield to Mr. Conyers.

Mr. CONYERS. Well, I wanted to take a few minutes on the reservation that I had earlier.

Chairman HYDE. All right. Well, you are recognized for——

Mr. CONYERS. I will move as quickly as I can, Mr. Chairman, and thank you.

I first wanted to let Sheila Jackson Lee utilize 30 seconds of the time.

Ms. JACKSON LEE. Thank you very much, Mr. Conyers.

Just very briefly, there was a comment on the presentation of the witnesses. Let me assume that you can come forward here because you in fact are expert witnesses, but I did want to very quickly comment on Dr. Battalino's case and Ms. Parsons' case.

Dr. Battalino's case, the issue of perjury went to the fact that she was attempting to reclaim monies for litigation costs. It was insurance fraud, if you will. That went to the question—that's why the Department of Justice prosecuted her, and you were unfairly asked about it.

Pam Parsons, she was accused of being a lesbian. She was a plaintiff and sued the newspaper that accused her of such, and lied that she was not and there was definite—or definitive proof otherwise. So it went to the heart of the case, and I think it is important that we clarify the record on those grounds.

I thank the gentleman. I yield back my time.

Mr. CONYERS. Mr. Chairman and members of the committee, and to this very much appreciated panel, this is a critical phase of the hearings, and it is helping us to recognize how the experts on this panel, seasoned and experienced prosecutors all, which Mr. Starr

acknowledged that he was not, would have rejected bringing a criminal case against the President based on Mr. Starr's allegations if he were an ordinary citizen.

It's critical at this part of our hearing to understand the vast difference between the allegations being considered by the committee and the system of criminal justice that applies to the rest of us. If no ordinary citizen would face even a criminal prosecution based on the allegations in the referral, how can we justify considering the rarely used remedy of impeachment for the same conduct? If no ordinary citizen would face a criminal prosecution based on these allegations, how can it be argued that to decline to vote for impeachment places the President above the law? If no ordinary citizen would face a criminal prosecution based on these allegations, why should we bother to take the Senate and the Chief Justice of our highest court to spend months resolving undignified and trivial questions of fact rather than attending to the important business of the country?

I hope these questions raise serious issues and reservations for all of my colleagues in the committee about the wisdom of proceeding on the paths that we apparently are on. And may I acknowledge the chairman of this committee's accommodations that he has offered me concerning prompt notice to all of us on the committee of any draft articles of impeachment and his further willingness to consider the motion that will be offered by the gentleman from Virginia, Mr. Scott, to require that the specific allegations against the President be provided to him before his counsel responds when we conduct our business session today or tomorrow.

May I reiterate my strong view to the Republican leadership that fairness dictates that the American people not be muzzled on the all-important issue of censure. Overwhelmingly, the American people that we have referred to, tested in the districts and the Nation, do not want the President impeached. Our citizens either support doing nothing or—under the theory that the President has already been censured or they support an additional resolution of censure.

But the important point is that for the vast majority of those who do not want an impeachment, a 6-month Senate investigation with all of the attendant political and economic turmoil for all of those who want a proportional and sensible alternative shouldn't be muzzled. And so your testimony here, and this panel, may well be the most important that we will have because you have dealt so significantly with these fact questions that have been troubling us.

Thank you, Mr. Chairman.

Chairman HYDE. I thank you, Mr. Conyers. And I want to say that I too deeply appreciate the contribution, which was and is substantial, that you have made to the sum of our knowledge on this very difficult question. You have all been enormously helpful, highly qualified, very forthcoming, and you have made a great contribution.

Now, we should take a 30-minute recess. But before I reach that happy point, I yield to Ms. Jackson Lee.

Ms. JACKSON LEE. Very briefly, Mr. Chairman, I would like to submit into evidence of this proceeding the Constitution of the United States, particularly noting that there is no prohibition on

censure noted in the Constitution of the United States. I would like to submit this into the record, Mr. Chairman.

Chairman HYDE. Certainly, without objection, even though ours is a government of delegated powers, but nonetheless, your motion is granted.

Ms. JACKSON LEE. I thank you very much, Mr. Chairman. I appreciate it.

[The information follows:]

CONSTITUTION OF THE UNITED STATES

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Article. I.

Section. 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section. 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section. 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

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.

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.

Section. 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section. 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section. 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section. 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repeal Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census of Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Article. II.

Section. 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representatives from each State having one Vote; a quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

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

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section. 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section. 3. He shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

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.

Article. III.

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section. 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

Article. IV.

Section. 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section. 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section. 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States,

without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Article. V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Article. VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Article. VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. In witness whereof we have hereunto subscribed our Names,

G°. Washington—Presidt.
and deputy from Virginia

New Hampshire
John Langdon
Nicholas Gilman
Massachusetts
Nathaniel Gorham
Rufus King
Connecticut
Wm. Saml. Johnson
Roger Sherman
New York
Alexander Hamilton
New Jersey
Wil: Livingston
David Brearley
Wm. Paterson
Jona: Dayton
Pennsylvania

B Franklin
Thomas Mifflin
Robt Morris
Geo. Clymer
Thos. FitzSimons
Jared Ingersoll
James Wilson
Gouv Morris

Delaware

Geo: Read
Gunning Bedford jun
John Dickinson
Richard Bassett
Jaco: Broom

Maryland

James McHenry
Dan of St. Thos. Jenifer
Danl Carroll

Virginia

John Blair—
James Madison Jr.

North Carolina

Wm. Blount
Richd. Dobbs Spaight
Hu Williamson

South Carolina

J. Rutledge
Charles Cotesworth Pinckney
Charles Pinckney
Pierce Butler

Georgia

William Few
Abr Baldwin

Attest William Jackson Secretary

In Convention Monday, September 17th 1787.

Present

The States of

New Hampshire, Massachusetts, Connecticut, Mr. Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.

Resolved,

That the preceeding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled. Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have ratified this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a Day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors should be appointed, and the Senators and Representatives elected: That the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed and directed, as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening and counting the Votes for President; and, that after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

By the Unanimous Order of the Convention

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment II.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment III.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Amendment VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one on the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Amendment XII.

The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest Number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XIII.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State

legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XVI.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Amendment XVII.

The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

Amendment XVIII.

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

[NOTE.—The Eighteenth Amendment was ratified January 16, 1919. It was repealed by the Twenty-First Amendment, December 5, 1933.]

Amendment XIX.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Congress shall have power to enforce this article by appropriate legislation.

Amendment XX.

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

Section 2. The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.

Section 3. If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

Section 5. Sections 1 and 2 shall take effect on the 15th day of October following the ratification of this article.

Section 6. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission.

Amendment XXI.

Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII.

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President, when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

Section 2. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress.

Amendment XXIII.

Section 1. The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXIV.

Section 1. The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice

President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Amendment XXV.

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives has written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives has written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

Amendment XXVI

Section 1. The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

AMENDMENT XXVII

No law varying the compensation for the services of the Senators and Representatives shall take effect, until an election of Representatives shall have intervened.

Chairman HYDE. Thank you.

And now I will try again. We will have a half-hour recess. Please come back at the end of a half-hour.

Chairman HYDE. The committee will come to order.

We are very pleased to welcome Mr. Charles F. C. Ruff, Counsel to the President, a very distinguished member of the bar, as our final witness. Mr. Ruff became White House Counsel last year and is a longtime and widely respected member of Washington's legal community as well as the rest of the community. He was the U.S. Attorney in the District of Columbia from 1979 until 1982 and the fourth and final Watergate special prosecutor.

Welcome, Mr. Ruff. Would you please raise your right hand?

[Witness sworn.]

Chairman HYDE. Thank you. Let the record reflect the witness answered the question in the affirmative.

Mr. Ruff, you are recognized for 2 hours to make a statement.

TESTIMONY OF CHARLES F.C. RUFF, COUNSEL TO THE PRESIDENT

Mr. RUFF. Thank you, Mr. Chairman. I probably will not use all of that time because, very candidly, having watched these proceedings with interest for the last 2 days, it seems to me that perhaps the most productive thing I can do and my colleagues can do is to respond to the questions of this committee. But I will, with the Chair's permission, speak for awhile about some of the issues that I think are important for all of us to understand.

Mr. Chairman, Congressman Conyers, members of the committee, as Counsel to the President, I appear before you today on behalf of the person who under our Constitution has twice been chosen by the people to head one of the three coordinate branches of government. Necessarily, I appear also on behalf of the man whose conduct has brought us to what for all of us is this unwelcome moment. Neither the President nor anyone speaking on his behalf will defend the morality of his personal conduct. The President had a wrongful relationship with Monica Lewinsky. He violated his sacred obligations to his wife and daughter. He misled his family, his friends, his colleagues and the public, and in doing so he betrayed the trust placed in him not only by his loved ones but by the American people.

The President knows that what he did was wrong. He has admitted it. He has suffered privately and publicly. He is prepared to accept the obloquy that flows from his misconduct and he recognizes that, like any citizen, he is and will be subject to the rule of law. But, Mr. Chairman, the President has not committed a high crime or misdemeanor. His conduct, although morally reprehensible, does not warrant impeachment. It does not warrant overturning the mandate of the American electorate.

If statements in this body and to the press accurately reflect what is in your minds and hearts, many in the Majority have already reached a verdict. I hope that for some that is not true. Indeed, if there is only one whose mind remains open, I will do my best to respond to your questions, to address your concerns, and to try to convince you that your constitutional duty, your historical duty, and your duty to the people you represent, is to vote against any article of impeachment.

In the nature of this extraordinary proceeding, no one can claim the ability to reach the absolute right answer. No one can claim to be free from doubt. But when all the questions have been asked and answered, when all the debate has ended, and when you look within yourselves and ask should I vote to exercise the most awesome power I am granted in our system of government, I have no doubt that you will reach your decisions on the merits and, I hope, unswayed by mere partisanship.

This committee has heard much in the last 2 days and in prior hearings on the subject of what the Founding Fathers meant to include within the term "high crimes and misdemeanors," and I will not even attempt to engage in the kind of scholarly discourse that

has filled this room over the last days and weeks. But I suggest to you that although there are differences of opinion which have been voiced, the weight of scholarly and historical teaching is on one side: nothing the President did falls within the constitutional definition of an impeachable offense.

Yes, there were witnesses who disagreed; enough to give anyone who wishes it some intellectual cover. But I suggest to you that any fair-minded observer must conclude that the great weight of the historical and scholarly evidence leads to the conclusion that in order to have committed an impeachable offense, the President must have acted to subvert our system of government. And members of the committee, that did not happen.

There has been a tendency, I think, in the debate over standards, to conflate some of the issues in what may not be a very helpful fashion. Let me say that there is one thing that I think all would agree on, and that is that the framers made it clear in their debate and in the drafting of article II, section 4, that they intended to place substantial constraints on the use of the impeachment power. They used language flowing directly from the history of impeachments in England that was clearly designed to reach conduct that involved abuse of official power.

Within those constraints, however, and quite rightly, the framers did not and could not anticipate the specific circumstances that might give rise even to the consideration of impeachment. Instead, they made it clear that in the nature of our republican form of government, impeachment of the President was not to be the equivalent of an expression of disagreement, but was to be reserved for only the most serious matters that threaten the very fabric of our political structure.

It is not enough to say, however, that the issue must be decided on a case-by-case basis, for that suggests that what is impeachable is to be left to the unfettered judgment of each Congress. Even if, as the events of 1974 and the events of 1998 reveal, it is not possible to set down rules that will govern every case, it is possible to set down principles, and we must. And those principles must be faithful to the intent of the framers and, most importantly, must be consistent with the form of government we live under and the delicate relationship between the legislative branch and the executive branch that is the hallmark of that government.

The debate over whether misconduct or even criminal conduct arises out of personal rather than official matters is in some sense misguided, I think. One can certainly conceive of acts arising out of a purely personal matter that would be presumptively impeachable, bribery of a judge to rule in the President's favor in some private matter, but that is not to say that you should ignore the roots from which a President's misconduct stems. If he were to perjure himself about some serious official act he had taken, one might find that he had abused his office. On the other hand, if perjury arose in a purely personal setting, one could sensibly ask, indeed should sensibly ask, whether—no matter how serious such a violation may be when viewed in the abstract, he has demonstrated an inability to continue to lead the Nation, which must be the test for each of you.

One need only look to something that has been discussed at great length before this committee, and that is the decision in 1974, even in the face of very strong evidence, not to return an article of impeachment based on President Nixon's alleged tax evasion, to test for yourself whether there indeed is a dividing line of constitutional importance between misconduct arising out of official matters and misconduct arising out of personal matters. But the core principle governing your deliberation should be that the only conduct that merits the drastic remedy of impeachment is that which subverts our system of government or renders the President unfit or unable to govern.

Such a standard impresses on all of us the recognition that impeachment is indeed a grave act of extraordinary proportions, to be taken only when no other response is adequate to preserve the integrity of government

Now you must, of course, as you all recognize far better than I, not set so high a bar as to make it impossible to act when our system of government is threatened, but you must not set so low a bar that you encourage future Congresses to set foot on this perilous path when the matter is uncertain and there is a danger that partisan forces alone will tip the balance. We should always look to the political process to deal with officials who breach their public trust. Impeachment must be the last resort.

Now, I want to talk very briefly about the record before you, because there has been much discussion on that subject. Yesterday we were chastised by some members of the Majority for not bringing forward so-called fact witnesses, as though somehow the burden was on us to bring that kind of evidence before the committee.

Now, I admit that I come to this exercise with the instincts of a former prosecutor and a former defense lawyer, but I really found that criticism to turn the world I know on its head.

This committee has determined in its wisdom simply to accept at face value all of the conclusions reached in the Independent Counsel's referral and to look to whatever backup information was provided in support of those conclusions. But with that decision, I suggest to you, comes the obligation to look into that record and to ask what the witnesses really said.

It seemed odd to me, as I listened to that criticism, that the committee should accept a predigested conclusion and then turn to the accused and say, bring us witnesses to convince us we were wrong.

What we tried to do in the submission that we gave to the committee yesterday, and what I will do much more briefly today, is to show you that your premise is wrong; that the very record on which you rely does not support the conclusion it purports to reach.

Some time ago, when Independent Counsel Starr testified, my colleague, Mr. Kendall, asked him whether he had ever met any of the witnesses on whom his referral relies. We asked that not out of some desire to launch an ad hominem attack on Mr. Starr, but because it seemed to us that some personal sense of the witnesses on whom the referral was relying, in recommending so grave a matter as the impeachment of the President, was important. It was important for him in making his judgments and important for you in making your judgments about the reliability of the evidence be-

fore you and the reliability of the Independent Counsel's recommendation.

You must, I think, also ask as you look to that record and test whether it is adequate for your purposes, did the Independent Counsel come to its task with the same sense of constitutional gravity that must guide these proceedings? Was there anyone in the Office of Independent Counsel who questioned the credibility of particular testimony or asked whether all the relevant facts were being considered?

Even if occasionally heated in its rhetoric, this committee's debates do lend to this process some of the value of the adversarial give-and-take that trial lawyers believe is important in seeking the truth. But none of that healthy tension between adversaries was brought to bear on the witnesses who appeared before the grand jury.

The members here are left with essentially the cold text of the referral and its supporting materials, followed by—and I truly do not mean to speak unkindly of the Independent Counsel—a recitation of that text by a witness who was, in all candor, equally impervious to any efforts to reach behind the surface and touch the reality of the events that are at issue here.

In our memorandum submitted to you yesterday, we attempted to set out a point-by-point rebuttal of the 11 grounds advanced by the Independent Counsel. We even, and I am sorry, Congressman Inglis—he doesn't appear to be here—set out some facts, and I will talk about those.

Today I want to touch only on some of the issues raised in the referral for the purposes of pointing out for the committee its principal deficiencies and to highlight those areas in which myth appears to have replaced fact in the committee's debates and in public discourse.

I want to begin by coming to grips directly with the issue that I think has been the principal focus of the committee's attention and concern: the President's grand jury testimony. We take this as our starting point to address the concerns oft-stated by Congressman Graham and others, whether if the President were proved to have committed perjury before the grand jury, such conduct would, without more, merit impeachment.

Mr. Chairman, members of the committee, we firmly believe, first, that the President testified truthfully before the grand jury; but, second, that no matter what judgment you reach about that testimony, there could be no basis for impeachment on any reasonable reading of the constitutional standards.

But that said, we do want to use our time today to address the issues that appear to be most troubling to the committee, for we recognize that only by doing so can we assist you in performing your constitutional duties.

I need to stop here because I want to address an issue that probably has been heard, bruited about more frequently than any other over the course of this committee's work, and it falls under the heading, I suppose, of legalisms.

What are they? Well, whatever they are, they have caused a great deal of pain to those of us engaged in trying to represent the President over the last many months. I and my fellow lawyers have

been accused by the media and by some of you, heaven forfend, of actually employing legalisms in defending our client. And, Mr. Chairman, I have to plead guilty on my behalf and on behalf of every lawyer who ever argued some point of law or nuanced fact to establish his client's innocence. But I am worried here not about whether lawyers will ultimately recover from these attacks, I am worried that our sometimes irresistible urge to practice our profession will stand in the way of securing a just result in this very grave proceeding for this very special client.

However, I do suggest that it is not legalistic to point out that the President did not say what some accuse him of saying. It is not legalistic to point out that a witness did not say what some rely on her testimony to establish. It is not legalistic to point out that a witness was asked poorly framed or ambiguous questions, and it is not legalistic to argue that a witness' answer was technically true, even if not complete. Yet, however proper it may be to make those arguments in a proceeding such as this one and for a witness such as the President, there is a risk that they will get in the way of answering the ultimate question: Did the President do something so wrong and so destructive of his constitutional capacity to govern that he should be impeached?

Even if we were successful, as I am confident we would be, in defending the President in a courtroom, that would not suffice to answer that question. For it is within your power, even if hesitantly exercised, to decide that even though there is insufficient proof to establish that the President committed perjury, he nonetheless should be impeached. But I suggest to you that even then, our oft-criticized legalisms are relevant to you. They are relevant because they were not just dreamed up by scheming lawyers looking for a good closing argument. Instead, they reflect the judgments of lawyers, judges and, yes, legislators through the centuries, that we must take special care when we seek to accuse a witness of having violated his oath.

Among the protections that the law has created, including laws enacted by this body, are the requirement that the witness intentionally testified falsely; that his testimony be material; that the question not be ambiguous; that the burden is on the questioner to ask the right question; and that the witness may be truthful but nonetheless misleading, without having violated the law. The Supreme Court has so told us.

It cannot be the rule, to add to an old phrase, that close only counts in horseshoes, hand grenades and perjury. The Supreme Court in Bronston made it clear that our adversarial system requires that we take great care when we ask whether a witness has perjured himself. It made clear that we rely largely on the adversarial process, particularly in civil cases, to test the truthfulness of witness testimony; and we do not, as the panel preceding me I think made eminently clear, look to prosecutors to police the civil litigation system.

What does it really mean to say that these are legalisms? Well, granting the system's belief in the sanctity of the oath, which no one would deny, they reflect the judgment of society, of the legislature, of the judiciary, that those who would charge perjury must bear a heavy burden.

The Office of Independent Counsel would have the committee believe that in three respects the President committed perjury in his testimony before the grand jury: first, by stating that his relationship with Miss Lewinsky began in February 1996 rather than November 1995; second, by stating that he believed that a particular form of intimate activity was not covered by the definition of sexual relations approved by Judge Wright in the *Jones* case; and third, by stating that he had not engaged in specific types of sexual conduct, theoretically in order to conform his testimony to his civil deposition.

Now as to the first of these, you must begin your consideration with the proposition that the President acknowledged to the grand jury that he did have a wrongful intimate relationship with Ms. Lewinsky. What then might have led him to change by 3 months the date on which that relationship began? Well, the referral surmises, it must have been because although the President was prepared to make the most devastating admission of misconduct any husband and father could imagine, he still wanted to have the grand jury believe that when their relationship began, Ms. Lewinsky was a 22-year-old employee rather than a 22-year-old intern.

Well, putting aside for the moment the fact that under no circumstances would any reasonable prosecutor or any judge or jury find such a discrepancy material, there is absolutely no proof of any such purpose on the President's part. Not one witness, including Ms. Lewinsky, even suggested such a thing.

The only proof the referral offers is a mischaracterization of the record; the contention that the President's concern about Ms. Lewinsky—about Ms. Lewinsky's badge reflected concern about her status, that is as an intern, rather than as was clearly the case, her ability to move freely in the West Wing of the White House. Other than this misleading representation, we are left only with the referral's bare speculation, clearly contrived simply in order to find some fine point in the President's testimony that it could trumpet as false.

As to the second of the three perjury allegations, the Independent Counsel would have the committee find that the President testified falsely, because the Independent Counsel has concluded that the President's statement of his own belief in the meaning of the definition of sexual relations in the *Jones* case is not credible.

At least here the Independent Counsel is candid enough to acknowledge that he has no evidentiary basis for that conclusion; the referral simply states it to be the case and moves on.

I suggest that those of you who have been prosecutors know as a matter of practical experience, and those of you who have not been prosecutors or even lawyers know as a matter of common sense, that no one could or would ever be charged with perjury because the prosecutor did not find credible a witness' statement of his personal belief, much less his personal belief about the meaning of a definition used in a civil deposition.

And so we come to the third. The referral alleges that the President lied when he admitted having one form of sexual contact with Ms. Lewinsky but denied having certain other forms of contact, as the Independent Counsel would have it, in order to make his grand

jury testimony consistent with the definition under which he testified in the *Jones* deposition.

We will not drag the committee into the salacious muck that fills the referral. Instead, let each member assume that Ms. Lewinsky's version of the events is correct; and then ask, am I prepared to impeach the President because, after having admitted having engaged in egregiously wrongful conduct, he falsely described the particulars of that conduct?

Let each member even assume that the President testified as he did because he did not want to admit that in a civil deposition, confronted with a narrowly, even oddly, framed definition, he had succeeded in misleading opposing counsel; and then ask yourself, am I prepared to impeach the President for that?

The answer must be no.

Does it not speak volumes that after 4 hours of hostile interrogation by prosecutors armed with information from countless documents and witnesses, the referral is able to identify only these three instances that even it is prepared to argue constitute false testimony?

The Independent Counsel had the opportunity to press the President on every point of his *Jones* testimony that they might have thought was false or misleading. They were experienced cross-examiners, unfettered by judicial supervision, and this is what they accomplished.

When one scrapes away all the rhetoric, what one finds is this: The referral alleges that the President lied to a grand jury about the details of sexual conduct, not to conceal his wrongful relationship with a 22–year-old employee, but to avoid admitting that in a civil deposition, he had misled plaintiff's counsel about an embarrassing matter that the Court ultimately found immaterial.

Now, I do not in any sense, and nor would any of my colleagues, suggest that we take false testimony lightly. We are, as most of you are, members of a profession that values truthful testimony. What we do suggest is that if you were to conclude as to this aspect of their relationship that Ms. Lewinsky was telling you the truth and the President was not, you might know—no, you should conclude that his conduct was wrong, deserving of severe condemnation; but you could not in good conscience and consistent with your constitutional responsibility conclude that the President should be impeached.

Surely the same result must follow to the extent that the referral alleges that the President committed perjury in the *Jones* deposition.

As any fair reading of the deposition must conclude, the questions were oddly and vaguely framed. The Jones counsel didn't follow up when they had the opportunity. Counsel were indeed invited, by the President's lawyer, to ask specific detailed questions and declined to do so. They decided to proceed on the basis of a truncated, artificial definition of sexual relations.

The President has said that he made no effort to be helpful, that he did not want to reveal his relationship, understandably. His answers were frequently evasive and incomplete, as my colleague, Mr. Craig said yesterday, even maddening. They were misleading but

they were not perjurious and, a fortiori, they cannot be the basis for an impeachment.

Now this conclusion is, in my view, only fortified by an assessment of the remaining allegations in the OIC referral. The President did not obstruct justice. He did not tamper with witnesses. He did not abuse the powers of his office. The referral's overreaching claims of impropriety are themselves but an attempt to lend artificial weight to allegations of perjury that, standing alone, Independent Counsel knew could not support the result for which he has been such a zealous advocate.

Let me examine at least part of the record that is before you. If the committee is going to rely on the testimony before it, contained in the submissions from the Independent Counsel, it must take all of that testimony. It cannot accept the Independent Counsel's picking and choosing. It cannot accept the Independent Counsel's assessment of the credibility of witnesses.

Let me just touch on two examples that demonstrate, I believe, how the committee can be misled by the referral into assuming a reality that does not exist.

First is the Independent Counsel's charge that the President conspired with Ms. Lewinsky to conceal gifts he had given her. The central events, as the Independent Counsel has described them, are these: that on Sunday, December 28th, 1997, Ms. Lewinsky visited the President at the White House. The Independent Counsel alleges they discussed the fact—in quotes, they discussed the fact that she had received a subpoena to testify in the *Jones* case and to produce any gifts that she had.

The President then gave Ms. Lewinsky a number of gifts because he believed she was moving to New York and it was Christmas time.

She went back to her apartment and sometime thereafter, on that day, according to the Independent Counsel, Betty Currie, the President's secretary, called and told Ms. Lewinsky that she understood that Ms. Lewinsky had something for her. Ms. Currie then drove to Ms. Lewinsky's apartment, took the gifts from her and put them under her bed. That is the essence of the Independent Counsel's description as it tries to deal with whether this constituted an obstruction of justice.

Now, the introduction to this issue as offered by Independent Counsel when he testified before you was that the President and Monica Lewinsky on December 28th, quote, met and discussed what should be done with the gifts subpoenaed from Ms. Lewinsky.

If you look at the record before you, I suggest to you you will find little or nothing to support that conclusion. For one thing, to the extent one is trying to determine whether indeed the President of the United States engaged in some obstruction of justice by urging or causing the concealment of evidence in the *Jones* case, begin by noting that there is not one single suggestion anywhere in any testimony that the President suggested, brought up, hinted at the notion of Ms. Lewinsky's concealing these gifts, in any manner.

Note as well that there is not one iota of proof that the President ever even mentioned Betty Currie in the context of this gift discussion. Note as well that Monica Lewinsky gave at least 10, and there may be more, versions of this event. The Independent Coun-

sel chose one, the one the Independent Counsel thought was most injurious, most reflective of what that office believed to have been improper conduct. They don't tell you about the other nine. They don't tell you about all of the ones in which Ms. Lewinsky doesn't mention the President saying anything to her or, at worst, says, uhm, I will think about it. Doesn't mention the ones in which the story they want to tell is not reflected in their critical witness' testimony.

And if you move to the issue of who triggered the picking up of the gifts, you face a comparable problem. According to what I have to say is a simplistic summation by the Office of Independent Counsel, it is easy. Betty Currie called Monica Lewinsky; said, the President tells me you have got something for me to pick up, or I understand that you have something for me to pick up; all of which fits neatly into a theory that it all must have happened at the President's instigation.

The problem is, Betty Currie says she never had such a conversation with the President. Betty Currie says, Monica Lewinsky called me. The President says he never had such a conversation with Betty Currie; didn't know anything about Betty Currie going to pick up gifts.

Where is that? Where is that in the Independent Counsel's assessment of its case?

Indeed, presumably it is the Independent Counsel's theory that the reason for this transfer of the gifts from Monica Lewinsky to Betty Currie had directly to do with the *Jones* subpoena. The problem with that is that what Betty Currie says about her conversations with Monica Lewinsky is nothing about *Jones;* references to people asking about the gifts and, in particular, a reporter, Michael Isikoff. Indeed, it is interesting that, in possession of Betty Currie's description of that telephone call, that conversation, the Independent Counsel never even asked Monica Lewinsky, is that right? Did you really say to Betty Currie that the reason you wanted to get rid of these gifts was because people were asking you, including Michael Isikoff? Never even asked her the question, much less put it before this committee.

But let me point not to conflicting testimony, one version by Ms. Lewinsky, another version by Ms. Currie. Let me point to the actual events about which there is no conflict on December 28th. On that day, the President gave gifts to Ms. Lewinsky. The Independent Counsel would have this committee believe that on the very day in which the President and Ms. Lewinsky, and maybe Betty Currie, are conspiring to get rid of the gifts that she already had, the President added to the pile. That's very strange conduct for a bunch of conspirators. Very strange conduct.

Why would the President, so concerned about the possibility that she might have to turn over gifts, give her a bunch and encourage her to send them all to Betty Currie on the same day? I don't think there is a sensible answer to that question; certainly not one offered by the Independent Counsel.

Let me just briefly suggest to you that a similar analysis on the issue of the job search leads to the same result. The referral would have you believe that there was an inextricable link between the assistance given to Monica Lewinsky in searching for a job and her

role in the *Jones* case, either as a witness or in connection with her affidavit. It does so, although I must say it does admit that there is only circumstantial evidence to support the theory, by offering a chronology that essentially focuses only on the events of late December and January. And indeed if you look at pages 183 to 184 of the referral, you will see that they talk about what happens on January 5th, Monica Lewinsky declines the U.N. job; January 7th, Monica Lewinsky signs the affidavit and Vernon Jordan informs the President that the affidavit has been signed. January 8th, the very next day, Ms. Lewinsky is interviewed by MacAndrews & Forbes, on Vernon Jordan's recommendation. Shortly thereafter, after it is reported that that interview did not go very well, Vernon Jordan calls Ron Perlman, and ultimately Ms. Lewinsky is reinterviewed and offered a job.

What could possibly be more incriminating?

Well, you might want to know, as I am sure you do if you have done your homework and you have looked at this record, that Monica Lewinsky was looking for a job months before any of this happened. Mainly, candidly, she wanted a job in the White House; spent a lot of the spring of 1997 looking for a job in the White House.

Now, there was one person who I guarantee you from personal experience in the last 2 years could have gotten her a job in the White House. That's the President of the United States. It didn't happen; never pushed the button, never called anybody and said put her back in legislative affairs, give her a job with them. It didn't happen. Strange.

Indeed, if you look at the record you will see that the President gave only limited assistance to Ms. Lewinsky in her job search, never put any pressure on anybody. Vernon Jordan has helped a lot of people in this town and he helped Monica Lewinsky, and he didn't do it because she was a witness in the *Jones* case or because she was going to file an affidavit.

Monica Lewinsky told the President as early as July that she wanted to move to New York. The reason for that is she had been told by her friend, Linda Tripp, that she wasn't going to get a job in the White House. Failing that, New York looked good to her.

When the issue of the U.N. job arose, she pursued it during the summer, and Vernon Jordan begins to help her later in the fall, and met with her in November. And at the same time, by the way, just so that the conspiracy gets broader and broader, Ken Bacon at the Pentagon, her boss, was helping to get her a job, too.

