

MOTIONS TO DISMISS AND TO
SUBPOENA WITNESSES

• Mr. FEINGOLD. Mr. President, during yesterday's impeachment trial proceedings, I voted against the motion to dismiss offered by the senior Senator from West Virginia, Senator BYRD. I also voted in favor of allowing the House Managers to depose a limited number of witnesses in this case. I would like to explain the reasons for my votes.

Let me state first that I understand that this trial is a unique proceeding; it is not precisely a "trial" as we understand that term to be used in the criminal context. The Senate, for example, as the Chief Justice made clear in upholding Senator HARKIN's objection early in the trial, is both judge and jury, with the final authority to determine not only the "guilt" or "innocence" of the defendant, but also the legal standard to apply and what kind of evidence is relevant to the decision.

Nonetheless, Sen. BYRD's motion was a motion to dismiss, which I believe gives the motion a legal connotation we must not ignore. I believe that in order to dismiss the case at this point, a Senator should be of the opinion that it is not possible for the House Managers to show that the President has committed high crimes and misdemeanors, even if they are permitted to call the witnesses that they want to call. Even apart from the possibility of witness testimony, in order to vote for the motion, a Senator should believe that regardless of what occurs in the closing arguments by the parties and in deliberations in the Senate, that a Senator would not vote to convict.

So for me, this motion to dismiss was akin to asking the judge in this case not to send the case to the jury. In a criminal trial, there is a strong presumption against taking a case out of the hands of the jury, and a very high degree of certainty on the facts of the case is demanded before a judge will take that step. Indeed, a judge must decide that a reasonable juror viewing the evidence in the light most favorable to the prosecution could not vote to convict the defendant, before he will direct a judgment of acquittal.

My view, as of this moment, is that to dismiss this case would in appearance and in fact improperly "short circuit" this trial. I simply cannot say that the House Managers cannot prevail regardless of what witnesses might plausibly testify and regardless of what persuasive arguments might be offered either by the Managers or by Senators who support conviction. And when the history of this trial is written, I want it to be viewed as fair and comprehensive, not as having been shortened merely because the result seemed preordained.

As Senator COLLINS and I indicated in a letter to Senator BYRD on Saturday and in a unanimous consent re-

quest we offered on Monday, my preference would have been to divide the motion to dismiss and allow separate votes on the two articles of impeachment to more closely approximate the separate final votes on the two articles contemplated by the impeachment rules. It would have allowed the Senate to consider the strength of the evidence presented on the two separate articles and the possibility that one of the articles comes closer to the core meaning of high crimes and misdemeanors than the other.

I believe that many of my colleagues on the Republican side view the perjury article as less convincing than the obstruction article and might have voted to dismiss it had the opportunity to do that been made available. But we will never know. When a final vote is taken on the articles, and I now believe such votes will almost certainly occur, I hope that my colleagues who did not vote to dismiss the case today will carefully consider the two articles separately.

I want to be clear that my vote not to dismiss this case does not mean that I would vote to convict the President and remove him from office or that I am leaning in that direction. I have not reached a decision on that question. It is my inclination, however, to demand a very high standard of proof on this question. Because the House Managers have relied so heavily on the argument that the President has committed the federal crimes of perjury and obstruction of justice as the reason that his conduct rises to the level of high crimes and misdemeanors, they probably should be required to prove each element of those crimes beyond a reasonable doubt. That is the standard that juries in criminal proceedings must apply. In this case, where the "impeachability" question rests so much on a conclusion that the President's conduct was not only reprehensible but also criminal, I currently believe that standard is the most appropriate for a Senator to apply.

It is my view at this point that the House Managers' case has some serious problems, and I am not certain that it can be helped by further testimony from witnesses. But I believe it is possible that it can, and the Managers deserve the opportunity to take the depositions they have requested.

In voting against the motion to dismiss and to allow witnesses to