You will search the referral in vain for an honest description of these events. And those are facts, not new, because they have been resting in your hands for months, but new if you ask the question: Were they in the referral; have they been the focus of discussion? In that sense, I suggest to you, members of the committee, that they are new and they are important.

And one last piece on this subject. To the extent that it has been suggested that there was some linkage between the job search and the filing of her affidavit in the *Jones* case, I direct your attention to Ms. Lewinsky's interview with the FBI on July 27th in which she said, as clearly as anyone possibly could, there was no agree-

ment to sign the affidavit in return for a job. You can search for awhile, too, before you find that in the referral.

Indeed, it is noteworthy that Ms. Lewinsky's friend, Linda Tripp, was the one who recommended, at a time when we now know she had other roles in life, not signing the affidavit until she had a job. Now this is not a new fact, because we have been very vocal about it from the very beginning, but it is a fact that isn't in the referral in any meaningful sense. And there is, of course, Ms. Lewinsky's statement in the grand jury, not in response to any question from a prosecutor but in response to a question from a conscientious grand juror. And she said, Ms. Lewinsky said: "I think because of the public nature of how this investigation has been and what the charges have been that are aired, I would just like to say that no one ever asked me to lie. I was never promised a job for my silence."

Lastly and very briefly, given what we surmise to be the articles that may be under consideration here, although of course we have not been given any specific information about what they may contain and thus our defense is modestly handicapped, let me touch very briefly on the issue of abuse of power in the assertion of executive privilege.

From the very first day that this story broke in January of this year, impeachment has loomed on the horizon for all of us in the White House.

We were faced with the truly unique experience of coping with a grand jury inquiry by a prosecutor who had a statutory mandate to inquire into whether there were grounds for impeachment of the President. I considered personally the question of whether we should raise any issue of executive privilege on behalf of the President in response to any documents that were subpoenaed or questions asked of particular witnesses. We fully understood from earlier litigation what our obligations were when the issue of executive privilege arises. It is to assess whether indeed the President had conversations which go to the essence of his official responsibilities and which need to be preserved as confidential so that he can, in fact, receive the candid and sensible advice to which he is entitled.

But step 1, whenever we contemplate assertion of executive privilege, is accommodation. There are some on this committee with whom we have engaged in accommodation in other settings in similar situations, and we do so as well when prosecutors seek information from us.

We accommodate by trying to get into the hands of, in this case, the prosecutors and, in some cases, congressional committees the facts, information which they need in order to perform their duty, and to screen off only those limited areas of inquiry that go to the heart of the confidential advice and discussion between the President and his senior advisers, and that is what we did here.

We tried, albeit unsuccessfully, to accommodate the interests of the Independent Counsel, and only when he rejected all efforts towards accommodation were we required upon his filing of a motion to compel to assert executive privilege, and we did so in two areas with respect to two nonlawyer staff members of the White House, and ultimately—although initially only one lawyer, ultimately

three lawyers, the latter really being linked to a wholly separate area of disagreement having to do with attorney/client privilege.

Now, one cannot read the Independent Counsel's description of what happened in the executive privilege area and come away, I think, with any true understanding of what happened. There is no indication of our efforts to accommodate, no indication that we understood the need to provide facts about the underlying conduct at issue, indeed no indication that we produced thousands and thousands of pages of documents without once ever raising the issue of executive privilege.

Instead what happened is that the Office of Independent Counsel took the position that executive privilege simply didn't apply at all to his inquiry because it all arose out of the personal conduct of the President, and we litigated that issue, and we litigated it on the ground that we weren't seeking to protect information about the President's personal conduct, what we were seeking to protect was the advice that he was getting and the discussions that he was having among senior advisers with respect to the conduct of his official business in the most extraordinary high-tension, hectic era that has ever been my—I won't say pleasure experience in this city.

We had state visits. We had the State of the Union address. We had the core business of the President to worry about, and we told that to the judge, and guess what? Although you will never read it in the referral, the judge agreed with us. She said these conversations are presumptively privileged. And she instructed the Independent Counsel to make a factual showing, which is what happens in executive privilege claims, it is a qualified privilege, to demonstrate that their need for this information was greater than our interest in confidentiality, and only then did the Independent Counsel finally and reluctantly acknowledge that indeed executive privilege properly was asserted here. They made a showing to the judge, ex parte. We don't know what it was. The judge found that it overcame our interest in confidentiality, and that was the end of the assertion of executive privilege for Ms. Hernreich and Mr. Blumenthal, the two nonlawyers involved. That all happened by March. There was no delay, no great hurdles to be overcome.

Most importantly, I think you need to understand what really happened. This was not the President throwing out willy-nilly whatever privilege claims he thought might stand in the way of an investigation. This was his lawyers' advice that the interests of the Presidency dictated protecting not the facts, but the day-to-day advice he was getting about running the Presidency and the discussions among his senior advisers.

Now, if you ever had any question about the extent to which the Independent Counsel's referral sought to color, sought to paint the blackest picture of this insidious effort to assert a privilege recognized by the Constitution and by the Supreme Court in as limited a way as was necessary to protect the core interests of the President, look to pages 207 and 208 of the referral.

At the bottom of page 207 we find the following: "The tactics employed by the White House have not been confined to the judicial process. On March 24, while the President was traveling in Africa, he was asked about the assertion of executive privilege. He responded, you should ask someone who knows. He also responded,

I haven't discussed that with the lawyers, I don't know. And the referral said this was untrue. Unbeknownst to the public, in a declaration filed in District Court on March 17, 7 days before the President's public expression of ignorance, White House counsel Charles F.C. Ruff," that's me, "informed Chief Judge Johnson that he "had discussed" the matter with the President, who had directed the assertion of executive privilege."

And not satisfied with noting that in the referral, the Independent Counsel, when he appeared before this committee, engaged in a colloquy with Congressman Cannon. I hope the Congressman will excuse me for making use of his dialogue.

"Mr. Cannon, According to the sworn declaration of White House counsel Charles Ruff, the President personally directed him to assert executive privilege to prevent you from questioning some of his assistants. When he was in Africa, however, President Clinton denied knowing about the assertion of executive privilege. Which is it? Did Mr. Ruff ever amend his declaration, or is the President lying to the public on his Africa trip?"

"Mr. Starr: To my knowledge, Congressman, there was never an amendment to the declaration, and the declaration was filed on March 17, and then the President's statement in Africa was on March 24. So they can't both be right. Either the President had discussed with Mr. Ruff the indications of the executive privilege, or he had not. Both cannot be true."

Well, unhappily, at least I think, for the Independent Counsel, both are true, because what really happened was that I did, as my declaration says, consult with the President of the United States. He did authorize me to assert executive privilege. And if you look at—and I will have to take a minute to find it—pages 174 and 175 in our submission of yesterday, what really happened in March in Africa was not what the Independent Counsel said happened. The Independent Counsel completely misstated the questions posed to the President, and by carefully selecting only a portion of his answer, took his response entirely out of context.

The actual exchange was this. Question by the press: "Mr. President, we haven't yet had the opportunity to ask you about your decision to invoke executive privilege. Why shouldn't the American people see that as an effort to hide something from them?"

The President: "Look, that is a question that is being asked and answered back home by the people responsible to do that. I don't believe I should be discussing that here."

Question: "Could you at least tell us why you think the First Lady may be covered by that privilege, why her conversation might fall under that?"

Answer, and this is where the quote comes from: "I haven't discussed it with the lawyers. I don't know. You should ask someone who does."

By the way, the First Lady was found by Judge Johnson to be covered by the executive privilege, but it would have been nice, whatever argument the referral wanted to make, to at least put the full statement in the record so you could assess and not simply rely on the Independent Counsel's assessment of what happened.

Some commentators, and indeed some Members of Congress, have suggested that the work of this committee, and indeed the

work of the House, should be treated as nothing more than some preliminary proceeding designed to package a bundle of evidence and send it over to the Senate. Some have likened the committee's work to that of a grand jury whose only task is to determine whether there is probable cause to believe that the President has committed an impeachable offense.

Members of the committee, nothing could be further from the constitutional truth. With all respect, nothing could be a greater abdication of your responsibility. This is not routine business. This is not a charging device pushing hundreds of thousands of cases out into the criminal justice system. Only twice before has this committee ever voted out articles of impeachment against a president. Such a vote is not intended to say, well, we think there may be some reason to believe that William Clinton has done something wrong, but we will let the Senate sort out things at trial. This vote is intended to speak the constitutional will of the people—to say we believe that on the evidence before us the President of the United States should be removed from office. No member of this committee and no Member of the House can take shelter behind the notion that an article of impeachment is the equivalent of nothing more than a criminal complaint or an indictment or some formalistic slap on the wrist. Each Member, and I need not tell you this, must weigh the weightiest burden that our Constitution contemplates, the burden of making an individual determination that the President has committed such grave offenses against our polity that he is no longer fit to serve, that the will of the people should be overturned.

If there is any analogy to the grand jury, it is this, and you heard it from some of my former colleagues in the prosecution business, and you heard it from others: For any professional prosecutor, the true test, and it is certainly true for serious cases, and one can conceive of no case more serious than this, is whether there is sufficient evidence on the basis of which a prosecutor could convince a jury beyond a reasonable doubt that an offense had been committed. This is not, as Congressman Canady suggested earlier today, a matter of counting noses in the Senate. It is not a question of whether a majority vote in the House somehow gives permission to put this responsibility in the hands of the Senate. They only require a majority vote in the grand jury, and we require a unanimous vote in a criminal case at trial.

This is a matter of testing the charges that you are going to consider and asking yourself not would I win if I really litigated this in the Senate, but rather do I have enough evidence to justify putting the country through the horror that we all know will follow if, in fact, there is an impeachment.

In closing, I urge you to ask, as Senator Fessenden asked 130 years ago, is the evidence before you of such character to commend itself at once to the minds of all right-thinking—forgive me—men as beyond all question an adequate cause for impeachment. And finally ask, what is best for our Nation?

Thank you, Mr. Chairman.

Chairman HYDE. Thank you very much, Mr. Ruff.

[Information not available at time of printing].

Chairman HYDE. Would you like a break?

Mr. RUFF. I am ready when you are, Mr. Chairman. Let me say as we venture into the questioning period, there may come a moment when I actually turn to one of my colleagues behind me for a little assistance as we get into the specifics.

Chairman HYDE. If you want to take a break——

Mr. RUFF. No, I meant as we go on, it may be necessary for me to turn for a little guidance on the facts. I will do it in such a way that it doesn't disrupt the process.

Chairman HYDE. It would be a terrible waste not to avail yourself of their talents, so I understand.

Mr. RUFF. Indeed.

Chairman HYDE. We are going to operate under a strict 5–minute rule.

Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Ruff, and thank you for a very eloquent statement. I will not get into the business that there were no fact witnesses provided here, because you are obviously the President's clean-up hitter, but I do think that we have got to cut through the academic discourse and the legal hair-splitting that has gone on in order to make an essential determination on whether the President has committed an impeachable offense, and let me say for my own part that I believe that at least perjury before a grand jury is an impeachable offense, whether the perjury has been committed by the President or whether it has been committed by a Federal judge. I think that issue was decided 9 years ago in the Walter Nixon impeachment.

So getting to whether or not the President did make a false statement before the grand jury, let me ask you a few questions. First, Mr. Ruff, did the President mislead the American people when he denied having sexual relations with Monica Lewinsky?

Mr. RUFF. He has admitted doing so, Mr. Congressman.

Mr. SENSENBRENNER. Did he lie then?

Mr. RUFF. Mr. Congressman, there is no secret here. When he stood in the Roosevelt Room and said, I never had sexual relations with Ms. Lewinsky, he knew that the vast majority of the people who were listening to him out there would probably understand that to mean that he had no improper relationship with her of any kind, and he knew when he said that, holding within him, as he did, his understanding that sexual relations means sexual intercourse, that he was misleading the people who were listening to him.

Mr. SENSENBRENNER. Mr. Ruff, was the President evasive and misleading in his answers in the civil deposition and before the grand jury?

Mr. RUFF. I have so stated, and so has he.

Mr. SENSENBRENNER. Did he lie?

Mr. RUFF. The President engaged in an exercise the hallmark of which was a desire to be as little help to these people on the other side of the *Jones* case as he possibly could.

I think my colleagues' description of his testimony as evasive, misleading and maddening is probably as good as you can get.

Mr. SENSENBRENNER. But did he lie?

Mr. RUFF. And I am going to respond to your question.

I have no doubt that he walked up to a line that he thought he understood. Reasonable people, and you maybe have reached that conclusion, could determine that he crossed over that line, and what for him was truthful but misleading or nonresponsive and misleading or evasive was, in fact, false. But in his mind, and that's the heart and soul of perjury, he thought and he believed that what he was doing was being evasive but truthful.

Mr. SENSENBRENNER. The oath that witnesses take require them to tell the truth, the whole truth and nothing but the truth. I seem to recall that there were a lot of people, myself included, when asked by the press what advice we would give to the President when he went into the grand jury in August, was to tell the truth, the whole truth and nothing but the truth.

Mr. RUFF. Indeed.

Mr. SENSENBRENNER. Did he tell the truth, the whole truth and nothing but the truth when he was before the grand jury?

Mr. RUFF. He surely did.

Mr. SENSENBRENNER. Then how come following the grand jury's—the grand jury appearances, we heard all kinds of allegations of legal hair-splitting, and debating the meaning of various types of words, and claims that some of the questions were ambiguous? My list includes words such as is, alone, sex, and sexual relations.

Do you have any more?

Mr. RUFF. Well, I will take your list for starters, but I am not sure how that addresses the question that you put to me, which is did he tell the truth. He made it very clear to the grand jury that he engaged in inappropriate intimate relationships. There is no one who listened——

Mr. SENSENBRENNER. Mr. Ruff, you are saying that some of the questions were ambiguous, and the President really did not understand what those questions were. Now, who do we blame for the fact that the President didn't understand and we have had all of these redefinitions and legal hair-splitting? Is it the President, or is it his lawyers?

Mr. RUFF. I don't think that you will find any suggestion that the President didn't understand the questions put to him. What you will find is an effort by him to explain not how he was responding to the questions in the grand jury, but how he responded to the questions in the deposition, and that's where the issues are debated over what the meaning——

Mr. SENSENBRENNER. But whose responsibility is that? Is it the President's responsibility or his lawyers' when he is talking about all of the legal hair-splitting?

Mr. RUFF. When the President is answering questions in the grand jury under oath, it is his responsibility to answer truthfully. He did so.

Mr. SENSENBRENNER. Thank you.

Chairman HYDE. The gentleman's time has expired.

The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you.

I appreciate your coming forward and taking this lengthy amount of time, and I am very moved by what you have had to say. The question that I think most people are asking themselves is

whether in this 445-page narrative, even assuming that for the benefit of this question that everything in it is true, are there any acts? Is there any conduct, are there any things in the narrative that would rise to the level of an impeachable offense?

Mr. RUFF. As I have stated, Mr. Conyers, it is our very clear conviction the answer to that question is no.

Mr. CONYERS. Thank you.

You've pointed out one glaring example of Mr. Starr's omissions. We have noted that a fair amount of exculpatory evidence was excluded as we've gone through our exercise here, but the one concerning the President's response to a question about executive privilege, is that the only example of an important omission that has come to your attention by the Independent Counsel?

Mr. RUFF. As one might gather from not only my testimony today, but submissions that we made both yesterday and earlier, we find many—I referred to a few today in terms of leaving out exculpatory information about the gifts and the job search, and those are, I think, but examples of areas, and I raise them, Mr. Conyers, in the setting not because of some collateral attack on the Independent Counsel, but rather to ask the committee to look with care at the record before them.

Mr. CONYERS. Have you, Mr. Ruff, any insight as to why the President's grand jury testimony was videotaped by the Independent Counsel?

Mr. RUFF. Well, I was not engaged in the discussions over that. I am advised by my colleague, Mr. Kendall, that this was something on which the Independent Counsel insisted nominally because there might be a missing grand juror. I don't candidly know if that was, in fact, the case on August 17 or not. But one might surmise that there was some collateral interest in fleshing out the package to be sent to this Congress.

Mr. CONYERS. Thank you.

What about the struggle that is now going on within the Congress and even outside of it to find some intermediate position to which we may all find an exit, to which we might with whatever integrity remains get to a conclusion to this matter? Is there any way that this kind of a resolution might resonate favorably in the White House?

Mr. RUFF. I think what I can say, Congressman Conyers, is what we have said before. We are looking for an end to this process. We think that it does not advance the public weal to drag it out further. We are open to any reasonable suggestion from any side as a way of finding an end to this.

Mr. CONYERS. I appreciate that. If you believed, Counsel, that the President had abused the powers of his office, would you still be serving as the White House counsel?

Mr. RUFF. I think we all have as our core professional responsibility an unwillingness to serve where we believe our legal skills are being abused, and I surely would not serve where I thought that was the case.

Mr. CONYERS. Thank you very much, Mr. Ruff.

Chairman HYDE. I thank the gentleman.

The gentleman from Florida, Mr. McCollum.

Mr. MCCOLLUM. Mr. Ruff, in your opening comments you suggested that the matters before us, no matter what we might conclude are the facts, do not rise to the level of impeachable offenses because nothing the President did amounts to subverting the system of government?

Mr. RUFF. Yes.

Mr. MCCOLLUM. And you also suggested that these were purely personal matters that were involved in this case.

Mr. RUFF. I think not the latter. They arose out of personal conduct.

Mr. MCCOLLUM. Very well. Whatever your characterization.

I would submit to you that the President of the United States committing perjury, if we believe he did, obstructing justice in a court system, and lying to the grand jury are things which subvert the justice system of this Nation. If we believe that, you may not, but if we come to that conclusion, that certainly subverts the American Government system because the justice system is integral to that government system. So I would suggest that they do rise, as was said by Professor Dershowitz, to—lying and committing perjury before the grand jury—to impeachable offenses, if we conclude that, for which the President should be impeached.

Mr. RUFF. May I respond?

Mr. MCCOLLUM. That is a comment. I have a question or two.

You have every right to characterize, just as Mr. Starr has, and you also highlight. There were a number of pages that you submitted, 180 or something like that. At any rate, I find that those things that you highlighted which were your strongest points, and I respect that, but there are things that you didn't highlight that you glossed over more. You only gave us about two and a half pages on the perjury before the grand jury in your written testimony, although you mention it today. You gave us 20 pages on the gift question, and you gave us no comments, although a few pages, on Betty Currie in her specific questions whether the President may have tampered with her as a witness.

Now, with regard to the perjury question before the grand jury, the central issue is whether the President committed that perjury or not, whether he lied or he didn't lie. And the issue there, as I discussed this morning, as you may or may not have observed in my questioning, boils down to whether or not you believe Monica Lewinsky. The President said one thing, and she said another. The President said, I did not have sexual relations based on the definition that the court had given me in the *Jones* case. Monica Lewinsky described at least two things on several occasions that the President did with her that would meet that definition.

She is corroborated by having talked to seven different family members and friends on seven different occasions at contemporaneous times to engaging in with these relations with the President, having told them precisely what she later told the grand jury, which was consistent with that. To me that is corroboration. That is something that you don't want to highlight. Mr. Starr highlighted it a little bit, and I do want to highlight it because I think that is factually very important.

And the other matter goes to perjury as well as Betty Currie. When the President testified under oath in his civil deposition that

he could not recall being alone with Monica Lewinsky, was he telling the truth?

Mr. RUFF. First of all, Congressman, that is not an accurate statement of what he said. He was originally asked, were you ever alone in the Oval Office with Ms. Lewinsky, and he responded, not completely but accurately, that he recalled being alone with her during the government shutdown when she brought letters to him.

Now, it is frequently bruited about that he made some broad-ranging and closed-in representation that he was never alone with Monica Lewinsky.

Mr. MCCOLLUM. He was asked later very clearly, as my recollection of the evidence, was he alone, and my reading was that he said that he wasn't alone, and any fair reading of it would say that—you are parsing—which is in your own reports that you gave to us today, your own analysis, would say that alone doesn't mean the same thing to me as it does to the average person.

If the President thought that he was having relations with her when nobody else was around in a room, that is alone, not simply being in the White House when somebody else was there.

With regard to Betty Currie, there were a number of times when he went back to her and asked her, suggested things like to her the next day after this deposition was given. He asked her, you know, do you agree, you were always there when she was there, right? We were never really alone? You could see and hear everything? Monica came on to me, and I never touched her, right?

The fact is he knew she was going to be a witness in all probability even though she wasn't on the witness list, and he wanted to know that. That strikes me as very apparent because he had raised her name a number of times in that deposition.

Chairman HYDE. The gentleman's time has expired. Does Mr. Ruff wish to answer?

Mr. RUFF. Just quickly.

Betty Currie was not a witness. She was not on the witness list. The discovery process was closing down in *Jones*. Betty Currie had been known to the *Jones* lawyers for months. They could have put her on the list if they wanted to, and they didn't.

Chairman HYDE. The gentleman from Massachusetts.

Mr. FRANK. Thank you, Mr. Chairman, and for the very even-handed and appropriate way that you have been presiding over this particular tricky question-and-answer series.

First on hair-splitting, I think we are in a hair-splitting tie, because what some of my colleagues on the other side have said is the actual nature of the acts which the President committed is irrelevant. That is whether or not you lied about interfering with a State court prosecution of your partner's son for drugs, Judge Nixon—Judge Nixon was accused of lying about whether or not he tried to fix a case in State court using the prestige of his Federal judgeship, whether he was trying to fix a case for his partner's son. That is the same as lying about a consensual sexual affair.

Morally and factually most of us would think those are different, but we are told but technically, if they are both perjury, they are identical. That is, the notion that conformity to technical legal standards trumps all other questions comes from the accusers of the President, and it certainly is in a situation legal and reasonable

for the President to say, you have basically said that a consensual sexual act which you have said in and of itself would not have caused all of this becomes a constitutional crisis if it conforms to these legal standards, and he is obviously therefore entitled to say it doesn't.

You can't have a one-sided objection to the invocation of legal standards because the gravamen of the charge against the President is not that he did something terrible, not as in the Watergate case that there were substantive violations of people's rights, but that he told untruths or he didn't tell the whole truth. He was supposed to tell the truth, the whole truth and nothing but the truth, and he only got two out of three, that that makes it technically perjury, and therefore we go off the substance and into the technical legal situation, and that then requires a technical legal rebuttal.

Even on those terms it seems to me with regard to the grand jury there is no showing that perjury—that the President committed perjury.

I must say, Mr. Ruff, I do not find the rebuttal on it was alone persuasive. I think the President simply wasn't being truthful. I think he waffled past the point of the lying on that. But given the circumstances of a civil deposition where the issue of consensual sex was, in my judgment, completely irrelevant to the underlying case, that there is a materiality question.

And I note that my colleagues have stressed grand jury perjury. That is the one that they are talking about. We now, as you note in your point here, Mr. Schippers, dropped two of the three counts in his presentation of grand jury perjury. He skipped the one about May and November, and he skipped the one about what the President thought in August about what he said in January that is so complicated that I can't say it right.

The only question is one that Mr. McCollum referred to. It is an unpleasant subject to talk about, but the fact is that the accusation, am I correct, is that while the President acknowledged before the grand jury that there had been inappropriate intimate conduct, and Mr. Starr himself notes that was an admission of sexual contact, Mr. Starr on page 147 of the referral notes that the President admitted to sexual contact, so the grand jury perjury issue is that while the President admitted that there had been inappropriate intimate, i.e., sexual, contact between him and Ms. Lewinsky, she had performed sexual contact on him, and he did not reciprocate. Is it, in fact, the case that is the substance of the grand jury perjury? That is the factual issue that we are talking about?

Mr. RUFF. That is correct, Congressman.

Mr. FRANK. How would you prove that? Corroboration might be that Ms. Lewinsky told somebody. Is there any—as a lawyer, how do you prove when two people are being alone? If he lied about being alone—I think he didn't lie about being alone, but if you lied about being alone, that means that they were alone, and if they were alone, how do we prove perjury, because it really comes out who touched what. Now, we are thinking about the President of the United States who admitted that he had inappropriate sexual contact, but he kind of shortchanged us on the details in a perjurious way, and that is the question. How would you prove one side or the other if you had to?

Mr. RUFF. Well, I think my colleagues on the earlier panel made it very clear that, first of all, you would never bring a case in which you had two people, one of whom was saying X and one of whom was saying not X. But even if you did, the notion suggested by Congressman McCollum that someone whom you would rely on as witnesses, people that Ms. Lewinsky told the same story that she is now telling the grand jury, whatever motivation that there might have been to tell that story, plus noting some of the people that she talked to she didn't tell the same story, is I think a nightmare for any prosecutor. And indeed, Congressman, to take it out of that context would be a nightmare for this country if we tried to try that lawsuit in the Senate of the United States.

Chairman HYDE. The gentleman's time has expired.

The gentleman from Pennsylvania, Mr. Gekas.

Mr. GEKAS. I thank the Chairman.

Mr. Ruff, from the first moment that I reviewed the referral from the Independent Counsel, I developed reservations about the executive privilege portion of his litany of abuse of power, and since then I have further examined that, and counseled with my colleagues, and have reached conclusions that may at some point coincide with your affirmance as to that. But on other portions of the referral I have some grave questions.

As Mr. McCollum brought out from you in the opening remarks that you made in setting this scene, you stated, or implied at least, that no offense that didn't amount to subverting the government or resulting in the inability to lead the Nation, anything short of that, no matter what the offense is, would not be an impeachable offense; is that a fair description?

Mr. RUFF. That is fair, and I truly believe that, and let me——

Mr. GEKAS. No, we agree on that. I need some more time.

Mr. RUFF. I will circle back at the end, but go ahead.

Mr. GEKAS. The thing that bothers me about that is you also said in defense of the President he didn't commit bribery—as stated in the Constitution, he didn't accept a bribe or give a bribe, I think you gave that as a little example—and therefore he didn't come within the meaning and the actual literal wording of the Constitution. That means to me that if bribery is committed, whether or not it subverts the government, whether or not it deprives him of the ability to lead the Nation, whether or not it is an attack on our system of government, because a bribe can take 20 minutes and then he can lead the Nation for the rest of the term, that means to me that the inclusion of bribery does not require—does not require the subversion of government or an attack on government, but is so heinous that it is treated by the founders as by itself enough to impeach the President. That is what it means to me.

Mr. RUFF. May I respond?

Mr. GEKAS. Hold on.

Following that logic, if I come to the conclusion, or others do, that perjury is a high crime or a high misdemeanor, or middle or low or some kind of misdemeanor, something to fit into that structure, and it is not accompanied by subversion of the government, or subversion of the system, or rendering him unable to lead the Nation, that even so I would be justified, if I feel that perjury is such an attack on the government or such a heinous offense and

has the result of destroying the case of an American citizen who lawfully brought a lawsuit in Arkansas, if I feel that strongly, you cannot, can you, tell me that I have no basis for doing that simply because it might not render him unable to lead the Nation or that it subverts the Constitution?

Mr. RUFF. May I respond now, Congressman?

Mr. GEKAS. Yes, I think so. I'm exhausted.

Mr. RUFF. I have the advantage on you. I wasn't here this morning.

Two points to make. With all due respect, Congressman, I think your analysis is wrong.

Mr. GEKAS. I knew you would say that.

Mr. RUFF. I do think your analysis on the first point is right.

Mr. GEKAS. Yes, of course.

Mr. RUFF. What the Founding Fathers determined is that where a President is guilty of treason or bribery, you don't need to ask any other questions. Those two offenses do go so much to the fabric of our government that they are presumptively subversive of his ability to govern. But where it is a question of what fits into high crimes and misdemeanors, you must apply the same test.

Mr. GEKAS. I must interrupt you. I have to say that to me bribery, as in the Constitution, is less destructive of the structure of government than is perjury committed by the President of the United States.

Mr. RUFF. With all due respect, Congressman, and I do appreciate your candor and the strength that you hold that view, the Founding Fathers made a different judgment.

Chairman HYDE. The time has expired.

Mr. Schumer.

Mr. SCHUMER. Thank you.

I want to thank you, Mr. Ruff. I think your testimony was outstanding. I think the gentleman from Wisconsin said you were the clean-up hitter for the administration. Well, I think you have hit it out of the park.

Mr. RUFF. Thank you.

Mr. SCHUMER. I have seen this in three levels. The first level, even if you agree with all of Mr. Starr's factual allegations, there would be—you would say the President did a lot of wrong things. It doesn't reach the high bar of high crimes and misdemeanors, and that we talked about yesterday.

And then this morning we talked about the two other—the nonperjury parts of the OIC's brief, and I think again you have destroyed those quite well. The obstruction—the abuse of power charge is just even not brought up in Mr. Schipper's points. The obstruction of justice really relies simply on somebody's surmise, the OIC's surmise, and to impeach a President because somebody felt, with no outside evidence, that Monica Lewinsky was getting a job because of a desire to influence her testimony as opposed to desire not to have the world find out about an illicit relationship strikes me as almost Kafkaesque, and so I think we knocked that out.

What you really dwelled on and the questions have dwelled on is the third, the last bar to overcome, and that is perjury. And I think my colleague from Pennsylvania, and he made the same mis-

take as the colleague of Wisconsin, they are assuming that one perjury is, "the same as another. Arguendo, just for the sake of argument, not saying that perjury was done, Mr. Nixon was interfering in a State court to get someone out of a criminal proceeding, which is the essence of what our system of laws is all about, perjury in that case would be different than lying about an extramarital affair.

The reason I would say to my friends on the other side you are not getting very far with the American people is they don't buy that. Very few fair-minded individuals would buy that. It is different. It is totally different, and it goes directly to a sense of fairness. Are we trying to be fair and treating someone not as a Democratic or a liberal or conservative, but just being fair because what we are doing here is an extremely serious exercise, or do we have other motivations?

But I would ask you, Mr. Ruff, given your, in my judgment at least, superb testimony, that you have also made the other point here which is what the President did is not perjurious. Misleading and perjurious are not the same is the basic thrust. One is a standard of common usage as you and I would talk to each other, or even as an elected official talks to his or her constituents, and the other is a legal standard which is much harder to reach.

Could give us a few other types of examples? I thought of one, and maybe it has holes, but that the Earth has a blue sky except for all of the hundreds and hundreds and thousands of miles the sky is blue, but there is one square mile in Antarctica where the sky is pink, and you ask a witness is the sky blue, and the witness says no. Even though it is logical that witness knows that the rest of the sky is blue, and there is that one little part that is pink, clearly misleading, but it seems to me if you value our system of laws, if you are not hair-splitting, that that is not perjurious per se unless you can get inside that person's head and know that they never saw the pink square of sky or didn't believe that pink square mile of sky existed. I don't know if that is a good example.

Mr. RUFF. It is as good as any.

As I tried to suggest in my testimony, we didn't just dream up perjury protections. They serve a societal purpose, and they reflect a judgment about what we do and what we don't do with witnesses under oath. We tolerate a lot of bobbing and weaving and a lot of evasion and a lot of misleading before we say, you perjured yourself and we are going to pursue you criminally.

Chairman HYDE. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. I thank you, Mr. Chairman. I thank you, Mr. Ruff, for being with us.

I said something yesterday, Mr. Ruff, that I am going to repeat today. I am getting tired of folks saying the Republicans are unreasonably partisan because they are favoring impeachment. I don't think there is any justification of that, nor do I think it is justification to say that the Democrats are unreasonably partisan because they oppose impeachment. I think reasonable men and women can differ, and I hope to carry that through the end of this week and maybe into next week.

Mr. Ruff, I want to address a couple of myths, and one myth is that we have no evidence because there have been no fact witnesses called.

Five volumes sit alongside me that contain sworn testimony before criminal grand jury, FBI interviews, depositions, and other materials, and I don't believe the critical testimony has been challenged by the other side.

The second myth is that Judge Starr omitted from his referral important evidence favorable to the President. I am not saying that you said this, Mr. Ruff, but others have said it.

Mr. RUFF. I have said it.

Mr. COBLE. Well, you and I may have to disagree agreeably, Mr. Ruff, but I believe every shred of evidence upon which the White House relies was provided herein by Judge Starr. On the one hand, they said, we didn't get anything, and on the other hand they use it oftentimes to trash it, but let me put a question to you, Mr. Ruff, if I may.

Does the President still believe that Ms. Lewinsky's affidavit denying a sexual relationship is true?

Mr. RUFF. Congressman, the President believes that when she submitted that affidavit, that the word "sexual relations," and he has so stated, involved sexual intercourse. And it is on that basis of that definition that the representation in the affidavit was true. That definition in his mind of sexual relations was one that he held in his mind in January and in August, and he has so testified.

Mr. COBLE. All right. Sir, let me ask you this. I am wondering why the President did not intervene when his attorney told Judge Wright that Ms. Lewinsky's affidavit meant "absolutely no sex of any kind in any manner, shape or form." Now, that, Mr. Ruff, it seems to me, and I will qualify that, but it seems to me that is right smack dab in the shadow of obstruction of justice. Now, steer me away from the rocks and shoals if I am heading for the rocks and shoals.

Mr. RUFF. I would like to steer you away from those particular rocks and shoals. Let me put aside your legal characterization of what that might have been if indeed the President understood that his lawyer actively misrepresented the facts to the court.

The President has testified—and having represented several hundred witnesses in depositions, I think I have a fair sense of where this testimony comes from—that when the colloquy started between Mr. Bennett and the other participants there, the President was not focusing on what his counsel was saying.

I understand that Mr. Starr says that is not the case, in fact the President either was paying attention or should have been paying attention and should have cut off that series of representations. I was in the room, and I will tell you that I have not—I don't have a recollection of that particular moment in time. I have not seen the videotape, but the President has testified, and it seems entirely reasonable to me in my experience in civil depositions——

Mr. COBLE. Pardon me, but my time is ticking.

Did not Mr. Bennett, the President's attorney, subsequently admit to the court that the affidavit was not true?

Mr. RUFF. What he advised the court, quite properly under the rule of professional conduct in the District of Columbia and Arkan-

sas, was that Ms. Lewinsky had testified that the affidavit was false.

Mr. COBLE. My red light has illuminated. I will yield back.

Chairman HYDE. I thank the gentleman.

The distinguished gentleman from California, Mr. Berman.

Mr. BERMAN. Mr. Ruff, did you want to use a minute of this time to finish?

Mr. RUFF. No, I am at your disposal, Congressman.

Mr. BERMAN. Thank you.

Both sides, we do it, they do it analyze this as a judicial proceeding with very formal rules and legal relations. You critiqued it, I think, appropriately when you argued that we should not consider ourselves a grand jury applying those standards in this very important process. That is why this issue of perjury is a legal conclusion. It is highly technical. We heard an excellent panel this morning describe its elements, talk about the difficulty of prosecuting it and the kinds of cases that would be prosecuted.

The thing that bothers me most in the context of the testimony before the grand jury the one area that both Mr. McCollum and Mr. Frank focused in on is the question of what was touched. In looking through all of the evidence, it basically boils down to a "he said" and "she said" kind of a situation. I am not a judge. I look at this and apply common-sense rules, and I come to the conclusion in this case, I hate to say it, I think the President lied. I take the other version of what happened rather than his.

And I guess the point I want to come back to is, I don't care whether that is perjury—I mean, I do care whether it is perjury, but for this purpose it isn't my job to try to analyze that. I am aware of the difficulties of prosecuting it. I don't think anybody should be making those conclusions about it in this context, but the question still arises.

Having said all of that, what does it tell us in terms of the constitutional standard we should apply here, and I would like you to speak about as you have already, and I think it is worth hearing over and over again, your analysis of what one who comes to that conclusion should do with regard to the issue of whether or not to pass an article of impeachment?

Mr. RUFF. This really goes back in part to one of my earlier discussions in questions and answers. None of us condones perjury, if that is what occurred. I happen to believe it did not occur. Let me accept for the moment your position that it did.

Mr. BERMAN. I didn't say it occurred, I said if it occurred. I said I think he lied under oath in that particular instance.

Mr. RUFF. If you ask the question does any violation of the oath, does any violation of a witness' obligation to testify truthfully mean that the President of the United States should be removed from office, that, it seems to me, ought to be the starting point for this discussion, and it has already been suggested by Congressman Frank and Congressman Schumer and others that you can't simply, when you are dealing with this gravest of constitutional issues, leap from a conclusion that we would all agree on, which is lying is not a good thing, to a conclusion that we are going to overturn our system of government and the mandate of the people, because if you do that, you are failing to weigh in the balance what I think

the Founding Fathers, the framers of the Constitution, had in mind, which is, as I said, as bad as this conduct may be, whatever the conduct is, does it mean that the President of the United States should not and cannot lead the country?

If you ask that question, people might reasonably disagree about where in the spectrum that inability to lead falls, but if you don't ask the question, you don't ever start getting into the right constitutional debate.

Mr. SENSENBRENNER [presiding]. The gentlemen yields back.

The gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you.

Mr. Ruff, you testified today that the President did mislead the Nation. Some of my colleagues, and I think particularly the last one, said that they felt that the President had actually lied under oath.

Mr. RUFF. I'm sorry, I missed that last——

Mr. SMITH. Some of my colleagues, and I think particularly my colleague from California, said that he thought the President lied under oath. You have testified that the President misled the American people, probably on numerous instances. Don't you think that those public statements and don't you think the President's actions were designed to thwart or impede the investigation of the Independent Counsel?

Mr. RUFF. I really don't, Congressman, and let me tell you why.

Mr. SMITH. That seems incredible that you don't think that the President's motive was to do just that.

Mr. RUFF. The reason that I want to address your question is if you ask would everything have been simpler for the Independent Counsel if the President had come out on January 21 and said, yes, everything they say about me is absolutely true, yes, that would have indeed eased the path. I guarantee you one thing, it would not have brought us here.

Mr. SMITH. I am not just talking about that one instance, but the repeated instances of admitted misleading, evasive answers, perhaps lying under oath.

Let me just say to you, if there is 1 percent of the American people who don't think that he was trying to—and intentionally trying to mislead or impede the investigation, I would be surprised, but that is my opinion, and apparently you disagree with it.

Mr. RUFF. I do.

Mr. SMITH. Let me go on to my next point and that is this. Yesterday, the White House brief that was delivered to us contained this statement which I assume that you are responsible for: "The referral omitted evidence that exonerates the President." And then, interestingly enough, in many, many instances where you say, "the referral omitted evidence that exonerated the President", then you cite the appendix itself as the source for the facts that were omitted. By my count, 17 times you referred to the appendix for the facts that you said were omitted.

So my question to you is, don't you consider the appendix to be part of the Independent Counsel's referral?

Mr. RUFF. No. Congressman, I am glad you asked that question because I would have responded to Congressman Coble when he asked the same question.

If there is one thing I think we all understand is that what the Independent Counsel chose out of this mass of material to put in the referral ought to have been as honest, as unbiased, as detached an assessment of the facts as he could manage.

And let me say further that when the Independent Counsel himself came before this committee, in his own testimony he should have, if he had failed to bring to your attention this exculpatory information in the thin little document—excuse me, Congressman, you——

Mr. SMITH. You have answered my question to my satisfaction. Let me just respond to you. Is that not a prime example of splitting hairs and parsing of words and playing word games to say it should have been in the main body rather than in the appendix?

Mr. RUFF. On the contrary——

Mr. SMITH. As long as it was there and people had access to it, I think arguably the facts were evident and available.

Mr. RUFF. Let me ask you rhetorically, if it was just part of the referral, if it was there for all to see and all to know, why didn't the Independent Counsel talk about it when he testified to you? Why hasn't one word been said of it in all the debate?

Mr. SMITH. My time is up, Mr. Ruff. Let the record show that you really didn't respond to my question about whether you considered the appendix to be part of the referral.

Let me ask—end on one other point. You have said and many others have argued that the actions of the President don't warrant overturning the mandate of the American people at the last election. But the point, the response to that is that the American people didn't know then what they know now. They didn't know in the 1996 election. They didn't know in the 1992 election what they know now or their votes might well have been different.

Mr. Chairman, I yield back. Thank you.

Chairman HYDE. I thank the gentleman.

The gentleman from Virginia, Mr. Boucher.

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

Mr. Ruff, I want to join with others today who have commended you on the quality of your presentation. I think that you have made significant strides in attempting to put this entire sad matter into a clearer context. I commend you for what you have said.

I would like to take some time this afternoon to explore with you the allegation by the Independent Counsel that in asserting executive privilege and in asserting attorney-client privilege, the President, in the words of the Independent Counsel, has abused his office, and the Independent Counsel, therefore, suggests that the assertion by the President of these two privileges would be a ground for impeachment.

My first question to you is, do you agree that the President, as the caretaker of the executive office, has a responsibility to tend and look after the privileges, including executive privilege and attorney-client privilege, that attend his executive function?

Mr. RUFF. I do, and I so advised him, Congressman.

Mr. BOUCHER. Isn't it also true that when the executive privilege was asserted in the U.S. district court that Judge Johnson, in passing on that privilege, ruled that presumptively the executive privilege did, in fact, cover many of the communications involving the

President's assistants but that in the particular context in which they were raised those privileges had to yield to the need for information by the Independent Counsel?

Mr. RUFF. That's correct.

Mr. BOUCHER. And isn't it also true that upon that ruling the President decided not to appeal that decision by the Judge and basically dropped that claim of executive privilege at that time?

Mr. RUFF. As to the nonlawyers, that's correct.

Mr. BOUCHER. And then when the attorney-client privilege claim was appealed and reached the U.S. Supreme Court, isn't it true that two justices of the Supreme Court said that there was no clear legal answer to the question the President was raising to the claim of attorney-client privilege that he was putting forth and that there was, therefore, a clear basis for the Supreme Court to pass on that question?

Mr. RUFF. That's correct.

Mr. BOUCHER. And so would you not conclude that there was a plausible basis for the assertion by the President of the claims of both executive privilege and attorney-client privilege, the same claims that now, in the view of the Independent Counsel, are being suggested as possible bases for impeaching and removing the President from office?

Mr. RUFF. Without taking the matter too personally, Congressman, I would look not only to the opinion of the two Supreme Court judges, but I like to believe that my own assessment and my own advice to the President set a level of plausibility for the claim of privilege that would defeat any suggestion of abuse of power.

Mr. BOUCHER. Mr. Ruff, I also would like to explore with you question of statements made under oath. During the process of these hearings, many of our colleagues on the other side of the aisle have tried to equate the standards for impeaching a president with those applicable to the impeachment of Federal judges. I would like to ask you if you believe that that is a fair comparison and ask you also what differences you perceive in the standards that should be applicable to the impeachment of a president on the one hand and the impeachment of Federal judges on the other?

Mr. RUFF. Congressman, I think it is fair to say that there is agreement that the pure constitutional test is the same. The difference ought to be in the assessment of the House as to what the impact on our system of government is if you speak about a judge with a lifetime appointment engaging, as Judge Nixon did, in the commission of perjury, and the impact on our system of government if you think about removing the President, who has to stand for reelection at least once and as to whose status the public can speak in many different ways.

The President is the single head of the executive branch of government. To remove him from office, it seems to me, cannot be compared with the seriousness, however important it is, of removing a single judge of 900 or so with a lifetime appointment.

Mr. BOUCHER. Thank you very much, Mr. Ruff.

Thank you, Mr. Chairman.

Chairman HYDE. The gentleman from California, Mr. Gallegly.

Mr. GALLEGLY. Thank you, Mr. Chairman.

Mr. Ruff, thank you for being here. I know this isn't an easy duty for you. It certainly has not been a simple duty for us either.

Mr. RUFF. I understand.

Mr. GALLEGLY. Yesterday, Mr. Craig appeared before us and was asked about the President's candor before the Federal grand jury. He said, while the President was evasive, incomplete, misleading, even maddening, that he did not believe the President had lied under oath.

With all due respect to Mr. Craig, and I have great respect for his legal ability, I think he is a fine lawyer, that might sell to a Georgetown law grad but to the average citizen across this country, it is a pretty tough sell.

Mr. RUFF. Can I just comment on one thing, Congressman? I won't be long.

I think Mr. Craig, when he described the President's testimony as evasive, misleading, maddening was not talking about the grand jury. He was talking about the civil deposition.

Mr. GALLEGLY. In other words, it was testimony under oath, though.

Mr. RUFF. That is true.

Mr. GALLEGLY. Very well.

In the panel following Mr. Craig's panel, Mr. Wayne Owens, former Member of this House, in an unsolicited comment stated that the President clearly did lie under oath. Who do you most associate your position with, either Mr. Craig or Mr. Owens?

Mr. RUFF. Well, I suppose I could say that Congressman—former Congressman Owens' statement to you reflects our efforts to put together a panel with no preconceptions about the issues before you. But without being flippant about it, and it is too important to be flippant about, I associate myself not surprisingly with my colleague, Mr. Craig, not just because he is my colleague but because, indeed, as I have indicated earlier, as misleading and evasive as the President's testimony in his deposition was, in my view, it represented, albeit perhaps an abortive effort, to stay within some very narrow, strange boundaries and yet not to help—to be evasive. There is no question about that.

Mr. GALLEGLY. Thank you, Mr. Ruff.

Mr. Ruff, you stated earlier that the President did not help Ms. Lewinsky get a job. I think you further stated that Vernon Jordan did help Monica Lewinsky to get a job and that he helps many people in Washington get a job; is that correct?

Mr. RUFF. I did not say that the President did not help. I said he provided very little assistance.

Mr. GALLEGLY. But you have said that Vernon Jordan did help Ms. Lewinsky get a job and had helped others get a job.

Mr. RUFF. Yes.

Mr. GALLEGLY. Do you know if it is common practice for Mr. Jordan to call the President's secretary and report, "mission accomplished, "or report, "business has been taken care of" every time he helps someone get a job?

Mr. RUFF. I don't know on how many occasions he has helped someone get a job who was a friend and acquaintance of Betty Currie's. But there is nothing evil in any connotation about that telephone call.

Mr. GALLEGLY. Thank you, Mr. Ruff.

Ms. Lewinsky testified that she spoke to the President three times about her testimony in the *Jones* case. All three conversations were within a one-month period prior to the President's deposition. Vernon Jordan also told the President Ms. Lewinsky had been subpoenaed. President Clinton was asked at his deposition if anyone told him that Ms. Lewinsky had been served with a subpoena. He answered, "I don't think so."

Mr. Sullivan, on a previous panel, stated that this is not perjury only if the President genuinely forgot these conversations. Do you think it is really reasonable for us to believe that the President completely forgot about those three conversations with Ms. Lewinsky about her testimony?

Mr. RUFF. I have to quarrel with your premise, Congressman. Because if you read the President's testimony I think you will see that he acknowledges knowing that Ms. Lewinsky had been subpoenaed. He questions whether it was Mr. Lindsey who first told him. The very fact that he frames it in terms of wondering who the first person who told him was suggests, it seems to me, that he was acknowledging——

Mr. GALLEGLY. He just didn't remember whether Mr. Jordan——

Mr. RUFF. I don't think you will find a question put to him, I will look at the record with you, if you would like, asking whether Mr. Jordan had advised him that Ms. Lewinsky had been subpoenaed.

Chairman HYDE. The gentleman's time has expired.

The gentleman from New York, Mr. Nadler.

Mr. RUFF. Mr. Chairman, can I take you up on your earlier offer?

Chairman HYDE. You surely may. A 10-minute recess. The committee stands in recess for 10 minutes.

[Recess.]

Chairman HYDE. The committee will come to order. Having finished with Mr. Nadler—I thought I could get away with that.

Mr. NADLER. I don't think so.

Mr. RUFF. I will chat with him later.

Chairman HYDE. The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you. Nice try, Mr. Chairman.

Mr. Ruff, I want to join my colleagues in thanking you for your presentation, and I hope this lays to rest any further declarations that the President and his supporters have avoided addressing the factual allegations in the Starr report.

I am, however, disturbed by the suggestion that the President's accusers have no obligation to prove their case with direct evidence or that the President must prove his innocence. I think you have done an outstanding job of showing that the Starr referral is, especially in view of the facts that he omitted and the including contradictory statements by some witnesses and omitting exculpatory statements by those witnesses, I think you have done a good job of demonstrating the referral is incomplete and misleading.

Now, some of the members of this committee and various newspaper editorials and other people have denounced the President's and the President's defenders' use of legalisms and hair-splitting when you and others have pointed out that what the President said did not meet the legal definition of perjury because his answers

were either—his statements were either not material because they were literally true even if perhaps somewhat misleading.

I would point out that nearly every member of this committee is a lawyer, so their disdain for the law is a bit disconcerting. But, more importantly, my question to you is, why are these legalisms important? Why not just forget about these legalisms and the hair-splitting and just admit to perjury or to lying under oath if that is necessary to make some editorial writers less hostile or to get a few more votes against impeachment? Why not just say, even if it is not really perjury or lying under oath, why is enforcing a precise legal definition of perjury important for all of our liberties?

Mr. RUFF. Thank you for the question, Congressman Nadler. As I indicated in my opening statement, we didn't just dream up the elements of perjury. They didn't spring full grown from the forehead of some legislator, judge or lawyer. They come to us from a jurisprudence that is very carefully designed to ensure that when there is a charge that a human being committed perjury, that is, knowingly lied, it can be distinguished from testimony that may be actually truthful, evasive, misleading but nonetheless the product of human frailty. We don't put people in jail for that, and we certainly don't impeach them.

So I think the legalisms that we are legitimately accused of using, we use them, no question about it, because that is what we believe best reflects the seriousness and the gravity of the offense that the Independent Counsel has charged the President with committing. No one is defending the morality of the underlying conduct. The President himself has said he was evasive and misleading, didn't want to help the *Jones* lawyers. But to get from there to a charge of perjury, even though I believe at the end of the day perjury itself in this setting would not warrant impeachment, requires a leap through hundreds of years of law and protection that has grown up around that particular charge.

Mr. NADLER. So, in other words, when we hear people saying, forget about these legalisms, forget about this hair-splitting, implying that even if the President didn't commit perjury under oath or meet the legal definition of lying under oath, forget about that, just say you did and then it will make some people happy, happier about voting against impeachment for the President, to do that would be—that would be a betrayal of his oath, would it not?

Mr. RUFF. Indeed, indeed.

Mr. NADLER. Thank you.

Let me ask you—let me also point out that it is interesting for members of this committee to advocate that since it is this committee that recommends to the House the legal definitions of things like perjury and other elements of the criminal code; and if they are too strict, it should be this committee that should change them.

I would also ask that some people have said that the President is incapable of fulfilling his duties.

Chairman HYDE. The gentleman's time has expired.

The gentleman from Florida, Mr. Canady.

Mr. CANADY. Thank you, Mr. Chairman.

Mr. Ruff, I want to thank you for your presentation here today. The President chose well when he chose you as his White House counsel.

Let me say also that I agree with some of the arguments that you have made both in your presentation here today and in the written submission to the committee. I agree with your conclusion that this committee should have clear and convincing evidence before we proceed with an article or articles of impeachment. And I agree with you that this committee should not rely on the referral's account of the evidence. I believe that we have an independent duty to look at the evidence.

I would quarrel with your contention that we have decided to rely on the referral. I don't think that is accurate. I think we all understand that we have to go behind the referral to look at the independent evidence that is before us. And your presentation has helped point us to the portions of that record before us that you believe are relevant to your client's defense, and that has been helpful to us.

But let me say that I am still frustrated by what I consider to be legal arguments that don't really meet the test of common sense and human experience. And we have heard about legalisms and I understand, I am a lawyer, I understand making legal arguments and legalisms. But there is a point beyond which things just don't make sense. And the contention that has been made that when the President testified in his deposition that he had no specific recollection of ever being alone with Ms. Lewinsky, that that was truthful, I just don't think meets the test of common sense and experience.

I understand that is your contention. But I have to respectfully submit, using that as an example, that it just does not stand up to analysis. I believe that when the President gave those answers he was lying, and I come to that conclusion reluctantly, but I think that viewing the evidence in context, one can only reach that conclusion.

And I would say that the talk about legalisms and hair-splitting, it isn't just coming from this side of the aisle. I quote Mr. Daschle, the Senate Democratic leader, who said he agreed with the people, this is in September, who have grown impatient with hair-splitting over legal technicalities. That is the Democratic leader in the Senate.

Mr. Gephardt himself said that he believed that this matter was going to rise or fall not on the fine distinctions of a legal argument but on straight talk and the truth. I am concerned that we are still not getting straight talk and the truth.

Now, let me also, as a legal matter, refer you to the *DeZarn* case which was decided just a few weeks ago by the 6th Circuit. This is a very interesting case dealing with perjury, and it has some comments which I think are directly pertinent to what we are considering here and which I candidly believe directly undermine some of your contentions. In that case, the court said——

Mr. RUFF. Can you give me the name again? I am sorry.

Mr. CANADY. It is the *DeZarn* case, the *United States* versus *DeZarn*, decided by the 6th Circuit, opinion filed October 14, 1998.

Mr. RUFF. Thank you.

Mr. CANADY. There the court said, a perjury inquiry which focuses only on the precision of the question, which you seem to be doing quite a bit, and ignores what the defendant knew about the subject matter of the question at the time it was asked misses the

very point of perjury. That is, the defendant's intent to testify falsely and thereby mislead his interrogators. Such a limited inquiry would not only undermine the perjury laws, it would undermine the rule of law as a whole, as truth seeking is the critical component which allows us to determine if the laws are being followed. And it is only through the requirement that a witness testify truthfully that determination may be made as to whether the laws are being followed. Indeed, that is the entire purpose of the sworn oath, to impress upon the testifier the need under penalty of punishment to testify truthfully.

I have to candidly submit that when the President was asked, "so I understand your testimony, is that it was possible then that you were alone with her, but you have no specific recollection of that ever happening," and he answered, "yes, that's correct, it is possible that she, while working there, brought something to me, and at the time she brought it to me, she was the only person there, that is possible," the President was lying.

Mr. RUFF. Congressman, may I have just a moment to respond?

Chairman HYDE. Surely.

Mr. RUFF. Obviously, I am not familiar with the case, and I will make myself familiar with it, and I don't know what setting it arose in. I don't think there is any difference of opinion, though, on the critical point that you seem to have been making. It is not that anybody gets to choose any little loophole in a question and slide through it and avoid prosecution. You have to look at the question, make a reasonable assessment of it, ask in a criminal case whether a jury would find it sufficiently precise or not, and then ask whether, in fact, the response to the question was such as would permit a perjury charge.

I don't know what the questions were in *DeZarn*. I would be glad to address those with you independently. But I don't think there is an underlying concern.

My position is that any reasonable reading of what happened in the Jones deposition would suggest that it, not to use a legal term of art, was a mess.

Chairman HYDE. The gentleman's time has expired.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Ruff, were you given a list of the allegations that we're actually pursuing? You are aware of the fact that Mr. Starr started off with 11 allegations with subparts. Two days ago, ABC News said that the Republicans were thinking of adding some new ones. Yesterday, Mr. Hutchinson added another statement of the grand jury that he thought might be added to the list. Mr. Graham this morning added another allegation. The scope of the inquiry has gone, has expanded and contracted to include the Willey matter and campaign finance committee matters and then not finance committee.

Have you been given a definitive list with specificity of the allegations that we are actually pursuing?

Mr. RUFF. No, I haven't, Congressman. The last list I saw was Mr. Schippers list of 15 points. It is an unusual experience for me to be making a closing argument without quite knowing what I am closing about, but——

Mr. SCOTT. Well, you are doing well. So I guess we have to guess what the allegations are and, skipping through, I think you ignored some of the allegations. 11, Count 11, "there is substantial and credible information that President Clinton's actions since January 17, 1998, regarding his relationship with Monica Lewinsky have been inconsistent with the President's constitutional duty to faithfully execute the laws." And he concludes, number 17, by saying, "this represents substantial and credible information and may constitute grounds for impeachment."

I did not hear you comment on part B of that, which cites that "Mrs. Clinton forcefully denied the allegations on January 17th, 1998, one day after the President's public denial", and cites her appearance on the Today show. Did you ignore that because you can't believe that we would actually pursue that particular allegation?

Mr. RUFF. Well, with limited time, Congressman, I wanted to touch on those points that I thought had the most weight. And whatever one might think about the allegation that the President himself misled the country, the notion that the First Lady misled the country and that that would lead to bringing a President down, putting him out of office did strike me as not worth devoting the small amount of time I had this afternoon.

Mr. SCOTT. Do you have a comment on the presumption of guilt that has been pronounced that if you don't—whether the evidence is there or not, if you don't prove your innocence, that in fact you will be presumed guilty? If nobody produces a witness, if it is zero to zero at the end, then you will be presumed guilty?

Mr. RUFF. Congressman, I truly do operate on the assumption in this body, made up as it is almost of all lawyers, that the basic principles are going to be enforced, which is, the burden is on those who favor impeachment to show by clear and convincing evidence that there are grounds for that. And I——

Mr. SCOTT. Can you get to a clear and convincing standard with uncross-examined, contradictory statements?

Mr. RUFF. I can't, as my opening statement reflects, conceive that, without some basis for assessing the credibility of particular testimony, you could achieve that result.

Mr. SCOTT. Okay. So without knowing what the allegations are, let us try to get to one of the allegations.

How do you conclude that Betty Currie—that the allegations involving Betty Currie, why she wasn't going to be a witness?

Mr. RUFF. Well, I think you need to understand that as you came to the President's deposition in the *Jones* case on January 17th you were essentially at the end of the pretrial process or almost at the end of pretrial process in that case. Ms. Currie, whose name was certainly not a secret to the *Jones* lawyers, given the amount of information they clearly had about these matters, had never put her on the list. She was very close to the President. That was no secret. They never subpoenaed her.

Let me just make—give you a small anecdote. The President sometimes has a way about him. And I was the victim of one of those. If you look at the grand jury transcript, you will find a moment in which, I forget which question he was asked, and he sort of looks at me across the room and says, I wish Mr. Ruff could answer that question. I was taken aback. We smiled at each other

and went on about the President's testimony. I trust that that didn't make me a participant in the Independent Counsel's investigation any more than his reference to Betty Currie didn't make her a part of the *Jones* case.

Chairman HYDE. The gentleman's time has expired.

The gentleman from South Carolina, Mr. Inglis.

Mr. INGLIS. Thank you, Mr. Chairman.

Mr. Ruff, if there were a trial involving the President for perjury, would anything that you have said here today be a fact in such a trial?

Mr. RUFF. I believe that many of the facts to which I referred and which I included in my presentation would be essential elements.

Mr. INGLIS. Would anything that you have said be a fact?

Mr. RUFF. No more than, with all due respect, Congressman, anything said by any member of this committee.

Mr. INGLIS. Right. The point is that you have not met the standard that Mr. Craig pointed out.

And, by the way, earlier I was listening intently in the committee room to what you were saying. But in the course—as Mr. Craig said earlier, in the course of our presentation today and tomorrow, we will address the factual and evidentiary issues directly. The score is now zero to five. Five groups have come before us. No one yet has addressed evidentiary matters.

Mr. Ruff——

Mr. RUFF. I absolutely disagree with that.

Mr. INGLIS. I understand you do, but you have just agreed that there are no facts that you have testified to.

Mr. RUFF. No, that is not at all what I said.

Mr. INGLIS. Let me ask you this, are there any witnesses that you would like to have called but have failed to call?

Mr. RUFF. Congressman, I think that question, with all due respect, betrays to me an inappropriate view of the process. This——

Mr. INGLIS. I understand—excuse me, with limited time, I understand what you are going to say. You are going to say that the burden of proof is not on you, and I think you are correct in that.

The point I am interested in making here is the normal White House spin operation is coming unglued under the light of accountability here, because here Mr. Craig raised a very high bar, and you are not meeting it. You are failing to meet what the White House spin put out at the beginning of this proceeding. And now that you have failed, you want to sort of split hairs again about what it is that you are doing here.

Let me ask you this—I understand your response. Let me ask you something very different. When the President said on January 26, 1998, the famous finger-wagging experience, "I did not have sexual relations with that woman, Ms. Lewinsky," was he lying?

Mr. RUFF. I responded to that question earlier, I forget who put it to me, Congressman, and I will respond again. The President has said flat out, no question about it, he intended to mislead the American people, and he did mislead them because he spoke in that—on that occasion on the assumption in his own mind that sexual relations meant sexual intercourse. Just a moment, Congressman. And he knew that most of the people listening to him

out there didn't understand the definition he was using and thus would be misled into believing that——

Mr. INGLIS. You see, I think that if you were consistent with your argument on page 72 of the 184–page submittal, I think your answer here today to the question I just put to you should be, no, he did not lie.

Mr. RUFF. That is what I said. I said he misled intentionally.

Mr. INGLIS. So what is the difference been misleading and lying?

Mr. RUFF. Because he believed, rightly so in his own mind, that he was telling the truth, that he used the word sexual relations to mean sexual intercourse and that he had not had sexual intercourse with Monica Lewinsky.

Mr. INGLIS. This is the heart of it then. That is not what he was saying. What he said subsequently is he lied when he said that with a finger wagging. But, you see, the finger wagging is the same as what he said earlier, that he didn't have sexual relations.

Mr. RUFF. I fear that your recollection of the facts and the record is incorrect.

Mr. INGLIS. Well, please straighten me. What is wrong here?

Mr. RUFF. You said the President admitted he lied. He didn't.

Mr. INGLIS. Well, leave aside the lying. Your word misleading—you like the word misleading better than lying. I understand that. For some reason, you like that better. But if it is not the truth, I don't think—under consistent theory with your submittal here, he was telling the truth when he said that he didn't have sexual relations with that woman, Monica Lewinsky. But he subsequently admitted to lying when he said that. I lied to you, the American people, when I said I did not have sexual relations with that woman.

Mr. RUFF. What he said was that he misled the American people, and that is what he did. He did it wrongfully. He has apologized for it.

And whatever your—Congressman, and I—look, I absolutely respect your right, however misguided I believe it to be, to have your own view of the record, but the fact is the President said that he misled the American people and he did it with malice of forethought because he wanted to hide this improper relationship.

Chairman HYDE. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

Mr. Ruff, I followed Mr. Inglis in asking questions this morning, and this is the question that I asked immediately after he asked his question this morning, so I am going to open it up and ask you the exact same question that I asked following him this morning. Is there anything in the referral or in any of the information that was submitted by the Independent Counsel to this committee that could be admitted in that form in a criminal proceeding?

Mr. RUFF. I suppose I might find a document or two in there, but the essential question is, could you simply dump that record in the laps of the Senate and say, go ahead and try the case? No.

Mr. WATT. So I can ball that one back up now.

Mr. RUFF. Well, I would put it in your pocket.

Mr. WATT. Wait on the next round of questions then.

I am struck by how my colleagues on the Republican side keep saying that this is not about sex, yet we have heard 2 hours worth of testimony from Mr. Starr and all of your testimony and none of

the basic underlying charges that we started out with in this investigation were even mentioned or hardly mentioned, and so I would like to go through a series of questions which you, I think, can answer very quickly just yes or no.

Mr. RUFF. I will do my best.

Mr. WATT. Is it true that the Independent Counsel back in 1994 was appointed to investigate matters related to Whitewater?

Mr. RUFF. That is correct.

Mr. WATT. And have we ever gotten a referral from the Independent Counsel on the Whitewater matter?

Mr. RUFF. No, sir.

Mr. WATT. And during his appearance before the committee on November 19, was that the first time that we were told that we would not be getting a referral on any Whitewater matter?

Mr. RUFF. The first I learned of any of those matters and their status was on that date.

Mr. WATT. And Mr. Starr, after that, investigated the alleged misuse of FBI files by the White House personnel; is that correct?

Mr. RUFF. That's correct.

Mr. WATT. And we found out last month that Mr. Starr—that was also a dry hole?

Mr. RUFF. Yes, sir.

Mr. WATT. And, next, Mr. Starr investigated firings of personnel from the White House travel office; is that right?

Mr. RUFF. Yes.

Mr. WATT. And we found out last month that that was a dry hole?

Mr. RUFF. Yes.

Mr. WATT. Do you recall the talk over the summer that the key to this whole case was the so-called talking points that were given by Ms. Lewinsky to Ms. Tripp?

Mr. RUFF. Yes.

Mr. WATT. Those are no longer an issue. We haven't heard a thing about those, have we?

Mr. RUFF. I think we now learned where they came from, yes.

Mr. WATT. Would you agree that only part of Mr. Starr's five-year investigation that hasn't been a bust is his investigation of the President's sex life?

Mr. RUFF. Well, I am not sure I would buy into your description. It is the only one that has reached this House.

Mr. WATT. It is the only one that is still going on that we are still talking about. And we got it over here, and then we start talking about investigating campaign finance matters. Do you remember that a week or so ago, a couple of weeks ago?

Mr. RUFF. I do.

Mr. WATT. And then we dropped that one, didn't we?

Mr. RUFF. We did.

Mr. WATT. And then the Republicans decided to expand the investigation into Kathleen Willey, you remember that?

Mr. RUFF. I do.

Mr. WATT. We dropped that one, too; right?

Mr. RUFF. I believe so.

Mr. WATT. And then the Republicans subpoenaed documents from Mr. Starr relating to John Huang, you remember that happening?

Mr. RUFF. I read about it.

Mr. WATT. And we withdrew that subpoena after a little while, in a couple of days; right?

Mr. RUFF. So I understand.

Mr. WATT. And then there was a point at which the Secret Service was going to get information about the President's dealings with other Arkansas women. You remember some discussion about that?

Mr. RUFF. Uh-huh.

Mr. WATT. They dropped that one, too.

Mr. RUFF. As far as I know.

Mr. WATT. So we are back to allegations about the President's sex life. That is basically what this is about, notwithstanding all the protestations to the contrary?

Mr. RUFF. Yes, sir.

Mr. WATT. Thank you, Mr. Ruff. I appreciate that.

I yield back, Mr. Chairman.

Chairman HYDE. Thank you, Mr. Watt.

The gentleman from Virginia, Mr. Goodlatte.

By the way, just parenthetically, a lot of things you just dropped ain't dropped. Just thought I would mention that.

Mr. WATT. It would be nice to know when we are going to get them.

Chairman HYDE. You will know in good time.

Mr. WATT. I am sure it will be next year in the next Congress.

Chairman HYDE. You got that right.

Mr. WATT. After the election.

Chairman HYDE. It is all after the election.

The gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. Thank you Mr. Chairman.

Mr. Ruff, I would like to follow up on a line of questions that the gentleman from Florida, Mr. McCollum, pursued with you earlier.

You said to us in your statement that, with regard to the grand jury testimony of the President, that two of the instances cited by the Independent Counsel you explained with what I would call and I think we have been calling today legalisms or legal hair-splitting, but on the third one, your answer was interesting to me. That was this issue of the nature of the relationship between the President and Ms. Lewinsky.

In that case you said to us, take the evidence in the light most favorable to Ms. Lewinsky, take the evidence as Ms. Lewinsky said it. Would that rise to being an impeachable offense?

I took that to mean an acknowledgment that if we do take the evidence as provided by Ms. Lewinsky, which I think is very strong and which is corroborated by her previous statements to other people, long before anybody knew anything about the significance of this, that she said to friends, the computer printout on her computer of an apparently half-written letter that makes reference to her description of the relationship, all of that corroborating her testimony, I do take it as correct.

And I would like you to explain to me why, if the committee does take that testimony as being the accurate testimony, and I believe that the vast majority of the American people on the issue of whether or not the President had any contact with her while this was going on would agree with her statement as well, as detailed as it is, why that does not constitute perjury.

Mr. RUFF. If, in fact, you were to believe Ms. Lewinsky's description of those particular events and conclude—in this setting by clear and convincing evidence or, since we are talking about perjury in a criminal case, beyond a reasonable doubt—that she was right and the President was wrong, then you could legitimately conclude that there was a basis for believing that a jury would find the President guilty of perjury.

But I suggest two things: First, and I think you heard exactly this from the panel this morning and I base this partly as well on my own prosecutorial experience, I can't conceive of a case going forward to a petit jury on that basis. But even putting that aside, what you have, in essence, is Ms. Lewinsky's saying X and the President saying not X. And the corroboration that you look to and that, with all respect, that Congressman McCollum looked to, I think is not a legitimate basis of support——

Mr. GOODLATTE. Let me respectfully disagree, and let me go to another point, because you have and I have very limited time here.

But you have also made the contention that this is simply about lying to cover up a personal embarrassment. But isn't it true, Mr. Ruff, that moments after the President completed that testimony before the grand jury he went before the American people and admitted an embarrassment, "which he acknowledged his side of what took place there? Isn't that really the reason why he committed what I think is that perjurious statement? Not to avoid embarrassment, because he had already embarrassed and disgraced himself, but for the purpose of covering up a previous lie in the testimony before the civil—the deposition in the civil case because of the fact that if he acknowledged what Ms. Lewinsky says took place, he would be acknowledging that what he said earlier were falsehoods and that he knew they were falsehoods in that case.

So his intent here was not to cover up an embarrassment but to avoid prosecution for a crime, that crime being perjury and obstruction of justice in the earlier case. And he compounded it 7 months later by continuing his perjurious activity by lying before the grand jury.

And I think that you have accurately stated that if we believe what Ms. Lewinsky stated, not only in her deposition but what she stated to other people over a long period of time, before it was ever even known that this was an issue, if we believe that, then the President of the United States has indeed committed perjury before the grand jury.

Mr. SENSENBRENNER [presiding]. The time of the gentleman has expired.

Mr. RUFF. May I have one moment?

Mr. SENSENBRENNER. Of course you can.

Mr. RUFF. Thank you.

Two points. One, the kind of "corroboration", that you refer to, statements to other people, for the reasons already addressed and

addressed by Mr. Davis at length this morning, simply would not fit into any prosecutor's calculations in deciding whether or not perjury had occurred.

Second, and this was the point I made in my opening statement, I believe, I am convinced and I think the weight of scholarly evidence would lead to the conclusion that, even if you reach that conclusion, that is your conclusion, not mine, about whether the President lied or not in that deposition, in that grand jury testimony, it still doesn't warrant removing him from office.

Mr. SENSENBRENNER. The gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. Mr. Ruff, thank you for being here today and for conducting yourself with such intelligence and clarity and dignity. I think that you have helped not just all of us but the American people to understand what some of these issues are.

I was interested in your earlier exchange with Mr. Gekas about the phrase "Treason, Bribery and other high Crimes and Misdemeanors?" Thinking back to all of the reading that I have done in the notes of the Constitution and the Federalist papers and the like, it seems to me clear that what the Founding Fathers had in mind with treason and bribery was to protect the integrity of the chief executive's loyalty towards the United States. And all the discussion I can recall in those original documents had to do with a fear that a chief executive could be the recipient of bribes and, therefore, have his loyalty diverted from the new country, the new America. They were also very concerned about titles and other emoluments and that their newly elected executive might become nobility, which they were trying to escape.

The other high crimes and misdemeanors had to do with the other acts that would subvert the Constitution that were not in the first two categories, and as we discussed throughout these proceedings, there are really two ways to look at that. One is in terms of conduct that is so egregious that it prevents the discharge of the constitutional duties of the President, and it occurs to me that that is not just a matter of an opinion. I'm interested in your comment on this.

In a sense, that is the one area that is really subject to the judgment of the American people, whether or not the President's duties can be discharged, thinking ahead, if we were to have a trial in the Senate on these charges for the next six months to a year, wouldn't we have to go and prove up how many Mideast peace settlements have been established, how many Northern Ireland peace settlements, how is the economy as part of that whole system? Wouldn't that be part of the evidence that would need to be put on?

Mr. RUFF. Thank God I've never had the opportunity to try an impeachment. There is no—first let me say that your analysis of the issue that Congressman Gekas and I were discussing was framed much more articulately than I did and I think is exactly correct.

The issue of the President's capacity to govern, whether it be Mideast, economy, Ireland, what have you, is what has to underlie every Senator's vote and indeed the vote of every member in this committee and the House. I'm not sure whether we would introduce evidence or whether it would simply be taken as a matter of

public knowledge as to what the President is doing and how he is doing it, and whether overturning the verdict of the election is going to damage our country.

Ms. LOFGREN. That's really the question we need to face, but I think there are other issues that obviously we are dealing with, which is what Professor Van Alstyne, Mr. Starr's former law professor, termed minor crimes, petty crimes.

As I was listening to both Mr. Inglis and Mr. Gallegly ask how could something be misleading and not a lie, I was thinking about cross-examination and sort of the issue of "did you spend $10 today" and you answered "ham sandwiches cost four bucks." It's the obligation of the questioner then to go back to the expenditure question. Do you feel that was done in this case vis-a-vis the President's testimony? Is that part of the problem why this misleading confusion has occurred?

Mr. RUFF. That's certainly a large part of it, Congresswoman Lofgren. I think any amongst the many trial lawyers here who go back and look at that deposition will realize that for whatever reason, there were—there was never a follow-up, and the example you give is a good one. And I might just note that at the very beginning of the deposition, Mr. Bennett, the President's lawyer, urged Ms. Jones' lawyers to ask the most special detailed questions and they declined to do so. And I think maybe that set a process in motion that we're living with today.

Mr. SENSENBRENNER. The gentlewoman's time has expired.

The gentleman from Indiana, Mr. Buyer.

Mr. BUYER. I reserve my time.

Mr. SENSENBRENNER. The gentleman from Tennessee, Mr. Bryant.

Mr. BRYANT. Thank you, Mr. Chairman.

Good afternoon, counselor. I just want to make a quick comment and ask you two or three questions. We're still having a problem in my district with some of your wording, and I say "you" collectively meaning the White House, in terms of squaring with the oath to tell the whole truth. Your concept that he can give incomplete testimony that seems opposite when you talk about giving incomplete testimony and telling the entire truth; also, the other part of the oath about nothing but the truth with evasion. They just seem opposite, how you can evade a question and say nothing but the truth and how you can give incomplete answers and say the whole truth. Because we understand that both misleading answers and evasive answers are all—all tend to thwart the judicial system in its efforts to get at the truth.

Let me ask you a couple of questions, if I could. I want you to—you put yourself in the President's mind today, and I want you to put yourself—this is a hypothetical—put yourself in the President's mind, his thinking process, and, using the *Jones* definition of sexual relations, could he agree that Monica Lewinsky had a sexual relationship with the President?

Mr. RUFF. If I understand your question, it is using the *Jones* deposition definition, the conduct that he engaged in with Ms. Lewinsky——

Mr. BRYANT. No, did she have a sexual relationship with him, the conduct she engaged in?

Mr. RUFF. I guess I would have to have the definition in front of me in the sense that she was the moving actor in whatever——

Mr. BRYANT. You haven't thought about this?

Mr. RUFF. No, I really have not.

Mr. BRYANT. The reason I asked that is she would have had a sexual relationship.

Mr. RUFF. Please don't hold me or my client to this, but I think that is probably correct.

Mr. BRYANT. Under his definition, he would not have had a sexual relationship with her?

Mr. RUFF. That is correct.

Mr. BRYANT. He has brought forth the idea that one party can have a sexual relationship with another party, but that other party not have a sexual relationship with the first party. That's my understanding.

Mr. RUFF. No, it isn't. It's not as though you and I were having this conversation in a vacuum. What he had in front of him is, I have to tell you, one of the strangest definitions I have ever seen, and in fact it was a one-sided definition and not a two-sided.

Mr. BRYANT. You've answered my question. She did and he didn't, so. Let me ask you also, you mentioned that the President—and you've made something of an apology today. The President has had two opportunities to give this committee, the House, testimony in these proceedings, the grand jury testimony to the Independent Counsel and his answers to the 81 questions. And you've indicated that, in your wording, his answers were evasive and misleading and even maddening. You left out incomplete, which Mr. Craig said yesterday.

Mr. RUFF. He'll remind me of that.

Mr. BRYANT. But now, with all due respect, that apology seems somewhat hollow. In fact, you helped the President over the Thanksgiving holidays construct the answers to those 81 questions, did you not?

Mr. RUFF. I sure did, yes, indeed.

Mr. BRYANT. And surely in preparation for his deposition, Mr. Kendall and probably others and you helped him prepare on how to answer those questions?

Mr. RUFF. No, only Mr. Bennett. I take no responsibility for it.

Mr. BRYANT. But your apology that boy, he's just a terrible client to work with, he's maddening, you folks are the ones helping him do that, and for you to come in today, it rings sort of hollow to apologize for that. You're responsible for this, too.

Mr. RUFF. I will take whatever responsibility falls on me, but let me make this point because I'm glad you raised the 81 questions. I know there's been a lot of discussion here and in the committee and the press about how somehow those 81 questions were stiff-arming the committee. I have to tell you I disagree with that, not only because of the introduction to them in which the President reflects his continuing contrition but because—very honestly those questions were framed, for example, "At 1:02 a.m. on February 18, did you have. . . The fact is that neither you nor I expect the President to do anything other than to say "I don't remember specifically, but I will tell you that in fact my records reflect I did have a conversation on that day."

Mr. SENSENBRENNER. The gentleman's time has expired. The gentlewoman from Texas, Ms. Jackson-Lee.

Ms. JACKSON-LEE. Thank you very much, Mr. Chairman.

Let me say to Mr. Ruff that your testimony has been both compelling, convincing, and understandable. And I just would like to take judicial note of the fact that you had already indicated to this committee if you thought that you were being asked to do something other than what an officer of the court should do, you would not be here or be still in the White House, and that's an understanding that you have made on the record.

But I do want to start from your premise, "Did the President do something so wrong deserving of impeachment?" Frankly, I have in my mind here a letter that I wrote to the President extending to him my concerns about issues in my district, particularly the energy industry with the enormous number of mergers and loss of jobs, and frankly have called upon his good services for us to begin to look at how to solve this portending crisis. I'd much rather be dealing with the needs of my constituents, but I'm obligated to be here.

And frankly we have to do the very best job that we possibly can. And so I want to just put in the record, because there seems to be again a lack of clarity about perjury, the words of Jim Cole, a public integrity lawyer here, and I think he says it in a way a layman can understand: "Perjury, it seems, comes down to what the person said, what they understood themselves to be saying, and what they understood the question to be."

And we've gone over and over this. I think we can't be any clearer. So let me say this. Let me change the score. Let me come into the game and change it. Five for the defense and zero for those who don't understand what we've been doing here these past two days.

But I would like to go straight to the question of this number 11 in the referral by the OIC, that says there is substantial and credible information that President Clinton's actions since January 17, 1998, regarding his relationship with Monica Lewinsky has been inconsistent with the President's constitutional duty to faithfully execute the laws. Included in that, subsets B and C, and he says the First Lady—can I say it again—"The First Lady, the Cabinet, the President's staff and the President's associates relied on and publicly emphasized the President's denial." I am speechless. The First Lady? Constituting abuse.

Can I ask you a question? Abuse of power requires use of power. Did President Clinton in any way ask any of the members of his Cabinet to use the powers of their office to help cover up his affair with Monica Lewinsky?

Mr. RUFF. No, Congresswoman. I think the point that's been made there in our submission that I think really goes to the heart of it is the President had already, and he's admitted it and we all have, misled the American people in public statements. It's a little difficult to contemplate a setting in which persons who listen to him make those public statements go out and say "I believe the President" and then he finds himself accused of misusing his power.

Ms. JACKSON-LEE. So he did not actively engage in meetings and conversations to devise strategy for them to go out and perform what has now been alleged to be abuse of power by their statements?

Mr. RUFF. Obviously I can't speak to all the discussions he had with Cabinet members and others, but the point that the referral makes, which is that they listened to the President say "I didn't do it" and then went out and said "I believe the President," struck me when I read it, particularly against the backdrop of the events of 1974, as an odd proposition to have constituted an abuse of power.

Ms. JACKSON-LEE. Let me go immediately to this other more chilling example, and that is the question of executive privilege and the use of the Africa statement. I cannot believe in the referral that—the distortion of what was actually said. Can you just comment on that? The question was about the First Lady's being covered by executive privilege, and this is now being cited as an answer to the question of executive privilege for everyone.

How did you find this, and did you find this stunning to have this left out, the entire transcript of the actual words of the President that would have said to us that he did not in fact lie by saying "I know nothing about it, I didn't talk to the lawyer." Could you just give me that again? It is chilling, it is pernicious. I cannot believe it.

Mr. RUFF. I'm going to surprise everybody by being kind to the Independent Counsel. What I believe happened is—forgive me, Washington Post, if you're here—they read the "Washington Post" story for that day, which carried only part of the dialogue and had relied on the very limited line they used as though the President was referring to executive privilege. So I don't attribute evil motive but I do attribute error, and that's what I wanted to bring to the attention of the committee.

Mr. SENSENBRENNER. The gentlewoman's time has expired.

The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. I thank the Chairman.

Mr. Ruff, you were asked earlier whether you believed the President lied under oath, and you replied that you would like to associate yourself with Mr. Craig, another lawyer of the President who believes the President did not lie under oath, rather than with one of the witnesses the other day, another witness presented by your side, Mr. Owens, who believed that the President did lie under oath; and that's correct, right?

Mr. RUFF. Mm-hmm.

Mr. CHABOT. Let me associate myself with Mr. Berman and with Mr. Schumer, both Democrats on this committee, who after looking at all the evidence in this case have concluded that the President did indeed lie under oath. Now, we may disagree as to what the consequences of that lie under oath might be but nonetheless, we've reached a conclusion that this President did lie under oath.

Let me turn to something else. You also said in your statement, and I quote, "It's clear that many in the majority have already reached their conclusion." Have you heard anything from the minority which leads you to believe that they haven't reached a conclusion or reached one quite some time ago?

Mr. RUFF. Congressman, I'm here with no, pretense. to represent the President of the United States in this proceeding. Obviously I would hope that we have convinced members of the minority and members of the majority that we are in the right here. My goal as an advocate, which is what I am today, is to reach the people whose minds I want to change, and that's what I was trying to do today.

Mr. CHABOT. Thank you. Also in your statement, you said that you were not going to, and I quote, drag us through the salacious muck that fills the referral. And I thank you for not doing that, but let's not forget that it was the President's own conduct which caused the subject matter of this hearing to be what it is.

Now, if he had lied about bribery, it would have been about that. If he had lied about a bank robbery, it would have been about that. In this case, he apparently lied under oath about a sexual harassment lawsuit, so that's what it's about, whether we like it or not.

Let me ask you this. Why do you think the President called Ms. Lewinsky, somebody he obviously knew quite well, "that woman"?

Mr. RUFF. You know, I don't know, Congressman. I think at that moment as he was standing there in the Roosevelt Room trying to be as forceful in his denial as he could be, those words came out. But I wouldn't begin to try to explain to you what caused that to happen.

Mr. CHABOT. He obviously knew her quite a bit better than referring to her as "that woman".

Mr. RUFF. Absolutely, and there's no question about it.

Mr. CHABOT. You stated in the preface to your written submission that you made to this committee that nothing the President has done justifies criminal conduct, correct?

Mr. RUFF. That's correct.

Mr. CHABOT. In that case, I assume that there's no reason for the President to grant himself a pardon before he would leave office for any criminal acts that he might have committed. Can you assure us that President Clinton will not pardon himself or that he will not accept a pardon from any presidential successor?

Mr. RUFF. Absolutely.

Mr. CHABOT. Thank you. Let me conclude by asking you this. In this written defense that you submitted to us, you again went into this legalese thing, which I really think is a mistake that you all do, and you talk about "alone" and you told this committee that the term "alone" is vague unless a particular geographic space is identified. I would strongly encourage you to drop that line of defense. I think if this President and his advocates would come forward and tell the truth, if they'd done that a long time ago, I don't think the President would be in the jeopardy he is in right now, and I would just strongly suggest that he come forward, come clean, tell the American people the truth, and let the chips fall where they may.

Mr. RUFF. I appreciate that.

Mr. SENSENBRENNER. The gentleman's time has expired.

The gentlewoman from California, Ms. Waters.

Ms. WATERS. Thank you very much. I too must join my colleagues in complimenting you on the job that you've done here this afternoon. I think you did a fantastic job of further taking apart really the allegations that we've been presented with and you

just—you were able to build on what was said by the witnesses who were—who this morning were discussing prosecutorial standards for obstruction of justice and perjury. They, too, did a fine job. I don't know what else can be done with these issues.

You've made it clear what the legal definitions of perjury are. We've discussed in detail obstruction of justice and bribery. The other side of the aisle, my colleagues cannot overcome the factual information that's been presented to us. As a matter of fact, the more we get into these allegations, the flimsier they are. I mean, in essence they're rather lightweight.

They would have some believe that we on this side of the aisle are simply some kind of liberals and that we're not paying attention and they don't know why this turns out to be a rather partisan effort. Well, let me just say this. We have members on this side of the aisle that I disagree with all the time. This turns out to be a partisan effort simply because the allegations are lightweight, they're flimsy, they can't prove the point, and the tactics that have been used by Ken Starr are tactics that many of us and I in particular have real problems with.

It is central to the civil rights movement of which I'm a part of, which my life's history is all about, that we pay special attention to the justice system, and we are absolutely focused on abusive tactics by prosecutors around this country. We are not happy about what happened to Monica Lewinsky. We're not happy about what happened to Julia Still. We're not happy about what happened to Rob Hill's son in the subpoena that was issued at the school. We're not happy about intimidation. So we cannot trust an investigation where these kind of tactics have been used.

And I want to just add to this. That we believe that Mr. Starr came with a bias. When Mr. Lowell, our attorney, questioned him here in this committee and asked him about connections of his law firm, about Mr. Richard Porter, about his contacts with Paula Jones' lawyer, he answered by saying things like "Well, to my best recollection" and "I'm not so sure I had those conversations with them," and then he said "I'm not sure" so many times until he finally ended up saying "Well, you can fault my judgment if you will, but just frankly it did not occur to me, as I think it happens to a lot of us in life." At the same time, we have colleagues from the other side of the aisle who claim any representations about the President that he did not recall is somehow lying.

I just want to get away from the flimsy allegations. They don't mean anything. I don't want to talk about the abusive tactics anymore. But I do want to talk about this bias that Mr. Ken Starr comes with.

Do you have information about contacts with Paula Jones' lawyers and/or information about the connection of his law firm with that case at all?

Mr. RUFF. I think what we know has been set out in our submission. It emerged during Mr. Kendall's cross-examination of Mr. Starr, and it certainly suggests that there were contacts and involvement with the Independent Counsel's law firm and the *Jones'* lawyers that in our view should have given serious pause to anyone who was undertaking this particular prosecutorial task.

Ms. WATERS. Did he tell Attorney General Reno about those tactics when he sought to expand his jurisdiction?

Mr. RUFF. Not to my knowledge, Congresswoman.

Ms. WATERS. Thank you very much.

Chairman HYDE. The gentlelady's time has expired.

Mr. Barr of Georgia.

Mr. BARR. Thank you, Mr. Chairman. Mr. Chairman, let me state for the record a couple of important items for those who believe perjury may not be a serious offense whether it is looked at in the context of a constitutional issue involving impeachment or in the context of criminal prosecutions.

I know that our learned witness is very, very familiar with the Federal sentencing guidelines which provide that perjury is even a more serious offense than offering, giving, soliciting, receiving a bribe. I know also he's very familiar, as the other attorneys are on this panel, that there are enhancements for sentencing under Federal criminal procedures for those in a position of trust, which I would presume all of us would believe includes the President of the United States of America. And I know that the witness is also intimately familiar with the U.S. Attorneys' manual that provides, quote, because false declarations affect the integrity of the judicial fact-finding process, all offenders should be vigorously prosecuted, closed quote.

So for any who believe that these are not serious offenses that we are looking at here, the procedures under the Department of Justice for United States Attorneys as well as for Federal judges in sentencing those convicted of the offenses of obstruction, bribery, or perjury, understand that they are indeed very serious.

With regard, Professor Ruff, to the procedures——

Mr. RUFF. You're taking me back too many years, Congressman.

Mr. BARR. More than we'd like to think.

Professor, with regard to some of the provisions of Title 18, I understand your reticence to go into great depth about perjury. I believe that the elements of perjury are here.

But let's put aside that for a moment and focus on some other provisions of Title 18 that I really believe are much more problematic for the President, and that is Section 1505, obstruction; Section 1512, tampering with witnesses; and of course for both of those you have to look at the definitions, which I'll come back to in a moment; as well as Section 1623, false declarations before a grand jury, which as you know does not contain the additional element of willful, just that a person makes false declarations knowing that they contain false material.

The problem is that when you look at these provisions of Title 18, as you know, one doesn't look at them just in a vacuum. One has to look at the definitions, and when one looks at the definition for misleading conduct, it means knowingly making a false statement. So, for example, if somebody walks into a room and makes a statement to somebody that either is or reasonably could be presumed to be a witness in an existing proceeding, and makes a false statement to them, they have engaged in misleading conduct which is—falls within—is the definition which applies to tampering with a witness.

So I think the President has a very serious problem when one looks at the statements that he made to Betty Currie the day after he gave his deposition in which he referred to her many times. So certainly he could presume—we've already established this morning that he was not acting as her attorney and she was not contemplating hiring him as her attorney, in which case it might make sense for him to talk with her about certain testimony that she might be giving, so I think one is left with the very clear inescapable conclusion that this was misleading conduct within the definition applicable to Section 1512, tampering with witnesses.

One also I think has to conclude that the President has other serious problems with regard to these provisions of Title 18 with regard to the definition of sexual relations. The definition of sexual relations, while you have correctly pointed out it does not include a specific reference to oral sex, it does include a very, very wide and expansive variety of activity that clearly falls within the definition—within the activity unrebutted by the President as late as today that Monica Lewinsky testified to under oath.

When you look at the fact that there were false statements, when you look even at the fact that even if we presumed they were not technically perjurious, I think clearly they fall within the ambit of these other provisions of Title 18, and notwithstanding that we all agree that you do not need to establish a criminal offense to impeach, I think clearly they do.

So I respect your arguments. They are indeed argument, eloquent as they are, but I think the President has a very serious problem in violating these provisions of Title 18.

Chairman HYDE. The gentleman's time has expired. The gentleman from Massachusetts, Mr. Meehan.

Mr. MEEHAN. Thank you, Mr. Chairman.

Mr. Ruff, in looking over pages 207 and 208 of the referral relative to the President's statements while he was in Africa, while you may view your comments as defending the Independent Counsel, I don't know. Where I come from, if you make a submission to any court of law and you're a prosecutor and you say to the judge, "Sorry, we've got that wrong, Your Honor, but we relied on the Washington Post" or any other newspaper, that generally would be the basis of admonishment from the judge, and I'm being kind. Prosecutorial misconduct potentially. But I think with that bit of misinformation, the report is consistent with a lot of information that is in this report.

Again, where I come from, a failure to provide exculpatory evidence or all of the evidence is the basis upon which in Massachusetts, that's what prosecutorial misconduct is all about, the failure to provide evidence which tends to show the innocence of the target of an investigation.

But let me go to the record. Mr. Ruff, in arguing that the President lied in his civil deposition about whether he had talked to Vernon Jordan about Ms. Lewinsky's involvement in the *Jones* case, the referral cites the following exchange:

Question. Did anyone other than your attorneys ever tell you that Monica Lewinsky had been served with a subpoena in this case?

President CLINTON. I don't think so.

Now, that might be a false statement by the President, except there's one problem. The referral failed to cite the entire exchange on this subject. The entire exchange was as follows:

Question. Did anyone other than your attorneys ever tell you that Monica Lewinsky had been served with a subpoena in this case?

President CLINTON. I don't think so.

Question. Did you ever talk with Monica Lewinsky about the possibility that she might be asked to testify in this case?

President CLINTON. Bruce Lindsey. I think—Bruce Lindsey told me that she was—I think maybe that's the first person who told me she was.

Now, the President's answer, "Bruce Lindsey," clearly is an answer to the first question about whether anyone asked the other attorneys—any of his attorneys told him that Ms. Lewinsky had been served with a subpoena. Indeed, it doesn't make any sense as an answer to the second question. The referral fails to mention the Bruce Lindsey answer. Fails to mention it.

Mr. Ruff, in light of this omission, is the referral's presentation on this subject fair or balanced?

Mr. RUFF. Both your analysis and your imitations are exactly on the mark.

Mr. MEEHAN. I don't mean to cut you off, but let me go to the obstruction of justice, the gifts. Mr. Ruff, the referral chose to accept Monica Lewinsky's claim that Betty Currie suggested the idea of picking up the gifts from Ms. Lewinsky's apartment rather than Ms. Currie's conflicting claim that Ms. Lewinsky initiated the transfer of the gifts. Now, in explaining why it believed Ms. Lewinsky's testimony, quote, made more sense than Ms. Currie's testimony, the referral noted that Ms. Currie drove to Ms. Lewinsky's house to pick up the gifts and then claimed, quote, the person making the extra effort-in this case, Ms. Currie is ordinarily the person requesting the favor, end quote. Now, that's incredible.

Let me repeat the rationale used by the referral to resolve the differences in the testimony between two key witnesses on a critical point. Quote, the person making the extra effort is ordinarily the person requesting the favor.

Mr. Ruff, do you think that that sort of speculation, and I guess you could call it pseudo-psychology, would ever be a legitimate or rational basis to draw this kind of a conclusion?

Mr. RUFF. I surely do not.

Mr. MEEHAN. Mr. Ruff, the referral claims the President encouraged Monica Lewinsky to file an affidavit which he allegedly knew would be false. This claim is based on the fact that during a December 17, 1998, conversation with Ms. Lewinsky about her filing an affidavit in the *Jones* case, the President allegedly repeated a cover story that he and Ms. Lewinsky had formulated early on in their relationship.

Now the President testified before the grand jury that he did not recall repeating that cover story on that date. So we have a case where the President's account conflicts with Ms. Lewinsky, and of course the referral believed Ms. Lewinsky.

But later on when the grand juror asked Ms. Lewinsky on August 20, 1998 whether she had any discussions about cover stories with the President after she learned she was a witness in the *Paula Jones* case, Ms. Lewinsky responded, "No, I don't believe so. No." Not in the referral.

Chairman HYDE. The gentleman's time has expired.

Mr. MEEHAN. Thank you.

Chairman HYDE. The gentleman from Tennessee, Mr. Jenkins.

Mr. JENKINS. Mr. Chairman, I would like to reserve my time.

Mr. HYDE. The gentleman reserves his time.

The gentleman from Arkansas, Mr. Hutchinson.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Mr. Ruff, I want to make sure I characterize this appropriately. The President has apologized for his personal conduct or misconduct, but he has denied any legal wrongdoing.

Mr. RUFF. That's correct.

Mr. HUTCHINSON. So if there's any violation of the law, it is fair to say that he has not accepted responsibility for that?

Mr. RUFF. He's accepted responsibility for his conduct. If someone determines—you described it, Congressman. Let me just try to be responsive. I want to be as responsive as I can be. He has taken responsibility for his conduct. We believe and I believe the better answer to the question is it was not criminal.

Mr. HUTCHINSON. Well, all right. I think that could have called for a simple yes or no. I will accept what you said.

Mr. RUFF. I apologize for that.

Mr. HUTCHINSON. Now, in your presentation of the defense, and I think you had as much time today as you wanted, and you did an excellent job, by the way, Mr. Ruff.

Mr. RUFF. Thank you.

Mr. HUTCHINSON. I was listening. You covered the allegations of perjury before the grand jury. You covered the abuse of office, and you covered the obstruction of justice charges. I did not hear any discussion from you on the allegations of perjury from the deposition testimony.

Mr. RUFF. I did cover it in this fashion. I said, I believe, in my opening statement that I think if you look back at the colloquies that occurred during that deposition, you'll be struck by the President's admitted, evasive, misleading answers which I do not believe were lies. But you will also be struck by the absolute mess the deposition was in terms of the questions that were put.

Mr. HUTCHINSON. I did spend some time last night looking over the President's response prepared by his lawyers to the charges, and if you have that, if you would refer to page 79 and 80, particularly page 80, I just wanted to ask you some questions about the civil deposition. The question deals with the charge that the President was not truthful when he was asked about his conversations with Monica Lewinsky and particularly whether she told him that she had been served with a subpoena in this case. And I would underline, "Did she tell you that?" And the answer was, "No."

The essence of the question is the conversation with Monica Lewinsky and whether the President learned from her that she had been served with a subpoena in the case.

Now, earlier, you said once again that the charge of false testimony—I'm at the top of the page on the right—is based on a wholly inaccurate reading of the President's deposition. The President acknowledged that he knew that Ms. Lewinsky had been subpoenaed.

Now, to me, that's not the issue addressed by the question, whenever you say the President acknowledged that he knew Ms.

Lewinsky had been subpoenaed. The question was, did Ms. Lewinsky tell you that she had been subpoenaed?

Mr. RUFF. And if you actually will go back and look at the context in which—I'm now looking at page 80. If you look at the context in which the Q and the A that are cited here and that you referred to occurred, there was a long series of questions about when was the last time that you saw Ms. Lewinsky, and it was in that setting that this question arose. In the broader setting of all the questions that were going back and forth with the President on this subject, the point we're making is—because this is the point that the Jones people were getting at—was did you know that she had been subpoenaed and, if so, at what time?

The critical issue I think you'll find in that context, Congressman, was not, was it she who told you? It was, in the setting of those meetings and conversations, did you know that she had been subpoenaed?

Mr. HUTCHINSON. Let me say, because I'm going to run out of time, that I would like to develop this factually for a long time with you, but it appears from reading your defense, that you set up a false charge and then you respond to the false charge. You're not responding to the charge of the perjury on the question "Did she tell you that she had been served a subpoena in this case?"

And on the next page, on page 81, there is a lengthy question and answer and you're critical of Mr. Starr, but here there is not a complete recitation of the Q and A in the deposition. There's a lot more that transpires in the deposition.

Chairman HYDE. The gentleman's time has expired.

Mr. RUFF. Indeed, I grant you that.

Chairman HYDE. The gentleman's time has expired.

The distinguished gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman.

I'll be very brief. Mr. Ruff, would you care to further elaborate on your answer to Mr. Hutchinson?

Mr. RUFF. I think the point I was trying to make, in no sense would we ever want to do what we indeed have accused Independent Counsel of doing and that is to skew the record here. But the point that I think needs to be made in response to Congressman Hutchinson's concerns is that the context in which this dialogue occurred was a dialogue over at what point did the President know that Ms. Lewinsky had been subpoenaed.

The issue, I think it's fair to say, and my colleagues behind me will elbow me if I don't have it right, was when the President last talked to Ms. Lewinsky, did he at that time know that she was—she'd been subpoenaed. In that setting, what is being done here, I think, in the Independent Counsel's analysis is to focus in on that one Q and A without grasping the full universe of questions and answers that were on that subject.

Mr. DELAHUNT. Thank you, Mr. Ruff.

Let me just say I generally want to extend my appreciation because you definitely have provided context and texture to the referral from the Office of Independent Counsel. And I hope the American people are listening.

You know, the President and the administration have been accused of hair-splitting, semantic gymnastics, and we're talking a lot

of conversation. Part of the dialogue today has been about the definition of sexual relations. And I really want to be clear, but it was not the President that suggested a definition of sexual relations in terms of the Paula Jones deposition. Is that a correct statement?

Mr. RUFF. That couldn't be more true, Congressman.

Mr. DELAHUNT. So it wasn't the President that insisted on a definition. In fact, it was counsel for Paula Jones?

Mr. RUFF. That's correct.

Mr. DELAHUNT. Do you remember—I remember seeing, I think it was on Fox-TV, Mr. Camarata who, when asked by a reporter or journalist, acknowledged that the definition was very confusing and convoluted. Do you have any memory of——

Mr. RUFF. I don't remember seeing that, but I will accept the——

Mr. DELAHUNT. You will accept that, though. Thank you.

In fact, my memory of the transcript is that, in a conversation with Linda Tripp, Monica Lewinsky herself said words to the effect that we're not really having sex unless you have sexual intercourse. Is my memory correct on that?

Mr. RUFF. Your memory is correct.

Mr. DELAHUNT. So, again, I'm going to repeat it because I think it's important to repeat. It was not the President that insisted on that particular convoluted, confusing definition of what constitutes sexual relations?

Mr. RUFF. That's correct.

Mr. DELAHUNT. Am I correct when I state that it was the judge that ruled that oral sex would not be considered within the concept of that definition?

Mr. RUFF. What she did was to strike those portions of the definition that would encompass that form of activity.

Mr. DELAHUNT. So it was the court that struck that particular aspect of the definition?

Mr. RUFF. That's correct.

Mr. DELAHUNT. Thank you. I yield back.

Chairman HYDE. The distinguished gentleman from Indiana, Mr. Pease.

Mr. PEASE. Thank you, Mr. Chairman.

Mr. Ruff, I, too, want to thank you for your time and your presence and for your demeanor before this committee. You're a very effective advocate.

I would like for you to address what appears to me to be an inconsistency between your strong assertion that the committee should not consider—when we review perjury, we must look at the underlying behavior, but when we look at executive privilege, we cannot look at the underlying behavior, in both cases it being the personal behavior of the President.

Mr. RUFF. No. I appreciate the opportunity to clarify that, because I don't believe there's any inconsistency at all. Let me describe for you what happened in the executive privilege setting so that I think that will make it clear.

Initially, the Independent Counsel took the position that no conversation that had anything to do with Monica Lewinsky could be covered by executive privilege because it all arose out of the President's personal conduct. It was that issue that we litigated before Judge Johnson.

The position we took was not that we were entitled to assert executive privilege over matters involving the President's personal responsibility, his personal liability, whatever it may have been, but that only to the extent that we were advising the President in the conduct of his official business. For example, what to do with the State of the Union address, which as you know came up six days after all of this broke, or how to deal with press questions in the setting in which he was meeting with Prime Minister Benjamin Netanyahu or Chairman Arafat, and his meeting thereafter with Prime Minister Blair.

It was in those official areas of conduct that we were saying you may not inquire, and it's that—that's the distinction that I think is the difference between those two.

Mr. PEASE. Thank you.

I don't want to misstate what I think I concluded from your presentations about the difference between misleading and lying, that you admit in many ways that the President misled the public but he did not lie because in his mind he technically was telling the truth on whatever the point might be at the time. Is that a fair assessment?

Mr. RUFF. That's fair.

Mr. PEASE. Do I understand that to mean, then, an assertion that that there is no objective standard for truth, that it is merely the subjective analysis of what one believes to be true at a moment in time?

Mr. RUFF. Absolutely not. The case law—if I were in a courtroom now instead of in this hearing room, we would be talking about what the case law establishes, and it is case law I think that we can all accept which is you have to make an assessment: Is the person who tells you that's what's in his mind telling you the truth? You make that assessment—of whether you believe the person who is telling you that—by asking whether there is corroboration for it, whether under the circumstances that is, in fact, a plausible, believable explanation of what was in his mind. And, most importantly, and this is really the crux of it, is what he is telling you was in his mind a reasonable interpretation of the facts? That's the test.

Mr. PEASE. Fair enough. Thank you very much.

I yield the balance of my time to Mr. Canady.

Mr. CANADY. Thank you.

Mr. Chairman, I ask unanimous consent to place in the record a letter from Donald Alexander, the former Commissioner of the I.R.S., and other materials relating to some of the argument that's been made concerning the action of the 1974 inquiry on the tax fraud article of impeachment against President Nixon.

Mr. HYDE. Without objection, so ordered.

[The information follows:]

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December 9, 1998

Hon. Henry J. Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

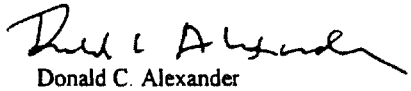
Re: Watergate: Impeachment Tax Article

Dear Mr. Chairman

In support of their claim that lying under oath is not impeachable, some Democrat Congressional veterans claim that President Nixon was not impeached "for lying on his tax returns". As they know, or should know, President Nixon was never shown to have "lied on his tax returns". Henry Ruth's article in yesterday's *Wall Street Journal* is accurate.

I was Commissioner of Internal Revenue during Watergate, and the Internal Revenue Service investigation of President Nixon's income tax returns is discussed, thoroughly and accurately, in Book X, Tax Deduction for Gift of Papers, Committee on the Judiciary, Statement of Information (May-June, 1974). Pages 387-88 (attached) of Book X show that the Internal Revenue Service concluded that it could not even recommend the assertion of the civil fraud penalty, much less criminal fraud. Therefore, the argument that the rejection of the Nixon impeachment tax article somehow supports the proposition that lying under oath or perjury is not impeachable is totally fallacious.

Sincerely yours,



Donald C. Alexander

Enclosure

6. ROBERT BROWNE MEMORANDUM, MARCH 22, 1974

Consideration Of The Assertion Of The 50% Civil Fraud Penalty

Based on the present information available there does not appear to be sufficient evidence to recommend the assertion of the 50% civil fraud penalty in this case.

The following individuals, although interviewed, have not submitted to questioning under oath:

Edward L. Morgan
Ralph Newman

John Erlichman has not been interviewed.

All of the above individuals had direct or indirect contact in the preparation of the tax return and could possibly testify under oath or a grant of immunity and possibly connect the taxpayer with the preparation of the tax return and therefore change our recommendation against the 50% civil fraud penalty.

To date our investigation has revealed the following and for these reasons we feel we could not sustain the 50% civil fraud penalty.

A - It is obvious that the taxpayer desired to make a gift of his vice presidential papers because of the financial benefit to him for tax purposes. This was legitimately accomplished by the taxpayer with respect to his 1968 Income Tax.

B - The taxpayer hired Ralph Newman to appraise his papers and paid him $25,000. Ralph Newman testified relative to his appraisal of the papers. Although there is some conflict with his testimony and others as to the dates he performed this service we feel this conflict is immaterial since the date of appraisal is irrelevant.

C - Vice presidential papers were delivered to the archives in March 1969.

D - Edward L. Morgan testified that In April 1969 he signed a deed in California in the presence of Mr. DeMarco. This is corroborated by his former secretary.

E - Mr. DeMarco was interviewed and corroborated Morgan's testimony.

F - Mr. DeMarco and Mr. Kalmbach testified that his contact with the White House for financial information was with either Mr. Erlichman or Mr. Morgan.

6. ROBERT BROWNE MEMORANDUM, MARCH 22, 1974

G - Mr. DeMarco has testified that he spent approximately 15 minutes with the taxpayer reviewing the finished return before getting the taxpayer or his wife to sign.

H - Mr. DeMarco's secretary testified that she remembered typing two deeds, one in March or April 1969, and one in April 1970.

I - There is no information available linking the taxpayer with the actual preparation of his return.

See attachment

In summary, it is our opinion that to sustain the assertion of the 50% civil fraud penalty on this return it would be absolutely necessary to have affirmative testimony by some or all of the individuals mentioned above. To date not one of the witnesses has testified in this matter.

CHARLES T. CANADY
12TH DISTRICT, FLORIDA
COMMITTEE ON THE JUDICIARY
CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON AGRICULTURE

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Congress of the United States
House of Representatives
Washington, DC 20515–0912

December 9, 1998

The Honorable Thomas M. Barrett
1224 Longworth House Office Building
Washington, DC 20515

Dear Mr. Barrett:

Yesterday you maligned me for certain comments I made to Wayne Owens concerning his testimony to the Committee. Your comments were apparently designed to bolster the credibility of Mr. Owens and his erroneous version of the Judiciary Committee proceedings in 1974 concerning the proposed article of impeachment against President Nixon for tax fraud.

I can only assume that your comments were made because you had not fully reviewed the statement made by Mr. Owens in the debate in 1974. For your information, I attach the text of Mr. Owens' comments from the record of the proceedings of the Nixon impeachment inquiry.

Mr. Owens' fundamental point in his recent statements has been that in 1974 the Judiciary Committee decided that tax fraud by a President was not an impeachable offense.

It is, of course, undisputed that the Judiciary Committee rejected the proposed tax fraud article against President Nixon. It is also undisputed that a small number of Committee members stated the view that tax fraud would not be an impeachable offense. That view is illustrated by the comments of Mr. Waldie -- which also appear in the attachment -- that in the tax fraud article there was "not an abuse of power sufficient to warrant impeachment . . . ."

The record is clear, however, that the overwhelming majority of those who expressed a view in the debate in opposition to the tax fraud article based their opposition on the <u>insufficiency of the evidence</u>, and not on the view that tax fraud, if proven, would <u>not</u> be an impeachable offense.

The record is also clear that Mr. Owens himself opposed the tax fraud article because of the "<u>lack of evidence</u>" to support it. No rational person familiar with the English language could read the attached statement by Mr. Owens and reach any other conclusion.

The portion of the statement cited by Mr. Owens does nothing to undermine this conclusion. Mr. Owens expressed his "belief" that President Nixon was guilty of misconduct. He went on to state that "on the evidence available" Mr. Nixon's offenses were not impeachable. Mr. Owens discussed his unavailing efforts to obtain additional evidence that would tie "the President to the fraudulent deed" or that would otherwise "close the inferential gap that has to be closed in order to charge the President."

These comments make it clear that if "hard evidence" had been available to prove tax fraud by President Nixon, Mr. Owens would have in fact supported the article of impeachment for tax fraud. Why would Mr. Owens be looking for evidence of fraud "to close the inferential gap" if he believed that tax fraud would not be an impeachable offense?

In his testimony yesterday Mr. Owens did the Committee a disservice by distorting the 1974 proceedings of the Committee. I did my best to set the record straight. I will continue to do so.

Sincerely yours,

Chas. T. Canady

Charles T. Canady
Member of Congress

CTC:mc

Mr. JENNER. You are really asking two questions. To the last portion of your question, the answer is yes, as to whether the gift had been completed.

Mr. COHEN. And he wouldn't necessarily know whether the gift had been——

The CHAIRMAN. The gentleman has consumed 2 minutes.

Mr. COHEN. He wouldn't necessarily know whether the gift had been delivered necessarily by looking at his tax return, would he?

Mr. JENNER. That is very difficult. It depends on what knowledge he had.

Mr. COHEN. But not on the tax return itself?

Mr. JENNER. Not from the face of the return, unless he knew the return didn't correctly reflect what he otherwise knew.

Mr. COHEN. Just one final point. I have heard the IRS praised day after day by my good friend, Mr. Sarbanes from Maryland, for its integrity, that it did not bend and yield to the pressures of the President of the United States and the question I would ask, if in fact there was criminal fraud involved, ask yourself this question. Wouldn't this independent agency have asked the Justice Department to bring it before the grand jury for prosecution?

Now, I yield to my good friend from California, Mr. Waldie.

The CHAIRMAN. The gentleman is recognized.

Mr. WALDIE. Mr. Chairman, I want to speak against this article.

The CHAIRMAN. The gentleman has 1 minute and 15 seconds.

Mr. WALDIE. I speak against this article because of my theory that the impeachment process is a process designed to redefine Presidential powers in cases where there has been enormous abuse of those powers and then to limit the powers as a concluding result of the impeachment process. And though I find the conduct of the President in these instances to have been shabby, to have been unacceptable, and to have been disgraceful even, I do not find a Presidential power that has been so grossly abused that it deserves redefinition and limiting. If there has been any abuse of a Presidential power it has been that the President may have utilized his office to cower the Internal Revenue Service from conducting a complete and thorough investigation. That has not been alleged. If that had been the case, that should have been included within article II of yesterday's action on this committee, when we were dealing with the failure of the President to faithfully execute the law.

I do find then, that this is not an abuse of power sufficient to warrant impeachment and thereby a redefinition and a limitation of that power, and I hope the article will be rejected.

The CHAIRMAN. The time of the gentleman has expired.

The gentleman from Michigan has 15 minutes remaining.

Mr. HUTCHINSON. How much time has the gentleman from——

The CHAIRMAN. The gentleman from Iowa has 12 minutes remaining. I recognize the gentleman from Michigan.

Mr. HUTCHINSON. Mr. Chairman, I yield 5 minutes to the gentleman from Virginia, Mr. Butler.

The CHAIRMAN. Mr. Butler is recognized for 5 minutes.

Mr. BUTLER. Thank you, Mr. Chairman. I yield 2 minutes to the gentleman from Utah, Mr. Owens.

The CHAIRMAN. Mr. Owens.

Mr. OWENS. I thank the gentleman from Virginia.

I believe Mr. Nixon did knowingly underpay his taxes in the 4 years in question by taking unauthorized deductions, and that he knowingly ordered or caused to be ordered improvements on his properties in Florida and California at Government expense. These are offenses against the people and I think the Government should pursue its remedies.

But you don't impeach for every offense, nor, on the other hand, do you excuse any offense by saying others did it. But whether to impeach or not is a question of judgment permitted to each of the members. Is it sufficient? Is it that serious? And on the evidence available, these offenses do not rise, in my opinion, to the level of impeachability.

It is not sufficient to the standards I set. I promised the people in Utah when I sat down to impeachment, that I would impeach only if there were hard evidence and which was sufficient to support conviction in the Senate, and I found it in four instances and I do not find it in this sixth, to which I feel I must apply the same remedy.

At least twice in the past, once at the first presentation of evidence and once as recently as 2 weeks ago, I asked the staff to obtain the sworn testimony of the President's attorneys and the appraiser and others. They were unable to get it, as I understand, because of the expressed wishes of the Special Prosecutor, Mr. Jaworski, and so we are here having to decide this issue without any hard evidence which will sustain tying the President to the fraudulent deed or which will support, in my opinion, the inference and close the inferential gap that has to be closed in order to charge the President——

The CHAIRMAN. The gentleman has consumed 2 minutes.

Mr. OWENS [continuing]. With an impeachable offense and based on that evidence, I urge my colleagues to—based on that lack of evidence, I urge my colleagues to reject this article.

Mr. BUTLER. Mr. Chairman, I yield 2 minutes to the gentleman from Arkansas.

Mr. THORNTON. I thank the gentleman for yielding. I think it is apparent that in this area there has been a breach of faith with the American people with regard to incorrect income tax returns and the improper expenditure of public funds. But it is my view that these charges may be reached in due course in the regular process of law.

This committee is not a tax court nor criminal court nor should it endeavor to become one. Our charge is serious and full enough, in determining whether high crimes and misdemeanors affecting the security of our system of Government must be brought to the attention of the full House, debated there, and if found to exist, presented to the Senate. And to my view, by so doing and by bringing those serious charges to the attention of the House which we have already brought we are doing our part to ensure that this system of justice—which will enable all men to receive equal treatment before the law—will continue and can be applied in these instances which have been described to us tonight.

Mr. BUTLER. I thank the gentleman Mr. Chairman

The CHAIRMAN. The gentleman from Virginia has 1 minute.

Mr. BUTLER. Mr. Chairman, I would like

The CHAIRMAN. One and a half minutes remaining. I am sorry.

Mr. CANADY. Having put that in the record I want to say, Mr. Ruff, you quarreled with the Independent Counsel's presentation of facts, and I have to quarrel with your presentation of the facts relating to the committee's dealing with the tax fraud article against President Nixon.

In your submission to the committee, I believe you really misrepresent the facts there. You quote four members who—one of whom you quote totally out of context for the proposition that the committee decided that tax fraud was not an impeachable offense, when the fact of the matter is and the record shows that 12 members of the committee, the vast majority of those who expressed an opinion on this subject in the debate, based their decision on the conclusion that there was simply insufficient evidence that tax fraud had been proven. And I think that's a significant omission in your report.

Mr. RUFF. Can I just respond briefly, Mr. Chairman?

Chairman HYDE. Yes.

Mr. RUFF. If in fact our description of those events is in any fashion misleading, I will see to it that it is corrected and resubmitted to the committee. And I will go back and look at it, and I will respond directly to you.

But I believe, and I don't—I haven't flipped through it, but I believe what you'll find, in essence, is that we acknowledge that there were many different opinions as to why no tax count ought to be returned.

Mr. CANADY. I suggest you read it.

Mr. RUFF. But that there were three or four, including Congressman Railsback, Congressman Hogan, and I forget who the others were, who said specifically I don't think tax evasion rises to the level of an impeachment.

Mr. CANADY. That's not what it says.

Mr. RUFF. I will see to it that it is corrected if it doesn't.

Mr. MCCOLLUM. I would like to ask unanimous consent, Mr. Chairman.

Chairman HYDE. The gentleman from Florida is recognized for a unanimous consent request.

Mr. MCCOLLUM. I would like to ask unanimous consent to put in the record at this point in time the Congressional Research Service report to you on the compilation of presidential claims of executive privilege from the Kennedy through the Clinton administrations.

Chairman HYDE. Without objection, so ordered.

[The information follows:]

Congressional Research Service • Library of Congress • Washington, D.C. 20540

Memorandum December 9, 1998

TO : Honorable Henry Hyde, Chairman
House Judiciary Committee
Attention: Will Moschella

FROM : Morton Rosenberg MR
Specialist in American Pubic Law
American Law Division

SUBJECT : Compilation of Presidential Claims of Executive Privilege From The Kennedy Through the Clinton Administrations

---

You have requested that we provide a compilation of presidential claims of executive privilege from the Kennedy through the Clinton Administrations. In response, in view of the short deadline imposed, we submit the following necessarily brief recounting of such assertions.

1. Kennedy

President Kennedy established the policy that he, and he alone, would invoke the privilege. Kennedy appears to have utilized the privilege twice with respect to information requests by congressional committees. In 1962, the President directed the Secretary of Defense not to supply the names of individuals who wrote or edited speeches requested by a Senate subcommittee investigating military Cold War education and speech review policies. The chairman of the subcommittee acquiesced to the assertion. The President also directed that his military adviser, General Maxwell Taylor, refuse to testify before a congressional committee examining the Bay of Pigs affair. See Mark J. Rozell, "Executive Privilege." (1994), at 46-47.

2. Johnson

President Johnson although he announced that he would follow the Kennedy policy of personal assertion of executive privilege, apparently did not do so in practice. Rozelle, *supra*, at 47-48, catalogues three instances in which executive officials refused to comply with congressional committee requests for information or testimony which involved presidential actions but did not claim they were directed to do so by the President.

3. Nixon

President Nixon asserted executive privilege six times. He directed Attorney General Mitchell to withhold FBI reports from a congressional committee in 1970. In 1971 Secretary of State Rogers asserted privilege at the President's direction to withhold information from Congress with respect to military assistance programs. A claim of privilege was asserted at the direction of the President to prevent a White House advisor from testifying on the IT&T settlement during the Senate Judiciary Committee's consideration of the Richard Kleindienst nomination for Attorney General in 1972. Finally President Nixon claimed executive privilege three times with respect to subpoenas for White House tapes relating to the Watergate affair: once with respect to a subpoena from the Senate Select Committee; again with respect to a grand jury subpoena for the same tapes by Special Prosecutor Archibald Cox: and finally with respect to a jury trial subpoena for 64 additional tapes issued by Special Prosecutor Leon Jaworski.

4. Ford and Carter

President Ford directed Secretary State Kissinger to withhold documents during a congressional committee investigation relating to State Department recommendations to the National Security Council to conduct covert activities in 1975. President Carter directed Energy Secretary Duncan to claim executive privilege in the face of a committee's demand for documents relating to the development and implementation of a policy to impose a petroleum import fee (1980).

5. Reagan

President Reagan directed the assertion of executive privilege before congressional committees three times: by Secretary of the Interior James Watt with respect to an investigation of Canadian oil leases (1981-82); by EPA Administration Ann Burford with respect to Superfund enforcement practices (1982-83); and by Justice William Rehnquist during his nomination proceedings for Chief Justice with respect to memos he had written when he was Assistant Attorney for the Office of Legal Counsel in the Department of Justice (1986).

6. Bush

President Bush asserted privilege only once, in 1991, when he ordered Defense Secretary Cheney not to comply with a congressional subpoena for a document related to a subcommittee's investigation of cost overruns in, and cancellation of, a Navy aircraft program.

7. Clinton

President Clinton has apparently discontinued the policy of issuing *written* directives to subordinate officials to exercise executive privilege. Thus, in some instances, it is not totally clear when a claim of privilege by a subordinate was orally directed by the President even if it was shortly withdrawn. We believe, however, the following 13 documented assertions may be deemed formal invocations. Nine (9) of the 13 assertions occurred during grand jury proceedings. We list the individual assertions and briefly identify them in view of the time structures of this request.

i. Kennedy Notes (1995)(executive privilege initially raised but never formally asserted)(Senate Whitewater investigation)
ii. White House Counsel Jack Quinn/Travelgate investigations (1996)(House Government Reform)
iii. FBI-DEA Drug Enforcement Memo (1996)(House Judiciary)
iv. Haiti/Political Assassinations Documents (1996)(House International Relations)
v. *In re Grand Jury Subpoena Duces Tecum*, 112 F. 3d 910 (8th Cir. 1997)(executive privilege claimed and then withdrawn in the district court. Appeal court rejected applicability of common interest doctrine to communications with White House counsel's office attorneys and private attorneys for the First Lady)
vi. *In re Sealed Case*, 121 F. 3d 729 (D.C. Cir. 1997)(Espy case)(executive privilege asserted but held overcome with respect to documents revealing false statements)
vii. *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21 (D.D.C. 1998)(executive privilege claimed but held overcome because testimony of close advisors was relevant and necessary to grand jury investigation of Lewinski matter and was unavailable elsewhere).
[The September 9, 1998, Referral to the House of Representatives by Independent Counsel Kenneth Starr detailed the following previously undisclosed presidential claims of executive privilege before grand juries that occurred during the Independent Counsel's investigations of the Hubbell and Lewinski matters]
viii. Thomas "Mack" McLarty (1997)(claimed at direction of President during Hubbell investigation but withdrawn prior to filing of a motion to compel).
ix. Nancy Hernreich (claimed at direction of President but withdrawn prior to March 20, 1998 hearing to compel)
x. Sidney Blumenthal (claim rejected by District Court, 5 F. Supp. 2d 21 (D.D.C. 1998). Dropped on appeal).
xi. Cheryl Mills (claimed on August 11, 1998)
xii. Lanny Breuer (claimed on August 4, 1998 and denied by Judge Johnson on August 11. *In re Grand Jury Proceeding*. Unpublished Order (Under Seal) (August 11, 1998).
xiii. Bruce Lindsey (claimed on August 28, 1998)

If you require further detail, please do not hesitate to call on us.

Chairman HYDE. Mr. Wexler.

Mr. WEXLER. Mr. Ruff, I think the American people owe you a debt of gratitude for today, I hope, finally putting to rest the argument that the President's lawyers, that the President's side, has not responded to the factual allegations against the President by presenting facts. It is undeniable that your 180-page submission—yours, Mr. Kendall's, Mr. Craig's—is replete with dozens and dozens of pages of factual rebuttal to the claims against the President; and certainly your talk here today enunciates many of those factual rebuttals.

I would like to talk to the issue of executive privilege, because Mr. Starr had some pretty strong condemnations of what I guess is your legal work or your legal advice.

On page 207 of the report, Mr. Starr claims that some of the executive privilege claims were patently groundless. Later on, on page 207, he refers to other assertions of executive privilege as frivolous.

If we turn to page 208, right after Mr. Starr either negligently misrepresented the quote to the President or just downright took it out of context, we don't know, he then cites the deception of, I guess, your legal advice and how it continued.

On page 209, he then seems to, I guess, get himself into your head, because he asserts to this committee that the executive privilege was not, and I quote, the executive privilege was not the only claim of privilege interposed to prevent the grand jury from gathering relevant information.

Mr. Ruff, please take the remainder of my time. Tell us why you recommended to the President to assert executive privilege. Tell us, was your advice to assert a frivolous claim a patently groundless claim?

Mr. RUFF. Thank you for the opportunity, Congressman.

I would like to think that I don't give advice to advance frivolous claims in any setting, much less with the President of the United States exercising a constitutional privilege.

The law in the District of Columbia circuit most recently embodied in a case called *Inre Sealed Case* which dealt with assertions of executive privilege in the Espy investigation, makes it absolutely clear exactly what the rules are and how broadly the presidential communication privilege extends and what the legitimate boundaries are for that privilege. And it was within the rules set down by that case that we advanced our claims here.

Indeed, we advanced them substantially more narrowly than we might otherwise have done if we were in a different setting, because we certainly realized the importance and the gravity of the investigation that was being conducted. Executive privilege was advanced, other than for the lawyers for whom it was wrapped under the attorney/client privilege, for only two individuals who by the middle of March had either had the claim withdrawn without a court ruling because we believed there was no need for it or the court had ruled against us and we did not pursue it.

So that whatever the Independent Counsel sees as the purpose, and I certainly would deny any intention improperly to withhold information from the grand jury, there can be no claim that it had even a measurable impact on the conduct of his investigation.

Mr. WEXLER. Thank you.

Chairman HYDE. The gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman.

Mr. Ruff, I'm going to hand you or have handed to you a couple of documents. If I could have staff do that. And while that's happening, I thought I would ask you a first question.

Yesterday, I asked Mr. Craig if he thought Judge Wright should deal with any wrongdoing by the President in the *Jones* suit, and he said yes. Mr. Ruff, if Judge Wright does take action against the President for his conduct in the *Jones* suit and the options run from mere admonishment to jail time, are you willing to commit on behalf of the President and the White House that he will be subject to Judge Wright's discipline, if any, and pledge not to invoke the defense that the President is not subject to jurisdiction because impeachment proceedings under the Constitution are the only method of disciplining a sitting President?

Mr. RUFF. I will say this, Congressman, and you pose a question to me I have not really had time to think about. I'll say this, that the President has stated through me, and he was very specific this morning, that he, like any other citizen, is subject to the law, and that would certainly include, because he has already been subjected to this civil proceeding, being subjected to the orders of the court, the question of whether while he is still in office a court could impose a sanction——

Mr. CANNON. Let me just shorten it and say that—you may argue that during his tenure in office but after he leaves office.

Mr. RUFF. After he leaves the office, just as I said——

Mr. CANNON. The reason I'm asking, is that it would seem terribly inconsistent to use such a defense when the White House is now seeking the extra constitutional measure of a censure.

You said earlier that the First Lady was found to be covered by the executive privilege. Does that mean that Judge Johnson agreed with the assertion that information could be withheld or only that in the proper context the President could assert privilege as to the First Lady's discussion?

Mr. RUFF. The latter.

Mr. CANNON. Because, in fact, the document or the information that was being sought was given to——

Mr. RUFF. That's true of all claims of executive privilege in this matter. The judge ruled that the showing finally made by the Independent Counsel overcame our interest in confidentiality.

Mr. CANNON. Certainly I had wanted to see how you were coming across on television when you invoked my name earlier. I was in the room watching out there. I was riveted by your description. Let me just say that you are coming across quite well, and I think that the way the information is coming forward I think will be helpful to people like Mr. Berman who has made up his mind that he disagrees with you. But that's not because of your demeanor, I will say.

On the other hand, you were quite rough with the Independent Counsel who you said misstated and misquoted the issues that I had dealt with earlier. Looking at the documents, let me have you look at the document labeled number one, and there's a yellow tab there that will show the part that's relevant. That's a declaration

filed by you which you referred to this morning under the seal with the D.C. District Court on March 17, 1998, in which you were attempting to assert executive privilege for Mr. Lindsey and Mr. Blumenthal.

On the very last page, under penalty of perjury, you assert, quote, I have discussed with the President these areas. Of course, you have many areas in there. But these areas of inquiry and the privileged nature of the information sought. The President has directed me to invoke formally the privileges applicable to these communications, unquote.

Now, a week later, while the first document was still under seal, the President was asked by the Washington Post in Africa about rumors that executive privilege was being asserted. Let me direct you to the document number two which is that article. Now, this is at a time when there was a great deal of public interest in the issue of executive privilege, and the President did not want to deal with that.

So let me read you the characterization by the Post in that case, which is Clinton, who has not yet acknowledged publicly even that he is asserting executive privilege, was pressed by reporters to explain why he is trying to block testimony. His voice curt and his expression cold—that's the Post reporter saying that, not me—the President responded as though he were a bystander in a controversy rather than its central character. All I know is I saw an article about it in the paper today, said Clinton, referring to the packet of news clippings faxed each morning to him on the road. I haven't discussed that with my lawyers. I don't know. You should ask someone who knows.

My question is, did you discuss with President Clinton asserting executive privilege on behalf of the First Lady in that document, in the document which you referred to?

Before you answer, let me just point out on page——

Mr. HYDE. Let me point out your time has elapsed. I don't want to foreclose Mr. Ruff——

Mr. RUFF. I would be happy to respond. I will be very brief.

Mr. CANNON. Would you do that in the context of paragraph 44 in which you specifically refer to the First Lady?

Mr. RUFF. The situation—and this is fully set out in pleadings subsequent to this, Congressman, which I would be happy to point you to so you will have a full record. This issue was litigated. Independent Counsel made the argument that somehow the claim as to the conversations between Mr. Blumenthal and the First Lady wasn't covered because it hadn't been adequately focused on by the President.

Now, in fact what I said in that subsequent litigation was quite consistent with my declaration and with normal process. We had to—because the Independent Counsel refused to provide any accommodation and tell us what he wanted—what areas he wanted to talk about, we had to go to the President and say they're inquiring about communications between Mr. Blumenthal and others and senior advisors to you, among whom is the First Lady. We don't know what they're going to ask. We need your authorization where an appropriate, protected communication among senior advisors is sought to be able to seek appropriate protection for it.

The President authorized that. Obviously, we could not, and I don't think anybody would have expected us to go back to the President when a witness was in the grand jury and say, Mr. President, they just asked Mr. Blumenthal about a conversation he had with Rahm Emanuel, the First Lady, whoever it might be. Would you specifically authorize us to assert the privilege? And the court accepted that position.

Chairman HYDE. I want to say to the gentleman from Utah that as your time is expiring, asking a complicated question prolongs, and I want to be fair to the witness. No, it isn't fair to you.

Mr. CANNON. Mr. Chairman, my question was very simple. It was only had he talked to the President about asserting the privilege as to the First Lady and I didn't hear the answer to that question.

Chairman HYDE. Well, okay. Well, we will just move on. Mr. Rothman from New Jersey.

Mr. ROTHMAN. Thank you, Mr. Chairman, and thank you, Mr. Ruff. I would like to make some observations. In my opinion, those at this point in our inquiry who are advocating the impeachment of President Clinton based on the charges raised by Judge Starr are going to do two very dangerous things. One is to expand the Constitution's definition or standard for impeachment without getting a vote of the people of the States, and, second, to turn traditional notions of fairness in American due process on their heads.

Let me explain. We were told by experts over the past several weeks that the original standard was treason, bribery and high crimes and misdemeanors against the State and that the words "against the State" meant against the three branches of government, interferring with the President's ability to carry on his affairs of State. The words "against the State," high crimes and misdemeanors against the State, that phrase "against the State" was taken out by the committee on style, without the intention of changing the meaning. Those on the other side of the aisle and those who wish to have the President impeached at this stage of the proceedings say, "Well, forget about the words "against the State," it is not there, so let's talk about personal conduct. It's got to be "if it's high crimes and misdemeanors, that's enough."

We heard from the panel today of Republican and Democratic prosecutors that no responsible prosecutor would raise the charges by Mr. Starr as crimes and would not indict on them. So then the folks on the other side of the aisle say, "Well, okay, it does not have to be a crime, it can just be a violation of the civil rule of law, and lying in a civil deposition is something that's bad and we have to tell our children that it's bad." And when we tell them that there are penalties by a civil court judge against lying under oath in a civil deposition and that as a matter of fact maybe that was one of the reasons the President settled that civil case for $850,000, they say, "Well, maybe that's not enough." What they want to do is add a new standard to the Constitution, treason, bribery, high crimes and misdemeanors and wrongful noncriminal behavior.

Well, I daresay that we can discuss the merits of that, but it is not presently in the Constitution. Then they want to say that Judge Starr presents evidence in his referral, which everyone agrees would be not admissible. Then yourself, Mr. Ruff, and Mr.

Kendall present your rebuttal to his referral which is also not admissible, so we have not one single fact witness, and they say, "Okay, but it's the President's obligation to prove his innocence," violating the long-standing notion in American justice that the accused does not have to raise a defense, because it is up to the prosecution first to bear the burden of proof here, a clear and convincing standard of proof. They say it can be accomplished without one single fact witness. I daresay that as I read history, the framers of the Constitution would have recoiled in horror and shock at the notion that we as a Congress must accept the word of a government official, here the prosecutor, the Independent Counsel, without a single corroborating fact witness, not only to convict someone of a crime but to impeach the President of the United States. They would say it is preposterous. Maybe they will present some fact witnesses. If you accept their notion that what has occurred requires impeachment of the President, then you must say that the constitutional definition of impeachable offenses has been expanded and amended without the people's say-so and without the States voting on it and that we are going to turn the presumption of innocence and the burden of proof on the prosecution on its head and make it a presumption of guilt and put the burden of proving one's innocence on the accused.

Chairman HYDE. I thank the gentleman. The gentleman from Utah has a unanimous consent request.

Mr. CANNON. Mr. Chairman, I request that the two documents I referred to earlier be inserted into the record.

Chairman HYDE. Without objection, so ordered.

[The information follows:]

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Memorandum of the White House in Opposition to OIC's Motions to Compel Bruce R. Lindsey and Sidney Blumenthal to Testify Concerning Conversations Protected by the Attorney-Client, Presidential Communications, and Work Product Privileges were served by hand or Federal Express, this 17th day of March, 1998 upon each of the parties listed below:

Kenneth W. Starr, Esq. Independent Counsel Office of the Independent Counsel 1001 Pennsylvania Avenue, N.W. Suite 490 North Washington, DC 20004	Independent Counsel
Charles F. C. Ruff, Esq. Counsel to the President The White House Washington, D.C. 20500	Counsel to the President
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Mr. William McDaniel McDaniel & Marsh 118 West Mulberry Street Baltimore, Maryland 21201	Counsel to Mr. Sidney Blumenthal
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W. Neil Eggleston

W. NEIL EGGLESTON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: SEALED CASE.	)	Misc. No. 98-95 (UNDER SEAL)

DECLARATION OF CHARLES F.C. RUFF

I, Charles F.C. Ruff, do hereby declare:

I. Introduction

1. I am Counsel to the President of the United States. I have held this position since February 10, 1997. Prior to that time, from 1995 to 1997, I served as Corporation Counsel to the District of Columbia. From 1982-95, I was a partner at the Washington, D.C. law firm of Covington & Burling. During that time, from 1989-90, I served as president of the District of Columbia Bar. I also served as United States Attorney for the District of Columbia from 1979-82. From 1975-77, I served as Watergate Special Prosecutor.

2. In my capacity as Counsel to the President, I provide legal advice to the President regarding a wide variety of matters relating to his constitutional, statutory, ceremonial, and other official duties and the effective functioning of the Executive Branch. At the President's direction, I review various matters that have legal implications and advise him on particular courses of conduct. Those matters include, among numerous others, the assertion of privileges in response to requests for materials and testimony, including executive privilege, attorney-client privilege, and attorney-work-product privilege.

3. The White House Counsel's Office, as a whole, provides confidential counsel to the President, in his official capacity, to the White House, as an institution, and to senior advisors, in

particular, about matters that affect the White House's interests, including investigative matters. To this end, the Counsel's Office receives confidential communications from and provides advice to current and former White House personnel about matters of institutional concern. These individuals provide this information to and solicit advice from our Office with the expectation and understanding that such communications will remain confidential.

II. The *Jones* Litigation

4. In May 1997, the Supreme Court held in *Clinton v. Jones* that the Constitution does not require a stay of private litigation involving the President until after his term. *Clinton v. Jones*, 117 S. Ct. 1636 (1997). Thus, the *Jones* litigation was permitted to proceed during the President's term, with the Court making particular note that the potential burdens that this litigation may place on the President need to be taken into account by the trial court. This decision requires the President to balance two competing demands on his time: (1) his need to defend the *Jones* lawsuit and (2) the absolute requirement that he devote his full time and attention to performing his duties as President.

5. From my experience as a defense attorney in private practice, a civil lawsuit involving these kinds of allegations and monetary claims requires a substantial time commitment by a client, especially during the discovery phase of the litigation. I also found that most of my individual clients, in addition to fulfilling their obligations as a litigant, have a genuine and important interest in being actively involved in the ongoing litigation, including participating in strategy discussions and decisions. This level of commitment necessarily places a substantial burden on a client's schedule.

6. The President, as the Chief Executive of our Nation, has extraordinary demands placed on his time. His schedule cannot accommodate the many demands of his office, independent of his personal and family responsibilities. In most instances, the many competing obligations

facing the President require him to rely on his advisors to meet with certain people, attend meetings, gather information and advise him on particular matters.

7. Thus, the progress of the *Jones* litigation concurrent with President's second term has placed additional obligations on the President's schedule that, under the law, he must fulfill despite the current demands of his office. Consequently, the President must look to his advisors to assist him in determining how he can fulfill the requirements of the lawsuit while not abandoning his duty to the American people.

8. The lawsuit has also spawned issues and the need for decisions (*e.g.*, discovery, the deposition of the President, and the possibility of a resolution of the litigation prior to trial) that affect the Presidency and the President's ability to perform his duties effectively. The President's advisors, who know the scope and weight of matters before the President at any given time, are best situated to advise the President as to how various aspects of the *Jones* litigation may affect the Presidency or official matters. Accordingly, presidential advisors need to know about and discuss those litigation-related issues or matters that may affect the office so that they can give the President informed advice as to how he should proceed.

9. The media's interest in the *Jones* litigation has generated inquiries in hundreds of official presidential press conferences and briefings by the President, his press secretary, and other White House staff, whether held here or in other countries. Indeed, the volume of *Jones*-related inquiries that the White House receives sometimes eclipses the inquiries generated by official White House policy matters. Therefore, presidential advisors need the ability to have informed, candid, and frank discussions about the *Jones* litigation to prepare the President for these inquiries.

III. The Expansion of the Office of Independent Counsel Starr's Jurisdiction

10. On January 16, 1998, at the request of the Attorney General, the Special Division conferred jurisdiction on the Office of Independent Counsel Kenneth Starr ("OIC") to investigate whether "Monica Lewinsky or any other individual" suborned perjury or committed other federal crimes.[1] The allegations surrounding the OIC's investigation involve the President during his tenure, the White House, and many White House employees.

11. Since that time, the OIC has served 13 subpoenas for documents on the White House or current White House employees containing more than 30 separate requests relating to the Lewinsky investigation and calling for expedited production. The OIC has also served at least 25 current and former White House employees with subpoenas calling for their testimony before the grand jury. The OIC also has requested interviews from more than 30 current and former White House employees.

12. Every day since January 21, 1998, the White House has received a flood of press inquiries related to the Lewinsky investigation, and the subject has been raised in virtually every White House press briefing and presidential press appearance.

IV. White House Cooperation with the OIC Investigation

13. Consistent with the practice of my predecessors, as Counsel to the President, I have endeavored to cooperate with the OIC by maintaining an open and constructive dialogue and by responding expeditiously to its requests. Indeed, the White House has responded in a timely fashion to the OIC's document subpoenas and has produced all responsive materials it has

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[1] *Text of Reno's Petition for Starr*, ASSOCIATED PRESS NEWSDAY.COM, Jan. 29, 1998.

located, usually by the designated production date. To accomplish this task, the Counsel's Office circulated a directive to the entire Executive Office of the President's staff and, where appropriate, performed several targeted searches for information.

14. Many current and former White House staff members, other than Mr. Lindsey and Mr. Blumenthal, have been subpoenaed to testify before the grand jury regarding their knowledge of facts pertaining to the relevant time period surrounding the Lewinsky investigation. Others have been asked to submit voluntarily to an interview. I understand that all of these individuals have cooperated with the OIC, and none has asserted privilege over any information that they possess. In particular, the following individuals have provided testimony about their knowledge of this matter: Betty Currie, Patsy Thomasson, Timothy Keating, Stephen Goodin, Kris Engskov, George Stephanopoulos, Deborah Schiff, Marsha Scott, Leon Panetta, Evelyn Leiberman, Carolyn Huber, and Bayani Nelvis.

15. As explained more fully below, with respect to certain individuals subpoenaed to testify, I anticipated that their testimony might implicate confidential communications and information. In an effort to avoid any unnecessary delay in the investigation and needless confrontation, my staff notified the OIC that the issue might arise and discussed ways to reach a mutually agreeable accommodation prior to or following an individual's appearance.

V. Certain Information and Discussions Relating to the Lewinsky Investigation are Subject to Privilege

16. It is my understanding that this and prior administrations, Republican and Democratic, have recognized that, with respect to matters that relate to the President's performance of his duties and the functions of the Executive Branch, presidential advisors, and their staff, must be able to inquire into matters in detail, obtain input from all others with significant expertise in the area, and perform detailed analyses of all possible alternatives before deciding what advice and

information to provide the President. *In re Sealed Case*, 121 F.3d 729, 750 (D.C. Cir. 1997). The President has an important confidentiality interest in seeking and receiving advice -- an interest that is constitutionally based "to the extent this interest relates to the effective discharge of a President's powers." *United States v. Nixon*, 418 U.S. 683, 711 (1974).

17. Moreover, we treat executive privilege as extending to communications among advisors and their staff, even if not communicated directly to President, *In re Sealed Case*, 121 F.3d at 751-52, and to communications in their entirety, not just the deliberative or advice portions, including pre-decisional, final, and post-decisional materials. *In re Sealed Case*, 121 F.3d at 745.

18. The Lewinsky investigation involves allegations regarding the President's conduct toward a federal government employee during his tenure in office. This matter is inextricably intertwined with the daily presidential agenda, and thus has a substantial impact on the President's ability to discharge his obligations. Accordingly, in the course of executing his duties, there have been discussions among advisors and the President involving the Lewinsky investigation, and these discussions have been held in confidence and treated as subject to privilege.

A. **Discussion of Possible Proceedings by the House Judiciary Committee**

19. Under Article II of the Constitution, Congress possesses the power to initiate proceedings against a sitting President that can ultimately result in his removal from office. Thus, even the mere speculation about such proceedings raises serious issues that a President and his advisors must address.

20. In November 1997, an impeachment resolution was introduced in the House of

Representatives. The resolution did not contain specific allegations regarding the President. Rather, it broadly claimed that there was considerable evidence developed from various "credible sources" that the President had engaged in conduct designed to obstruct the legitimate Executive Branch functions. *See* H. Res. 304, 105th Cong., 1st Sess. (Nov. 5, 1997).

21. Only days after the Special Division expanded the scope of the OIC's investigation, members of the House Judiciary Committee renewed their public discussions about the possibility of initiating proceedings against the President in light of the allegations arising from the Lewinsky investigation.[2] Weeks later, the press continued to report that many people "would like to see [the President] impeached or forced to resign."[3] Congressman Robert Barr recently went so far as to state that "the Republican leadership is beginning to lay the groundwork . . . [for] impeachment proceedings . . . ."[4] Thus, the Lewinsky investigation not only relates to and affects the Presidency -- it also threatens it.

22. Statements by members of Congress and related reports have generated numerous inquiries, some directed at the President, about the possibility of impeachment proceedings.[5]

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[2] *Bryant suggests Clinton should consider stepping aside*, GANNETT NEWS SERVICE, Jan. 27, 1998.

[3] N. Gibbs, *Twin Perils of Love & War*, TIME, March 2, 1998, p.36-39; *see Clinton Accused: Guide to Impeachment* THE INDEPENDENT, Jan. 23, 1998, p.8; *'Smoking Gun' Could Trigger Bid to Boot Bubba*, NEW YORK POST, Jan. 23, 1998, p.9; *Clinton Is Becoming Increasingly Isolated As His Latest Crisis Deepens*, THE SCOTSMAN, Jan. 23, 1998, p.15; *Excerpt of A Telephone Interview With Morton Kondrake and Ed Henry of Roll Call*, 34 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 115 (Jan. 21, 1998).

[4] *Bob Barr Discusses Impeachment Process for Bill Clinton*, CNN BOTH SIDES WITH JESSE JACKSON (Feb. 15, 1998).

[5] JOINT PRESS CONFERENCE OF THE PRESIDENT AND PRIME MINISTER TONY BLAIR OF GREAT BRITAIN, Feb. 6, 1998; PRESS BRIEFING BY MIKE MCCURRY, Jan. 26, 1998; PRESS BRIEFING BY MIKE MCCURRY, Jan. 23, 1998; PRESS BRIEFING BY MIKE MCCURRY, Jan. 21, 1998.

Consequently, presidential advisors must gather information and formulate advice for the President about the Lewinsky investigation to address the myriad of issues and inquiries that the investigation raises in this context. In addition, the Counsel's Office must prepare to defend against any such proceeding.

B. Domestic and Foreign Policy Matters

23. The President's State of the Union address occurred days after the press reported the expansion of the OIC's jurisdiction and the allegations surrounding Ms. Lewinsky. The White House received numerous inquiries as to whether the President would address these allegations in his State of the Union address.[6] The President's advisors obviously were required to gather information, consider available options, and advise the President about how to handle this and related matters.

24. The President's ability to work with Congress to enact legislation is likewise affected by the Lewinsky investigation. Certain legislators have been described as "throwing up their hands at the prospect of doing any serious business,"[7] thereby significantly affecting the President's domestic agenda.[8] Indeed, Senate Majority Leader Trent Lott recently remarked that the Lewinsky investigation "is beginning to have an impact on the presidency, on the president and on his ability to deal with many very important issues for the future of our country -- from Social

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[6] *E.g.*, PRESS BRIEFING BY MIKE MCCURRY, Jan. 26, 1998.

[7] *Clinton Under Fire*, LOS ANGELES TIMES, Jan. 26, 1998, p.A17; *see also The President Under Fire: The Public View*, NEW YORK TIMES, Jan. 27, 1998, p.A1 ("most Americans fear that the scandal will interfere with his future ability to perform his job effectively"); *Alleged Clinton Affair Boosts call for Impeachment Probe*, STATES NEWS SERVICE, Jan. 22, 1998.

[8] *See Lawmakers Return Amidst Scandal*, AP ONLINE, Jan. 26, 1998.

Security to what's going on in Iraq to now what's going on in Kosovo."[9] Therefore, in discussing with the President his ability to achieve the Administration's domestic policy objectives, advisors must take into account the impact of issues arising out of the Lewinsky investigation on his efforts and advise him accordingly.

25. Based upon information from others, I understand that the Lewinsky investigation also affected the President's ability to address foreign policy matters. For example, during the recent crisis with Iraq, certain people speculated that the Lewinsky investigation might harm the President's ability to "influence" the public, thus rendering him incapable of garnering support for the U.S. position on this issue and ultimately negotiating a successful resolution with Iraq.[10] These same concerns were raised when the President addressed Middle East issues, including his recent meetings with Prime Minister Netanyahu and Mr. Arafat.[11] Therefore, the President's advisors necessarily discussed the Lewinsky investigation and advised the President so that he could effectively execute his constitutional duties regarding foreign policy matters.

C. Discussions Regarding the Assertion of Applicable Privileges

26. When an investigative body subpoenas the White House or one of its staff members for

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[9] *Lott Urges Clinton to Give Details*, ASSOCIATED PRESS, March 9, 1998.

[10] *Crisis Develops Inside the White House*, CNN LATE EDITION WITH WOLF BLITZER (Jan. 25, 1998); *see also*, *Twin Perils of Love & War*, TIME, March 2, 1998, p.36-39 ; *Republicans End Silence On Troubles Of President*, THE NEW YORK TIMES, March 1, 1998, sec.1, p.20, col.1; *It's Hard To Believe The Clintons*, CHICAGO TRIBUNE, Jan. 29, 1998, p.19; *Echoes of the past but a far cry from Watergate*, FINANCIAL TIMES, Jan. 24, 1998, p.3; *Scandal tests Clinton on Iraq crisis*, AGENCE FRANCE PRESSE, Jan. 24, 1998.

[11] *N.J. lawmakers worry Clinton's woes could hurt host of issues*, GANNETT NEWS SERVICE, Jan. 30, 1998; *It's Hard To Believe The Clintons*, CHICAGO TRIBUNE, Jan. 29, 1998, p.19 ; *Letters to the Editor: Sex and the president through media eyes*, THE SAN DIEGO UNION-TRIBUNE, Jan. 27, 1998, p.B-7.

information, White House confidentiality interests are often implicated. The Counsel's Office has always attempted to deal with these privilege issues in a careful and deliberate manner.

27. After ascertaining that a subpoenaed individual possesses confidential information, the decision whether to assert privilege over such communications or information is one that the White House approaches thoughtfully, deliberately, and seriously. First, we carefully review the nature and substance of the communication to determine its confidential nature. Second, we evaluate whether the assertion of the privilege is legally sustainable and otherwise appropriate. Finally, we brief the President and advise him in making the ultimate decision. Thus, this process involves core presidential decisionmaking.

28. Accordingly, presidential advisors have engaged in deliberations to determine whether it is necessary to advise the President to assert privilege over certain communications. These discussions are presumptively privileged.

D. Strategy Sessions involving Presidential Advisors and Counsel

29. The President is unable personally to keep abreast of every matter that is handled by or could possibly affect him or the Executive Branch. Accordingly, the President must rely on advisors to ensure the progress and development of these matters and, when appropriate, brief the President with information and advice that will permit him to make decisions and respond to inquiries. Often, issues arise unexpectedly, and thus advisors must always be prepared to assist the President on a moment's notice with the most recent, accurate and comprehensive information, and the full range of options relating to a particular decision.

30. The Lewinsky investigation is no exception to this process. As illustrated in the examples presented above, since first reported, this investigation has affected the President's

ability to execute his constitutional obligations and has been the primary subject of press inquiries. This investigation has also intruded on the work of the President and his immediate advisors and staff, and has raised issues involving privilege, witness availability and subpoena compliance. As a result, the President's advisors and counsel have held regular meetings to gather and exchange information, as well as to formulate recommendations, for the President.

VI. The Subpoenas to Bruce R. Lindsey and Sidney Blumenthal

A. Communications with the OIC before Grand Jury Appearances by Mr. Lindsey and Mr. Blumenthal

31. On January 30, 1998, the OIC served on Bruce Lindsey, Assistant to the President and Deputy Counsel, a subpoena calling for his appearance to testify on February 4, 1998 before the grand jury.

32. In an effort to address, prior to Mr. Lindsey's appearance, the scope of the matters that the OIC sought to discuss with Mr. Lindsey and other senior advisors to the President and to address potential privileges that might be implicated, I contacted the OIC to discuss the matter. On February 3, 1998, Special Counsel Lanny Breuer and I met with Kenneth Starr, Robert Bittman, Steve Collatan, and Jackie Bennett. I explained the nature of the privilege concerns that would arise from broad-ranging inquiries into staff discussions and communications with the President, and I asked OIC to describe with particularity the possible areas of inquiry. They declined to do so.

33. The OIC informed me that it had postponed indefinitely Mr. Lindsey's appearance, and therefore a discussion of their examination of Mr. Lindsey was premature. As a result, our discussions about his testimony were curtailed, and instead we focused on the pending appearance of another presidential advisor, Deputy Chief of Staff John Podesta.

34. On February 4, 1998, Mr. Starr sent me a letter indicating that they intended to inquire into privileged areas based upon their view that executive privilege was inapplicable to information relating to the Lewinsky investigation. (2/4/98 Letter from Starr to Ruff, attached as Exhibit 1).

35. On February 5, 1998, I responded to Mr. Starr's letter and stated that, under the principles of *In re Sealed Case* and other relevant authority, conversations among advisors were presumptively privileged. (2/5/98 Letter from Ruff to Starr, attached as Exhibit 2).

36. I pointed out that the "discussions among and between the President's senior staff involve the very capacity of the President and his staff to govern--to pursue his legislative agenda, to ensure the continued leadership of [the] United States in the world community, and to maintain the confidence of the people who elected him--all of which lie at the heart of his role under Article II of the Constitution." (*Id.* at 2). I concluded by indicating my willingness to explore all possible accommodations of our respective interests. (*Id.*).

37. On February 6, 1998, the OIC sent me a letter rejecting my offer and restating its position regarding the communications about which it intended to inquire. In rejecting my offer, the OIC did not articulate any need for this information, as required by *In re Sealed Case*, but simply asserted that its desire "to resolve this matter in a timely fashion" compelled disclosure. (2/6/98 Letter from Starr to Ruff at 1, attached as Exhibit 3).

38. Finally, on the issue of discussions between witnesses and White House counsel, the OIC stated that, under the Eighth Circuit decision in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), it intended to question White House personnel as to the substance of such communications, and that if a witness asserted the attorney-client privilege, the OIC intended to "take such further steps as are appropriate." (*Id.* at 2).

B. Mr. Lindsey's Communications are Presumptively Privileged

39. As described in his declaration, filed in connection with the White House's opposition to the OIC's motions to compel, Mr. Lindsey testified before the grand jury on February 18 and 19, 1998, and on March 12, 1998. (Declaration of Bruce R. Lindsey ("Lindsey Dec.") ¶ 9).[12] Over the course of those three days of testimony, Mr. Lindsey willingly answered questions about his personal knowledge with respect to any allegations of a personal relationship between Ms. Lewinsky and the President, and any allegations of suborning perjury in connection with the *Jones* litigation, as well as several questions about Mr. Lindsey's discussions with others that involved Ms. Lewinsky. (Lindsey Dec. ¶¶ 15-17).

40. Mr. Lindsey declined to answer other specific categories of questions relating to the *Jones* litigation and the Lewinsky investigation on the grounds that they are subject to executive privilege, attorney-client privilege, attorney-work product privilege, and/or the common interest doctrine. (Lindsey Dec. ¶¶ 10-14).

41. The confidential communications that Mr. Lindsey declined to disclose to the grand jury are presumptively privileged. They occurred while performing his duties as Deputy Counsel to the President and as one of the principal advisors to the President, or as the President's personal attorney prior to the President taking office. (Lindsey Dec. ¶¶ 4-6, 8-14, 17). Mr. Lindsey had these discussions with the President, other White House attorneys, presidential advisors to the President, and/or with the President's private attorneys. (*Id.*). The communications contain information and advice relating to the *Jones* litigation or Lewinsky investigation that Mr. Lindsey gathered or provided for the purpose of assisting the President in making decisions in connection with his official duties or to ensure that the allegations and inquiries surrounding these matters did not impair the President's discharge of his official duties. (*Id.* ¶¶ 10-14).

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[12] Mr. Lindsey's entire declaration is incorporated by reference.

C. Mr. Blumenthal's Communications are Presumptively Privileged

42. On February 26, 1998, Mr. Blumenthal testified before the grand jury. (Declaration of Sidney Blumenthal ("Blumenthal Dec.") ¶ 16).[13] Mr. Blumenthal declined to answer certain questions on the grounds that they are subject to executive privilege. (*Id.*).

43. In his capacity as Assistant to the President, Mr. Blumenthal participates in and is consulted on a wide variety of matters, including domestic policy issues, presidential speeches, (including the State of the Union address), national security issues, and international freedom of the press issues. (*Id.* ¶¶ 4-7). Mr. Blumenthal also serves as the liaison for the President to the office of the Prime Minister of Great Britain; a role that requires him to interact with the Prime Minister and his advisors on a variety of subjects, including United States foreign policy matters. (*Id.* ¶¶ 8-12).

44. To perform his duties, Mr. Blumenthal consults with other presidential advisors to gather information and formulate advice to give to the President. (*Id.* ¶¶ 3, 14-15, 17). In carrying out these duties, Mr. Blumenthal has had discussions with the President, First Lady, and other senior advisors regarding the allegations and inquiries surrounding the Lewinsky investigation. (*Id.*). These discussions took place in the context of Mr. Blumenthal's assisting the President to perform his duties; in particular, the President's State of the Union address and the visit by the Prime Minister of Great Britain. (*Id.* ¶¶14-15). Accordingly, these discussions are presumptively privileged.

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[13] Mr. Blumenthal's entire declaration, filed in connection with the White House's opposition to the OIC's motions to compel, is incorporated by reference.

VII. Communications with the OIC in early March 1998

45. The White House sought to avoid needless confrontation by reaching a mutually agreeable accommodation that would permit the OIC access to the information that it purportedly needed to conduct its investigation while maintaining the legitimate confidentiality interests of the White House. On March 2, 1998, W. Neil Eggleston, the attorney representing the Office of the President in connection with litigation arising out of the Lewinsky investigation, sent a letter to the OIC requesting that the White House be consulted about whether such an accommodation was reachable. (3/2/98 Letter from Eggleston to Starr, attached as Exhibit 4). Mr. Eggleston also described to the OIC the well-established accommodation process that the White House historically followed, citing the *Espy* litigation as an example. (*Id.* at 1). Finally, Mr. Eggleston offered to meet with the OIC to discuss the areas of inquiry that implicated privilege concerns and to consider any articulation of need that the OIC might make. (*Id.* at 2).

46. On that same day, the OIC replied to Mr. Eggleston's letter, reiterating its earlier position that executive privilege did not apply to information relating to the Lewinsky investigation. (3/2/98 Letter from Bittman to Eggleston, attached as Exhibit 5). The OIC also stated that the White House was using executive privilege as a dilatory tactic. (*Id.* at 20). Finally, the OIC took the view that the White House was in the better position "to identify the areas it wishe[d] to withdraw the invocation of executive privilege," and thus requested that the White House submit a proposal by noon on March 4, 1998. (*Id.*).

47. On March 4, 1998, Mr. Eggleston responded to the OIC's letter. He began by underscoring the principle that, although the parties may disagree as to whether certain information is privileged, the accommodation process requires the parties to set aside any difference over the applicability of the privilege and focus on trying to reach an acceptable

agreement. (3/4/98 Letter from Eggleston to Starr, attached as Exhibit 6). Mr. Eggleston continued:

> Your Office was unwilling to describe the subject matters about which you intended to question White House officials prior to their testimony. After several weeks of grand jury testimony by White House officials, we now have a sense of the areas that we believe are of interest to your investigation. It appears that, in addition to seeking facts about this matter, you are seeking ongoing advice given to the President by his senior advisors, including attorneys in the Counsel's Office, as well as the substance of these advisors's discussions as to how to address the Lewinsky investigation in a manner that enables the President to perform his constitutional, statutory, and other official duties.

(*Id.* at 1).

48. Mr. Eggleston then explained that the Office of the President was prepared to instruct White House witnesses along the following general lines:

> (1) White House Advisors (Non-Lawyers): Advisors will be permitted to testify as to factual information regarding the Lewinsky investigation, including any such information imparted in conversations with the President. We will continue to assert executive privilege with respect to strategic deliberations and communications.
>
> (2) White House Attorney Advisors: Attorneys in the Counsel's Office will assert attorney/client privilege; attorney work product; and, where appropriate, executive privilege, with regard to communications, including those with the President, related to their gathering of information, the providing of advice, and strategic deliberations and communications.

(*Id.* at 2).

49. Mr. Eggleston stated that he believed that this approach would accommodate the parties' respective interests. (*Id.*). He also stressed that, because the White House did not know the specific questions the OIC intended to ask a particular witness, we would evaluate the application of these instructions in response to specific questions and were willing to discuss any

particular issue. (*Id.*).

50. Mr. Eggleston also rejected the OIC's suggestion that the White House's assertion of privilege was a delaying tactic, pointing out that during the six weeks of the investigation, numerous White House witnesses either appeared or were interviewed, and each had answered all legitimate questions. Moreover, the White House had attempted to address and resolve all privilege issues prior to the appearance or interview of a White House official. (*Id.*).

51. On March 6, 1998, the OIC responded to Mr. Eggleston's letter, maintaining its position that executive privilege did not apply, and rejecting Mr. Eggleston's proposed approach. (3/6/98 Letter from Bittman to Eggleston, attached as Exhibit 7). On that same day, the OIC filed its motions to compel.

VIII. <u>Disclosure of these Communications will Debilitate this and Future Presidencies</u>

52. The President's advisors have not merely assumed that the Lewinsky investigation is a matter that has substantially affected the Presidency. They have taken it upon themselves to evaluate carefully how, if at all, it relates to the President's discharge of his duties. Politicians (both Democratic and Republican), political analysts (both domestic and foreign), and the media have all pronounced that the investigation affects the President's ability to achieve his foreign policy objectives and domestic agenda, and even poses a real threat to his ability to remain in office. In response to these reports, advisors have acted to ensure that they completely understand the scope and ramifications of the Lewinsky investigation so that they can give well-informed advice to the President to enable him to fulfill his responsibilities to the American people.

53. Disclosure of these communications will have a chilling effect on these and future presidential advisors. When a matter like the Lewinsky investigation affects the President's ability to execute his duties, his advisors cannot sit idly by and hope that it will resolve itself with little impact on the President. The President relies on them to assess a particular issue and to help him make sound decisions. To be effective, these advisors need the ability to evaluate relevant information, explore novel approaches, engage in heated debate, and provide blunt, candid, and even harsh, advice to the President. The President has a constitutionally based confidentiality interest in this process, and "the critical role that confidentiality plays in [this process] cannot be gainsaid." *In re Sealed Case*, 121 F.3d at 750.

54. If advisors must perform these duties with the knowledge that they have no expectation of confidentiality, that at some point their deliberations and advice will be disclosed, and that they will be held publicly accountable for their recommendations, they will be disinclined to gather all of the relevant information about a matter and avoid giving novel and frank advice to the President. They will fail in their duty to assist the President in dealing with matters that have an impact on his office and the Executive Branch. In turn, the President will be hindered in performing his duties because he will not receive the full benefit of his advisors' skills. He also will have to waste much of his time performing the functions that intermediaries normally would -- and should -- handle.

55. To strip a President of the core assistance and critical advice that are the lifeblood of his ability to execute his duties will inevitably result in the erosion of the effectiveness of the Office of the President. Such an outcome conflicts with basic constitutional principles and our country's notion of an effective Presidency and a well-balanced, democratic government.

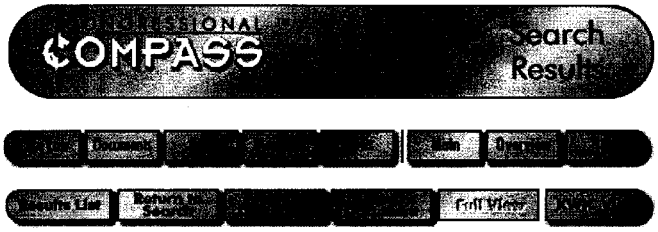
IX. The Decision to Assert Privilege

56. I have discussed with the President these areas of inquiry and the privileged nature of the information sought. The President has directed me to invoke formally the privileges applicable to these communications.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

March 17, 1998
Date

Charles F.C. Ruff
Counsel to the President



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HEADLINE: Clinton Finds There's No Escape; In **Africa,** President Sidesteps Executive **Privilege** Questions

BYLINE: John F. Harris, **Washington Post** Staff Writer

DATELINE: KAMPALA, Uganda, March 24

BODY:

Yes, President **Clinton** acknowledged today, he had heard something about a controversy involving executive **privilege** back in the United States.

And no, he had nothing to say about it.

Seven time zones away from Washington, the uproar about **Clinton's** decision to invoke **privilege** -- sparking a legal fight over what testimony a grand jury will hear from top White House aides -- caught up with the president in a photo session with Yoweri Museveni, the president of Uganda.

Clinton, who has yet to acknowledge publicly even that he is asserting executive **privilege,** was pressed by reporters to explain why he is trying to block testimony. His voice curt and his expression cold, the president responded as though he were a bystander in the controversy, rather than its central character.

"All I know is, I saw an article about it in the paper today," said **Clinton,** referring to the packet of news clippings faxed each morning to him when he is on the road. "I haven't discussed that with the lawyers. I don't know. You should ask someone who knows."

Specifically, **Clinton** was responding to a question about why White House lawyers have invoked executive **privilege** for conversations between first lady Hillary Rodham **Clinton** and aide Sidney Blumenthal. But he took the same tone on every other question relating to independent counsel Kenneth W. Starr's investigation into the Monica S. Lewinsky controversy.

Even as the president was sidestepping the issue in **Africa,** his lawyers back in Washington returned to federal court for a second day of arguments with Starr's attorneys about the **privilege** dispute. During a 90-minute, closed-door hearing before Chief U.S. District Judge Norma Holloway Johnson, attorneys continued their discussion about whether executive **privilege** or attorney-client **privilege** should prevent Starr from asking certain questions of Blumenthal, White House deputy counsel Bruce R. Lindsey and possibly others.

On another floor of the courthouse, the grand jury looking into the Lewinsky matter had a slow day, with no witnesses known to have appeared. On Wednesday, however, one of the key witnesses is scheduled to return, according to a source familiar with the matter. Marcia K. Lewis, Lewinsky's mother, appeared for two days last month before suffering what associates called severe emotional distress that caused a halt to her testimony. Lewis and Lewinsky share an apartment at the Watergate and are close confidantes.

In Little Rock, another grand jury that has looked into Whitewater for four years is set to expire in May and Starr said yesterday that he may not convene a replacement. Talking with reporters outside his Arkansas office, Starr said the cooperation of former governor Jim Guy Tucker under a recent plea agreement may speed the conclusion of the probe there.

"This investigation could conclude quickly if all persons who have relevant and material information would come forward and cooperate with the grand jury," Starr said.

As a general proposition, White House aides often cringe when asked about domestic uproars while overseas -- an anxiety they are feeling even more acutely on **Clinton's** six-nation, 11-day African tour. It is **Clinton's** first foreign trip since the Lewinsky controversy broke two months ago, and the president seemed to be forcibly restraining his temper during a brief session with reporters at the State House Lodge here in the Ugandan capital.

A reporter asked why people should not conclude that **Clinton's** assertion of **privilege** was "an effort to hide something from them."

"Look, that's a question that's being asked and answered back home by the people who are responsible to do that," **Clinton** responded. "I don't believe I should be discussing that here."

But as White House press secretary Michael McCurry acknowledged, it's actually a question that is being asked but not answered back home. The White House contends that because Judge Johnson has placed the legal proceeding under seal, **Clinton** and his lawyers cannot say anything about it -- nor offer a public justification for why he may be provoking a constitutional showdown over the scope of his presidential powers. Other legal specialists, however, have said such a situation would not preclude the president from acknowledging publicly that he is asserting the **privilege.**

Political advisers in and out of the White House have been uncomfortable about **Clinton's** use of **privilege** to shield his aides because of the inevitable comparisons with Richard M. Nixon, who lost his battle during Watergate to assert executive **privilege,** leading to the disclosure of secret White House tapes and, in the end, to his resignation.

Earlier this month, McCurry said at his daily briefing that if **Clinton** did assert **privilege,** "I think the president would want the American people . . . to understand why he would make such an assertion."

Should **Clinton** be prepared to make such an explanation, it could come on Friday in South **Africa.** In the only full news conference of his trip, **Clinton** and South African President Nelson Mandela will face reporters in Cape Town.

Clinton aides said they have dreaded the potential spectacle of **Clinton** fielding -- or ducking -- questions about his legal controversies and alleged sexual misconduct standing beside one of the world's most respected leaders. But one adviser said the **Clinton** team has concluded that such a scene, if it comes, will not hurt **Clinton** at home -- since viewers might resent reporters for asking questions they

consider impertinent.

Clinton scoffed at a suggestion that, with Washington so hostile, he would rather be in **Africa.** "I've looked forward to this [trip] for years," he said testily. "And I think most Americans want me to do the job I was elected to do."

Staff writers Lena H. Sun, Susan Schmidt and Peter Baker contributed to this report from Washington.

GRAPHIC: Photo, larry morris , The president's lawyer, Robert S. Bennett, waves to his driver after leaving the federal courthouse.

LANGUAGE: ENGLISH

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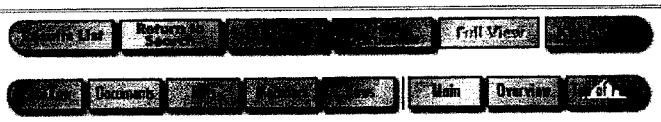

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Mr. RUFF. Do you need them back, Congressman?

Mr. CANNON. No, thank you. I have copies.

Chairman HYDE. The gentleman from California, Mr. Rogan.

Mr. ROGAN. Thank you, Mr. Chairman. Mr. Ruff, good afternoon. I thank you for your very cogent and able presentation today. I am also going to say something that might surprise you. I think you are right when you express the idea that words are everything. When it comes to looking at perjury and lying under oath, definitions may be misleading, they may even be maddening, but that is what lawyers do. We are supposed to parse these statements and look at the hypertechnical definitions, and determine whether reasonable inferences may be drawn.

I do want to make sure I understand your position. From the beginning, the President has taken the position that he never lied to the American people or lied while giving testimony under oath. Essentially claims he simply misled the people with a different definition, and he was sending the same message both to the American people and the court. Is that a fair assessment?

Mr. RUFF. I think that is fair, Congressman, yes.

Mr. ROGAN. And he did that intentionally, because in his own mind he drew a distinction between the technical definition of "sexual relations" and the definition of "improper relationship" or something along those lines, which is how he now characterizes his relationship with Monica Lewinsky?

Mr. RUFF. Yes, I think that's correct.

Mr. ROGAN. You suggested earlier in your testimony this distinction is one he has drawn since the Jones deposition. My notes indicate you said the definitions are one that he held in his mind in January and in August, and he has so testified.

Mr. RUFF. Yes.

Mr. ROGAN. In determining whether the President either perjured himself or lied under oath in this matter, you are asking the committee to look to his state of mind from the beginning of this whole episode and make that determination?

Mr. RUFF. Yes.

Mr. ROGAN. That is, I think, a very fair analysis on a technical legal point, and I will say that I agree with you. If the record supports this technical parsing, I don't think this would be an appropriate avenue for us to go down by way of an impeachment resolution.

Would you agree with me, however, if the record did not support that, and demonstrated the President was lying, that would be fair game for our committee to review?

Mr. RUFF. If any Member of this committee in good conscience in weighing the evidence concludes that my assessment is wrong, of course you must take it up and determine what action is appropriate.

Mr. ROGAN. Well, let me share with you what troubles me in this area and see if it rises to that level.

In his January 17 deposition, in the Paula Jones case, the President was asked if he ever had sexual relations with Monica Lewinsky. His answer was definitive. He said, "I had never had sexual relations with Monica Lewinsky. I have never had an affair with her."

I take it that was the definition that he adopted that would protect him from being charged with lying.

Mr. RUFF. I think there are two pieces to that: the sexual relations definition which is encompassed in the actual document put before him, and what he has already testified, that sexual affair or sexual relationship encompasses for him sexual intercourse.

Mr. ROGAN. That part I understand. Now, let's move on to four days later. He was being interviewed by Jim Lehrer. What he didn't say is interesting. He did not use that carefully crafted phrase to deny his conduct. He used a much broader phrase, and I am quoting now from the interview of January 21. He said, "There is no improper relationship."

Mr. Lehrer asked, "No improper relationship. Define what you mean by that."

The President responded, "Well, I think you know what it means. It means there is not a sexual relationship, an improper sexual relationship or any other kind of improper relationship."

On that very same day the President sent his press secretary, Michael McCurry, out to deny that he had no improper relationship, not a sexual relationship. When the press asked Mr. McCurry to define what an improper relationship meant, Mr. McCurry gave us the now-famous phrase, "I don't want to parse the words."

Finally, the President gave an interview to Roll Call, when he was asked about his relationship. The President said, "Let me say the relationship was not an improper one but let me answer, it is not an improper relationship and I know what the word means."

Question: "Was it in any way sexual?"

The President: "The relationship was not sexual and I know what you mean and the answer is no."

Then we had the famous finger-wagging speech a few days after that, where he said, "Everybody, listen to me, I did not have sexual relations with Monica Lewinsky."

Mr. Ruff, he used those phrases interchangeably. There was no distinction in his mind when he used those phrases.

Chairman HYDE. The gentleman's time has expired. The distinguished gentleman from Wisconsin, Mr. Barrett.

Mr. BARRETT. Thank you, Mr. Chairman. Mr. Ruff, I think you have done an excellent job this afternoon.

Mr. RUFF. Thank you, Congressman.

Mr. BARRETT. I think you have presented yourself very well. I think you have presented the President's case very well and you can be proud. For the first time today in these proceedings, those who are watching these proceedings and the Members here are engaged because this is the first opportunity I think that really you have been able to take advantage of to present the President's side of the case. This proceeding has been marked by claims by the Democratic side that this has not been a fair proceeding. You have said several times that you feel somewhat hampered because you have not—you don't know what you are responding to. I have here the articles of impeachment, the four articles of impeachment that have just been released to us, so apparently out of the feeling of fairness, you have about four minutes to respond to the four articles of impeachment which you have not seen. The first article deals with——

Mr. CONYERS. Would the gentleman yield just briefly? We had agreed not to give them the articles until after they had finished so that it wouldn't disrupt the proceedings. They just came off the press and it was given to the Members and it wasn't meant to disrespect counsel for the President, so I was hoping that we didn't try to get into that at this point.

Mr. BARRETT. Well, then I will withhold that. But I will ask you, Mr. Ruff, because this is your last opportunity with a Democratic questioner in these proceedings: From here we will move to the stage where we have to make decisions. Clearly the grand jury charge is the most serious charge. I want you to make your argument again to this committee as to why the President should not be impeached for his statements before the grand jury.

Mr. RUFF. Congressman, let me go right to what has been the heart of the debate on this subject today. It is very real and it needs to be addressed in two respects. One is the pure factual what-would-trial-lawyers-do issue, in a setting in which the President says he did not touch certain parts of Ms. Lewinsky's body and she says he did. I think it is fair to say, amongst all those here who are former prosecutors, that that kind of conflict between two witnesses simply would never be pursued in a court of law. Should it be pursued in this committee? I think for the same reasons, because you cannot reach the level of clear and convincing evidence, you ought not even to consider whether, or if you consider it, you cannot arrive at the conclusion that the President committed an act, which would take you to the determination as to whether or not he ought to be impeached and removed from office. But I want to pass over all of that and go to the heart of the issue. Even if you take, as some of the Members on the majority side have suggested they do, Ms. Lewinsky's testimony as the truthful version, I still am convinced, and I believe that it is the position most consistent with our Constitution and our history and our form of government, that you may criticize the President (he has criticized himself) if you believe he acted in this fashion—you ought to censure him in whatever fashion seems most appropriate, but you cannot overturn the will of the people even if you find that there is clear and convincing evidence, which I do not think you can, that the President was wrong and Monica Lewinsky was right on that point.

Mr. BARRETT. Thank you, and I would yield back the balance of my time.

Chairman HYDE. I thank the gentleman. The distinguished gentleman from South Carolina, Mr. Graham.

Mr. GRAHAM. Thank you, Mr. Chairman. Mr. Ruff, I agree with you. If it comes down to who touched who, we are not going to overturn the will of the people. My quarrel is not with you, Mr. Ruff. I think you are a fine lawyer and have done a good job. My quarrel is with your client. My quarrel goes sort of like this. We are bastardizing the English language. I can only believe your defense if I check my common sense at the door and I forget the way the world really works. I am singularly unimpressed with this defense. This defense is a rehashing of facts already in our presence except the quote about "in Africa." I do appreciate you reinterpreting the facts. The term "alone" is a get-out-of-jail-free card according to

your client because when you ask him were you ever alone with a woman, he says, "Well, no, I wasn't," and he meant there were other people in the building. When you try to prosecute him for perjury based on a different version of how they related to each other, the defense is, "Well, you can't corroborate it because there were only two people there. There was nobody else there." The term "alone" seems to be used in many ways, in an inconsistent way and in an offensive way to me. And if people in America follow Bill-Clinton-speak, we are going to ruin the rule of law, and he is not worth that. No one person in America is worth trashing out the rule of law and creating a situation where you can't rely on your common sense.

I am not through yet. The biggest problem I have got with your client is not about a consensual affair gone awry. Grand jury perjury, no excuse, anytime, anywhere. It is not about how they touched. I believe your client lied when he said he wasn't paying attention to the discussion that Mr. Bennett had with the judge. I have seen the videotaped deposition. He is following it very closely, nodding his head. He knew it was a false affidavit because he colluded, in my opinion, with Ms. Lewinsky to defraud Paula Jones from getting to a relevant, material fact. I believe that. Nothing has changed in my opinion there. But the most disturbing thing about your client to me goes like this. Do you know Sidney Blumenthal?

Mr. RUFF. I do.

Mr. GRAHAM. Right after January 18, your client, for the first time in my opinion, got wind of the fact that there may have been something known about Ms. Lewinsky that his little collusion with her would not protect, that they knew something he didn't know. This is a statement he makes to Mr. Blumenthal after Dick Morris, who is a real character but a pretty smart guy, tells the President that if he would just come clean it may save him because it might have saved Richard Nixon, and here is Blumenthal's discussion according to Blumenthal's testimony. Are they close friends by the way?

Mr. RUFF. Is who close friends?

Mr. GRAHAM. Blumenthal and the President.

Mr. RUFF. I truly do not know the answer to that.

Mr. GRAHAM. We will find out about that later. "I said to the President, 'What have you done wrong?' and he said, 'Nothing. I haven't done anything wrong.' I said, 'Well, then that's one of the stupidest ideas I've ever heard, the idea being confessing. Why would you do that if you've done nothing wrong?' And it was at this point that he gave his account of what happened to me, and he said that Monica, and it came very fast." Listen, female members of this committee. "He said, 'Monica Lewinsky came at me and made a sexual demand on me.' He rebuffed her. He said, 'I've gone down that road before, I've caused pain for a lot of people and I'm not going to do that again. She threatened me.' She said that she would tell people they had an affair and that she was known as the stalker among her peers and that she hated it and that if she had an affair or said she had an affair then she wouldn't be the stalker anymore. And I repeated to the President that he really needed never to be near people who were troubled like this, that

it was just—he needed not to be near troubled people like this. And I said, 'You need to find some sure footing here, some solid ground.' And he said, 'I feel like a character in a novel. I feel like somebody who's surrounded by an oppressive force that's creating a lie about me and I can't get the truth out. I feel like the character in the novel The Darkness At Noon.' ".

Do you agree with me that the President of the United States is telling an operative, for lack of a better word, that Monica Lewinsky was a sexual predator coming on to him?

Mr. RUFF. I take it that the implication in your use of the word "operative," Congressman——

Mr. GRAHAM. What ever relationship Blumenthal had with him, he was passing on a story about Monica Lewinsky, giving this individual an impression that he was having to fight Monica Lewinsky off. Is that true or not?

Mr. RUFF. You read the language.

Mr. GRAHAM. Thank you.

Mr. RUFF. And I take it we can all understand it. But the one thing I want to be absolutely certain of——

Mr. GRAHAM. I'm not certain.

Mr. RUFF. Because I think your implication is that this was somehow a directive to go out and trash Ms. Lewinsky or otherwise to denigrate her. And if that is your implication, let me tell you from someone who was involved, I think from day one through today in what the White House was doing and not doing, it didn't happen, never was thought of.

Chairman HYDE. The gentleman's time has expired. The gentlelady from California, Mrs. Bono.

Mrs. BONO. Thank you, Mr. Chairman. I will be happy to yield to Congressman Graham for the amount of time that he needs.

Mr. GRAHAM. Let's continue that thought. Is it your testimony that no one in the White House has ever planted a story in the press that Monica Lewinsky is a stalker, unreliable, a troubled young lady, shouldn't be believed, is that your testimony?

Mr. RUFF. Congressman, obviously I wouldn't know whether there was ever anybody in the White House, but I will tell you this——

Mr. GRAHAM. There was no organized effort.

Mr. RUFF. There was no authorized effort.

Mr. GRAHAM. Authorized effort.

Mr. RUFF. Because we thought long and hard about how to defend this President and how to deal with the very proceedings that are going on today.

Mr. GRAHAM. Thank you very much. You have answered my question.

Mr. RUFF. No, I have not, Mr. Congressman.

Mr. GRAHAM. Please. Please let me continue. You are saying there is no organized effort. I have got a mountain of press stories. January 31, 1998. "Should they paint her as a friendly fantasist or a malicious stalker? 'That poor child has serious emotional problems,' Representative Charlie Rangel said Tuesday night before the State of the Union. 'She's fantasizing and I haven't heard that she played with a full deck in other experiences.' " One of the most respected members of this House who was passing along something

told to him by somebody. Charlie Rangel is a good man, but he was of the belief that this is a disturbed young lady.

I will read to you other press accounts shortly after. "One White House aide called reporters to offer information about Monica Lewinsky's past. Her weight problems and what the aide said was her nickname, the stalker. Junior staff members speaking on the condition they not be identified said she was known as a flirt who wore skirts too short and was a little bit weird." I can go on and on. The troubled-girl defense. "The one White House aides have been quietly testing out on reporters is the troubled-girl defense. The great feeler of all pain who also bears the scars of a turbulent upbringing was just being kind to Lewinsky because she was a child of a difficult divorce, because Bernard Lewinsky's parents were German Jews who escaped to El Salvador. The White House even speculated about family Holocaust scars." I have tons of press reports linked back to the White House saying this girl is unreliable, that she is basically crazy and weird, and I am telling you I believe your client left that deposition, planted a story in Blumenthal's mind and tried to get Betty Currie to believe she wanted to have sex with me and I couldn't do that, he was trying to tell Betty Currie that she was coming on to him and that the President of the United States, his state of mind is established based on what he told two people close to him, and shortly after that, shortly after that, the press operation in the White House turns on this young lady, they were calling her unbelievably vile names, questioning her sanity, and if it had not been for that blue dress, they would have tore her to pieces.

Mr. CONYERS. Mr. Chairman, a point of order. Charlie Rangel's name has been mentioned as if he was working in connection with the White House.

Mr. GRAHAM. No, sir.

Chairman HYDE. Let the gentleman finish speaking.

Mr. CONYERS. We should be more careful about the use of Members of integrity in the House and what their connection is with the narrative that my distinguished colleague has put forward.

Chairman HYDE. Well, the Chair will say he heard Mr. Graham read from a newspaper account.

Mr. GRAHAM. Could I please make this correct. I have no higher opinion of anybody than Charlie Rangel. He is a Marine Corps veteran who served in Korea. Charlie Rangel was repeating something somebody told him. He had no reason to believe——

Mr. CONYERS. How do you know?

Mr. GRAHAM. I believe that is what the newspaper accounts show, that Mr. Rangel was passing on a thought planted in his mind and he is a very innocent victim of the spin machine like maybe all of us are around here.

Ms. WATERS. Mr. Rangel is smart enough to speak his own words. He doesn't need to have anybody plant them.

Chairman HYDE. The gentlelady is not recognized. The gentleman's time has almost expired.

Mr. GRAHAM. I yield back the balance of my time and I think I will introduce——

Mr. FRANK. Mr. Chairman, point of order. The witness was on the point of answering when the point of order came.

Chairman HYDE. Oh, all right.

Mr. FRANK. Shouldn't the witness have a chance to answer?

Chairman HYDE. He surely should. The gentleman may answer if he wishes.

Mr. RUFF. I would only make two points, with all due respect, Congressman. Other than your speculation, you have no basis to suggest that the President of the United States ever directed any such——

Mr. GRAHAM. Mr. Ruff, how do you establish state of the mind of a witness?

Chairman HYDE. Mr. Graham, please.

Mr. RUFF. I think out of all due courtesy, I am entitled to 30 seconds to respond to a 10-minute question. You have no basis for making that allegation, and I will tell you that to the extent I have any personal knowledge, I will represent to you that to the contrary, a very careful and well conceived decision was made to do our damnedest to ensure that in fact no such personal attack was ever made.

Thank you, Mr. Chairman.

Chairman HYDE. I thank the gentleman. Mr. Nadler.

Mr. NADLER. I don't know if this is a point of order or what, but I would just ask if the Chair would suggest to the witness he speak more closely to the microphone.

Mr. RUFF. I apologize. It has been a long afternoon, but I will try to stay close.

Mr. JENKINS. Mr. Chairman.

Chairman HYDE. Mr. Jenkins.

Mr. JENKINS. Mr. Chairman, I have time remaining and I yield it to the gentleman from South Carolina.

Mr. GRAHAM. Mr. Ruff——

Mr. FRANK. Parliamentary inquiry.

Chairman HYDE. The gentleman may state it. Just a moment. I am about to entertain a parliamentary inquiry. What is your inquiry?

Mr. FRANK. The question was, Mr. Jenkins hadn't been called on at all before?

Chairman HYDE. He reserved his time. Mr. Graham has been yielded Mr. Jenkins' time.

Mr. GRAHAM. I suggest this solution to this problem. That I will get the press reports that I am referring to and I will introduce them into the record, and every committee member will have a chance to look and see what was going on toward Ms. Lewinsky, what was coming out of the White House, and they can make their own decisions about how this started.

I also would like to point both—the committee members to the fact that we have statements from the President shortly after the deposition where he is planting in the mind of Mr. Blumenthal a story that is patently false, a story that if you believe he was having to defend himself from Monica Lewinsky, the stalker, a term he used. Shortly after the President used the term stalker, we see press accounts where White House sources are calling her a stalker. He goes to his secretary the day after the deposition and runs a passage by her basically saying, "She wanted to have sex with me and I couldn't do that." I have always wondered what that was

about. Now I believe it is not so much trying to influence her testimony as to plant into Ms. Currie's mind or thought pattern that Monica Lewinsky was coming on to him.

Every Member needs to look at this. This is something that is more than consensual sex. This is something in my opinion, ladies and gentlemen, where a high public official is using the trappings of his office, the White House, to go after a potential witness who if that witness is called and gives testimony down the road in a sworn fashion, not just tapes, that what he is trying to do is set up a defense to make her not believable; that this witness possesses information that would hurt his political and legal interest. The President of the United States, I believe, planted stories that were false and shortly after those stories were planted, the White House operation went into effect, notifying the press that "if you ever hear anything about this witness you need to know she's unreliable, she's a stalker, she's basically not a responsible person". Bill Clinton did in fact, like with so many woman in the past, make sure that Monica Lewinsky was going to go through hell, and that the only thing that stopped this was it was just maybe one too many women to trash out or it became the blue dress. You can think what you want to about Linda Tripp but I can tell you right now, I believe from the bottom of my heart, ladies and gentlemen, if she didn't have that blue dress proving a relationship, they would have cut her up. I have got evidence in the press reports coming out from the White House sources after the President planted in the minds of two people close to him that she was coming on to him—that was a false story—and I do believe for a moment in time the President of the United States used the full power and force of the White House to go after a young lady so that it couldn't hurt him politically and legally, and that is far more like Watergate than Peyton Place and I am going to believe that probably till I die and I don't ask you to accept my rendition of the facts. I do ask every Member, especially the female Members here, if you have ever done a rape trial, you know what comes women's way sometimes, they wear their skirts too tight and they're flirtatious and you've got to watch out for these tight ladies, they even called her Elvira at one time in one of the press reports. That this is serious, and I do wish the President would reconcile himself with the law, Mr. Ruff. I do wish he would quit saying "alone" means one thing one time and it means something else another time. I do believe that the President of the United States was willing to use the weight of his office, take a consensual sex partner, a 22-year-old lady, and he was going to turn on her and they were going to unleash stuff on her that she would have never been able to handle, and that to me is far worse or as bad as anything that anybody has brought to my attention in this case. I need to reconcile this in my mind and I will try to keep an open heart so we can bring this country together. But I will give the Members of the committee the press reports and you can read for yourself what they were about to do and what they were calling this young lady and it was not going to be pretty. And I will yield back the balance of my time, and I will apologize to this committee for getting upset because this does upset me.

Chairman HYDE. Mr. Buyer has time that he wants to use now.

Mr. FRANK. Mr. Chairman, I have a unanimous consent request.

Chairman HYDE. But I would be happy to entertain motions. Mr. Frank has one.

Mr. FRANK. I would ask unanimous consent after that loaded, filibustered question that the gentleman be given a chance to respond. To put a question such as that, to use up the full five minutes deliberately so that there could be no chance to respond is inappropriate and I would ask unanimous consent that the witness be given a couple of minutes to respond.

Chairman HYDE. I would join in that unanimous consent to give Mr. Ruff time.

Mr. GRAHAM. Absolutely.

Chairman HYDE. But before we get to that, we have Ms. Waters to deal with. Ms. Waters.

Ms. WATERS. A point of personal privilege. I resent Mr. Lindsey's reference——

Chairman HYDE. Ms. Waters, state your point of order.

Ms. WATERS. Yes. My point of personal privilege is the reference that he made to every woman on this committee.

Chairman HYDE. That certainly includes you.

Mr. GRAHAM. Ma'am, I certainly didn't mean to do anything disparaging. All I am saying is I have been a prosecutor in rape cases——

Ms. WATERS. I know what you did not mean to do but I have a point of personal privilege.

Chairman HYDE. Please state your point.

Ms. WATERS. My point is that he made a reference to what every woman on this committee should do and how we should feel about the spin that he just put on, wild allegations about the President of the United States. I think, as one of the women of this committee and every other woman should have an opportunity to respond, since he is talking for us and about us.

Chairman HYDE. I think your point is you have taken offense and you have expressed your resentment.

Ms. WATERS. No, I have not. I am asking your permission to do such, Mr. Chairman.

Mr. GOODLATTE. Regular order, Mr. Chairman.

Chairman HYDE. It really isn't a point of order. I want you to express yourself. I think you have. Could you do it in another minute maybe?

Ms. WATERS. Yes. I would like to say that every member of this committee should be offended by the spin that was just—the wild spin that was just put on by Mr. Lindsey in attempting to somehow send a message to Monica Lewinsky that she has been undermined by the President of the United States and thus set her up to be angry at the President in case she is called as a witness. We are no fools.

Chairman HYDE. Thank you very much. Now Mr. Buyer is recognized.

Mr. FRANK. Mr. Chairman, I had a unanimous consent request.

Chairman HYDE. I am sorry, Mr. Ruff is recognized for 3 minutes.

Mr. RUFF. I will try not to use all of that time, Mr. Chairman. I appreciate your letting me respond. Congressman Graham, I have

the greatest respect for you. I have to make two fundamental points: One, I absolutely reject the notion that the President of the United States either explicitly or implicitly authorized, directed, hinted at or caused any attack of the sort you describe. But second, I must say, even out of the greatest respect for members of this committee, that to be greeted at the end of a long day by the next to the last speaker with a litany of charges never heard before, not even I believe included in whatever document it was that I was handed a few minutes ago, does not give us any reasonable opportunity for fair response, and I would ask the Chair's permission that if this is to be in any respect a factor in the consideration of this committee's grave duties over the next few days that we be given an opportunity first to have clear and explicit statements by the Congressman with whatever supporting information he believes he has, and second a reasonable opportunity to respond.

Chairman HYDE. Well, we have a schedule to which we are trying to adhere. Mr. Graham can put together a package of his documentation and get it to you immediately for your review and response. We are not going to be through with our business, I don't think, until Saturday at the earliest, and anything you want to add by way of rebuttal or amplification or commentary would be received by the committee. This is kind of a wild card situation, unanticipated, but——

Mr. GRAHAM. Mr. Chairman, since I was referred to, I will be glad to do that. In terms of the timing, as I have said, this became clear to me after trying to figure out what he was saying to Betty Currie and we will all have a chance to evaluate it if it makes any sense and I will gladly give you the——

Ms. WATERS. Regular order, Mr. Chairman.

Chairman HYDE. We are trying to wind this up and I am trying to get Mr. Graham—and he seems to be agreeing—to present his information to Mr. Ruff, whereupon Mr. Ruff can analyze it and respond in some appropriate way. You just let me know how you want to do it, and if you want to come back. But we have a schedule.

Mr. RUFF. I will be glad to do that. I appreciate it, Mr. Chairman. We will work within your time lines.

Chairman HYDE. Very good.

Mr. CONYERS. Mr. Chairman, I was hoping that there would be a way to work out his return, that Mr. Ruff would need to be back if he so desired.

Chairman HYDE. If Mr. Ruff so desires. But I would hope this can be handled through the U.S. mail.

Mr. RUFF. If I could leave this open, Mr. Chairman, and Mr. Conyers, thank you for the opportunity, if I could get back to you and let you know how best we would like to be able to respond.

Mr. CONYERS. That is fair.

Chairman HYDE. Sure. We will give you an opportunity to respond but we are on a schedule. We have to file our report next week, it has to lay over two days, Christmas is coming, and all of this enters into our calculus. But you are entitled to respond because those were serious charges.

Mr. RUFF. Thank you, Mr. Chairman. We will do so.

Chairman HYDE. Now Mr. Buyer is recognized for 5 minutes.

Mr. BUYER. Thank you, Mr. Chairman. I was struck by Ms. Waters' comments that somehow Mr. Graham's statements here was an effort to anger Monica Lewinsky against the President. When I read Monica Lewinsky's deposition after the President's statement to the American people on August 17, there wasn't anybody that could have angered Monica Lewinsky more than that statement. There isn't anything anybody here can do. The President pretty well angered Monica Lewinsky and it really came out in that deposition that she gave to Ken Starr. One thing that is bothering me is that part of your defense here today, and Mr. Craig's of yesterday, is to come before the committee and to make an admission that the President's intent was to be evasive and incomplete, mislead, yet he was legally and technically accurate in anything and everything he did. Not only all of yesterday but today you were also very accurate, never ever to say the President lied. So you have done a good job. You stuck with the game plan. I agree with you, to prove perjury, the trier here must make an assessment: it must be a plausible and believable explanation with regard to the state of mind. Now, if in fact you have a witness who has perhaps a motive to lie, if in fact they are not helpful, they have an attitude to be misleading, to be evasive, to be incomplete, that all of that is relevant evidence to the trier of fact, is it not?

Mr. RUFF. Absolutely. It is.

Mr. BUYER. It is. Okay. Now, one thing that I am trying to reconcile, and Mr. Graham brought up the comment about, if I have to believe some of the defense, you are saying to leave our common sense out the door. I want to go back to the gifts for the moment, because of this question about feigned forgetfulness. Now, you worked with the President more than anyone else in this room perhaps, and Bruce Lindsey knows him much, much better. The President's memory is very good, is it not?

Mr. RUFF. It is.

Mr. BUYER. Now, I guess what is troubling to me is when I read the referral, in reference to the gifts, it says a day or two after Christmas. And I remember that, because I was with the President on Air Force One, we went to Bosnia, and when we came back from Bosnia a few days later, what happens? Ms. Currie lets Monica Lewinsky into the White House on a Sunday morning, December 28. She lets Ms. Lewinsky in there so she can give gifts to the President. But what is interesting is what happened later. The two of them, according to the referral which cites then the grand jury testimony, is that she wants to know how she ended up on the witness list. The President is not sure how she ended up on the witness list and said, well, it must have been Linda Tripp or maybe it was the Secret Service. But then she says, she mentioned with anxiety that she received a subpoena with regard to the hat pin, and he asked a specific question about the hat pin. Then three weeks later, three weeks later, the President was asked a specific question at the civil deposition with regard to what gifts he gave he said, "I don't remember. Do you know what gifts?" And then he comes back and says——

Mr. RUFF. It's the last part that's important, Congressman.

Mr. BUYER. But this feigned memory about I don't recall. There are a series—I don't have the time, I see that my yellow light is

on, but I have a series of case law and I know you have seen it also, where individuals have been prosecuted for I don't recall, I don't know, I don't remember when in fact they know. I have difficulty reconciling, and I want you to give your explanation, isn't in fact the President feigning fogetfulness, asking the witness about the hat pin, then three weeks later testifies and says, "I don't know. I don't recall." I would ask unanimous consent that Mr. Ruff be permitted to answer that question to reconcile.

Mr. RUFF. Just very briefly, because you yourself pointed at the critical issue there and I commend you not only to the transcript of his testimony but, when we all get to see it, to the video as well. It is clear that what he is saying is, "I don't recall, please remind me." It is virtually one sentence. Look, I don't know how many presents the President gets, but lots. What he said was not, "I don't recall any, I don't recall ever getting gifts." What he said was, "I don't recall, tell me which ones, remind me which ones they are." And that it seems to me is the natural human response under the circumstances.

Chairman HYDE. The gentleman's time has expired.

Mr. GOODLATTE. Mr. Chairman, I have a unanimous consent request.

Chairman HYDE. Please state it.

Mr. GOODLATTE. I would ask unanimous consent that a letter signed by about 80 scholars and former elected officials and Cabinet members, and so on, calling for the impeachment of the President, rebutting some of the information earlier submitted by other scholars be made a part of the record.

Chairman HYDE. Without objection, so ordered.

[The information follows:]

An Open Letter to the Members of the United States House of Representatives and the United States Senate

On October 28, 1998, six days before national elections to the U.S. House of Representatives and Senate, readers of several major United States newspapers were urged in a full page "open letter" from 400 historians to oppose "the dangerous new theory of impeachment" of President Clinton and to "demand the restoration of normal operations of our federal government." The historians were soon followed by 430 law professors publishing a letter to the Speaker of the House concluding that the President's offenses – even if proved – fall short of providing the foundation for a bill of impeachment.

Few subjects are more important to the health of the American Republic than that of impeachment. The historians and lawyers who presume to inform the public that President Clinton in committing perjury and obstructing justice, among other malfeasances, has committed no impeachable offense do a great disservice to the integrity of the Constitution.

For that reason, we have joined together as lawyers, law professors, political scientists and historians, most of whom have made careers studying the Constitution and litigating its many provisions, to correct the record. The anti-impeachment historians state that even continuing with an impeachment inquiry "will leave the Presidency permanently disfigured and diminished." To the contrary, dropping the impeachment inquiry would permanently disfigure and diminish not only the Presidency but the American system of government.

The President has violated and continues to violate his oath of office that "I will faithfully execute the Office of the President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."
That Constitution places upon him the duty to "take care that the Laws be faithfully executed." This President has instead taken great pains and used government resources, including White House personnel and the Secret Service, to see that the laws are not faithfully executed. The President has repeatedly and deliberately committed perjury, a felony, in both a civil case and a grand jury proceeding. He has solemnly lied to the American people and to the Judiciary Committee of the House of Representatives. Thus, he has attempted to warp public opinion and to thwart the House of Representatives in the performance of its constitutional duty.

These acts would be cause for sanctions if performed by any other official or private citizen. They are far worse when committed by the President. If the top sworn law enforcement official of the United States is permitted to undermine the Constitution and the rule of law, who can feel a moral obligation to testify truthfully? Who need hesitate to coach others to lie under oath? Who need respect the ideal of the rule of law? Indeed, who can any longer think of law as even-handed and impartial rather than as the shield of the politically powerful?

If a president can lie with impunity to the American people about his own disgraceful behavior and his multiple perjuries, who can henceforward expect any truth to issue from the Oval Office? If he can lie to Congress on these same subjects, doing his best to deny a Congressional inquiry into the facts on which judgment must rest, who can remain confident that constitutional processes will retain any integrity?

Alexander Hamilton, in words that bear repeating, said that impeachment is the proper response when a public official's misconduct results in "injuries done immediately to the society itself." As the Report of the Staff of the Impeachment Inquiry with respect to President Richard Nixon put the matter in 1974, "[W]here the issue is presidential compliance with the constitutional requirements and limitations on the presidency, the crucial factor is . . . the significance of its effect upon our constitutional system or the functioning of our government." Impeachment "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." The standard is undeniable, and it fits this President's multiple malfeasances and felonies precisely. A calculated assault on the Constitution and the rule of law falls within the category of "high crimes and misdemeanors" or nothing does.

The fundamental tenet by which a free society lives is the rule of law. When the President defies the constitutional rules applicable to him, there must be no escape by narrow sophistries and linguistic maneuvering. The framers devised a mechanism for removing from office any person who violates both his oath of office and his constitutional duties. That mechanism must be respected and used if we are to remain a free and law-abiding nation. The impeachment inquiry must not be defeated by partisan politics and public opinion polls. The Constitution was made in order to remove some subjects from decision by momentary popular sentiment. Impeachment is as much a part of the Constitution as the First Amendment. In fulfilling their constitutional duties, neither the courts nor the Congress should be deflected by public opinion polls. If we would not allow public opinion polls to silence unpopular speech, neither must we allow polls to excuse and ratify impeachable offenses. Should the House and the Senate shirk their responsibilities, they will establish a precedent for lawless government. That would be both unconscionable and dangerous.

There is no doubt that the felonies and malfeasances of which the President stands accused, and which have in major part already been proved, constitute impeachable offenses. It is essential that the impeachment inquiry go forward and, if the record stands as it does now, that a bill of impeachment be voted by the House of Representatives.

SIGNATURES FOLLOW:

The Honorable Griffin B. Bell, Former Attorney General of the United States

Professor Herman J. Belz, University of Maryland, History; specialist in American Constitutional History

The Honorable William J. Bennett, former Secretary of Education; Author

The Honorable Robert H. Bork, former Solicitor General of the United States and Circuit Court of Appeals Judge

Dr. John E. Murray, Jr., President, Duquesne University; former Dean, Duquesne Law School

Professor G. Robert Blakey, Notre Dame Law School

Professor Gary L. Gregg II, Intercollegiate Studies Institute; Author of "The Presidential Republic: Executive Representation and Deliberative Democracy"

Professor James W. Muller, University of Alaska, Anchorage, Political Science; Editor of "The Revival of Constitutionalism"

Professor Robert P. George, Princeton University, Department of Politics

Professor Jean Yarbrough, Bowdoin College, Department of Political Science; Author of "American Virtues: Thomas Jefferson and the Character of a Free People"

Professor Christopher Wolfe, Marquette University; Author of "The Rise of Modern Judicial Review and How to Read the Constitution"

Professor Steven G. Calabresi, Northwestern University School of Law, George C. Dix Professor of Constitutional Law

Professor Walter F. Berns, Georgetown University, Professor Emeritus of Government

Professor Stephan Thernstrom, Harvard University, Winthrop Professor of History

Professor David N. Mayer, Capital University School of Law; Author of "The Constitutional Thought of Thomas Jefferson"

Professor Thomas W. Merrill, Northwestern University School of Law, John Paul Stevens Professor of Law

Professor Philip Henderson, Catholic University of America, Department of Political Science; Author of "The Presidency Then and Now" and "Managing the Presidency"

Professor Douglas W. Kmiec, Pepperdine University, Distinguished Professor of Constitutional Law; former Assistant Attorney General of the United States

Professor Harvey Mansfield, Harvard University, Department of Government

Wm. Bradford Reynolds, former Assistant Attorney General of the United States

The Honorable Edwin Meese, III, former Attorney General of the United States

Professor Garret Ward Sheldon, Clinch Valley College of the University of Virginia, John Morton Beaty Professor of Political Science and Social Sciences; Author of "The Political Philosophy of Thomas Jefferson"

Professor Thomas West, University of Dallas, Department of Political Science; Author "Vindicating the Founders"

Professor James W. Ceaser, University of Virginia, Department of Political Science; Author "Reconstructing America"

Professor Richard Morgan, Bowdoin College, Department of Political Science; Author "The Law and Politics of Civil Rights and Liberties"

Professor Raymond Tatalovich, Loyola University, Chicago, Department of Poltiical Science; Author "To Govern a Nation" and "The Modern Presidency and Economic Policy"

Professor Barry Alan Shain, Colgate University, Department of Political Science; Author "The Myth of American Individualism"

Professor Mark Rozell, University of Pennsylvania, Department of Political Science; Author "Executive Privilege"

Professor Gary Lawson, Northwestern University School of Law

Professor James Lindgren, Northwestern University School of Law

Theodore B. Olson, Gibson, Dunn & Crutcher

Professor Thomas Pangle, University of Toronto, Department of Political Science

Professor Robert L. Paquette, Hamilton College, Chairman, Department of History

Professor Daniel Polsby, Northwestern University School of Law

Professor Stephen B. Presser, Northwestern University School of Law, Raoul Berger Professor of Law

Professor Claes G. Rynb, Catholic University of America, Department of Politics

Daniel E. Troy, former attorney advisor Office of Legal Counsel, Associate Scholar, American Enterprise Institute

Professor Graham Walker, Catholic University of America, Department of Politics

Professor Ken Grasso, Southwest Texas University, Department of Political Science

Professor Harry N. Clor, Kenyon College, Department of Political Science

Professor Fred Baumann, Kenyon College, Department of Political Science

Professor Edward J. Erler, California State, San Bernadino, Department of Political Science

Professor Robert Anthony, George Mason University School of Law

Professor Marshall J. Breger, Catholic University of America School of Law

Professor Roger Cramton, Cornell University School of Law

Professor Michael E. DeBow, Samford University, Cumberland School of Law

Professor Patrick J. Kelley, Southern Illinois School of Law

Professor Maurice Holland, University of Oregon School of Law

Professor Michael Paulsen, University of Minnesota School of Law

Professor William B. Stoebuck, University of Washington School of Law

Professor Lynn Wardle, Brigham Young University School of Law

Professor Adam Pritchard, University of Michigan School of Law

Professor Michael Krauss, George Mason University School of Law

Professor Kevin Clermont, Cornell University School of Law

Professor James Henderson, Cornell University School of Law

Professor Faust Rossi, Cornell University School of Law

Professor Julie Ann Ponzi, Azusa Pacific University, Department of Political Science

Professor Joseph Bessette Claremont McKenna College, Clarement Graduate School, Department of Political Science

Professor H. Lee Cheek, Jr., Brewton-Parker College, Department of Political Science

Professor Larry Toll, Brewton-Parker College, Department of History

Professor Mackburn Thomas Owens, United States Naval War College, Department of Political Science

Professor Robert Jeffrey, Dalton State College, Department of Philosophy and Political Science

Professor Stephen McKenna, Catholic University of America, Department of Communications

Professor Michael Federici, Mercyhurst College, Department of Political Science

Professor Robert Kraynak, Colgate University, Department of Political Science

Professor Stephen B. Hollingshead, Candor Marketing; former professor of Philosophy, Marquette University

Professor Ronald J. Pestritto, Saint Vincent College, Department of Political Science, Adjunct Fellow at the John M. Ashbrook Center; Author "Founding the Criminal Law"

Professor Jeffrey J. Poelvoorde, Converse College, Department of Political Science

Professor Ryan J. Barilleaux, Miami University (Ohio), Department of Political Science

Professor Daniel N. Robinson, Georgetown University, Department of Psychology; Author "Psychology & Law"

Professor Gary Dean Best, University of Hawaii, Hilo, Department of History

Professor J. D. Crouch II, Southwest Missouri State University, Department of Defense and Strategic Studies

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Professor Ralph Rossum,. Claremont McKenna College, Department of Political Science; co-author of American Constitutional Law, 2 volumes

Professor Richard Ferrier, Thomas Aquinas College, Department of Philosophy

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Professor Tom Lindsay, University of Northern Iowa, Department of Political Science

Professor Wesley G. Phelan, Eureka College, Department of Political Science

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Professor Ellis Sandoz, Louisiana State University, Department of Political Science; Author "A Government of Laws"

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Professor Mark Hall, East Central University, Department of Political Science; Author "The Political and Legal Philosophy of James Wilson"

Professor Don Racheter, Central College of Iowa, Department of Political Science, Director of Pre-Law program

Professor Alberto R. Coll, United States Naval College, Department of Strategy and Policy; former Deputy Assistant Secretary of Defense; Author "The Wisdom of Statecraft"

Professor Thomas C. Reeves, University of Wisconsin-Parkside, Department of History; presidential biographer (Kennedy, Arthur)

Professor Larry Peterman, University of California-Davis, Department of Political Science

Professor Richard G. Wilkins, Brigham Young University School of Law

Ms. WATERS. I have a unanimous consent request, Mr. Chairman. I have a letter here that was sent by one of our colleagues, Mr. Alcee Hastings, talking about the way that information was received in his case, and asking that information be provided in ways that other Members of Congress would have easy access.

Chairman HYDE. Without objection, it may be made a part of the record.

[The information follows:]

ALCEE L. HASTINGS
23D CONGRESSIONAL DISTRICT
FLORIDA

COMMITTEE ON
INTERNATIONAL RELATIONS
COMMITTEE ON SCIENCE

Congress of the United States
House of Representatives
Washington, DC 20515-0923

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December 9, 1998

The Honorable Henry Hyde
Chairman
House Judiciary Committee
2138 Rayburn Building
Washington, D.C. 20515

The Honorable John Conyers
Ranking Democratic Member
House Judiciary Committee
2142 Rayburn Building
Washington, D.C. 20515

Dear Chairman Hyde and Mr. Conyers:

Since 1973, the House Judiciary Committee has invariably produced a "Statement of Information" that was available for Members to review well before the House was called upon to consider Articles of Impeachment, except than in the case against a judge who had already been convicted of the alleged crime in the courts. I write to inquire when the Statement of Information for the present inquiry will be available for our review, and to make clear the reasons why I believe respect for the constitutional function of the House and the duty it imposes on every Member makes it even more critical that such a Statement of Information be made available for review, prior to any vote on Articles of Impeachment that the Committee may submit for our consideration as a product of this inquiry.

Both of you will recall that the Chair and the Ranking Minority Member (with the concurrence of the Committee) directed John Doar, Special Counsel for the Majority, and Albert Jenner, Special Counsel for the Minority, to produce a comprehensive Statement of Information in the inquiry into the conduct of President Nixon. The Statement of Information that the staff produced for that inquiry consisted of numbered paragraphs, each of which was followed by photocopies of the particular portions of the evidence that the staff concluded supported the assertions made in that paragraph. President Nixon was invited to and did submit a further Statement of Information in the same format. As a result, an organized, balanced, and neutral statement of the facts and presentation of the supporting evidence was a part of the Committee record that was available for any Member to review. The subcommittee that conducted the inquiry into my conduct as a federal judge directed its staff to produce a Statement of Information in the same form, notwithstanding the fact that the Judicial Conference had transmitted a report prepared by John Doar that included a detailed narrative and analysis of the evidence similar in form to the narrative and analysis included in the report transmitted by Independent Counsel Starr.

It is far more important that such a Statement of Information be made a part of the record available for review in this inquiry. I do not believe that any Member of the Committee or the

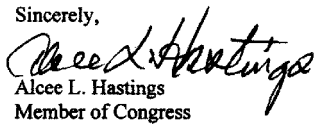
House could argue that the Starr Report was balanced or neutral. Of equal import, the Starr Report used footnote references to identify what Mr. Starr thought was the supporting evidence in the fourteen boxes of materials that he transmitted with his report. That report did not extract and present the underlying evidence in an organized form that would enable Members to meaningfully review it. That report did not purport to identify the conflicting or inconsistent evidence or the inferences such evidence might support. Moreover, Members, other than those who serve on the Committee, have not had access to all of the evidentiary materials, even in the form in which they were delivered to the House.

The need for such a Statement of Information in this inquiry was dramatically enhanced by the Committee's decision not to call for examination and cross-examination of any of the actual witnesses to the conduct that any proposed Article of Impeachment would require the House to prove before the Senate. For that reason, the Committee's hearings have not produced a record that would enable other Members of the House to meaningfully examine the evidence to determine for themselves whether there is clear and convincing evidence to support any or all of the allegations in any Articles of Impeachment that the Committee may submit to the House. Precedent and common sense dictate that no member should vote to impose the burdens of an impeachment trial upon the Senate, the President, the Supreme Court, and the American people unless he or she is satisfied that the available evidence meets that standard.

There is a further reason why such a Statement of Information is necessary, if this House is to be called upon to vote before its recently elected Members have taken office. As we all know, the House as presently constituted, includes Members who have retired, resigned, or been defeated at the polls, as well as three present Members who will take office in the Senate when the 106th Congress convenes. Not since 1933 has a lame-duck House voted to adopt Articles of Impeachment, after the election of the Members who will constitute the House that would be required to prosecute those articles. If the Committee recommends that the House take that action here, every Member must not only decide for herself or himself whether the offenses alleged constitute the kind of "High Crimes and Misdemeanors" that merit impeachment and removal. Each must also decide whether the available evidence is so clear, unambiguous, and convincing that it justifies the Members of this House imposing upon those who will constitute the next a duty to prosecute before the Senate Articles of Impeachment that the next House might well have declined to adopt. Never have the Members of a lame-duck House been called upon to make a decision of that nature.

I am simultaneously transmitting a copy of this letter to each Member of the House. I am confident that a number would have joined me in posing this inquiry had time permitted me to consult with them. I thought, however, that this letter should be made available to you and the Committee immediately.

Sincerely,



Alcee L. Hastings
Member of Congress

Chairman HYDE. We have reached the end of a stimulating day. I want to thank Mr. Ruff for his patience and for his superb presentation. We will convene at 9 a.m. tomorrow. These hearings, pursuant to House Resolution 581, are concluded, and the committee stands adjourned until 9 a.m. tomorrow.

Mr. RUFF. Thank you, Mr. Chairman, for your courtesy. I appreciate it.

Chairman HYDE. Thank you.

[Whereupon, at 6:00 p.m., the committee was adjourned.]

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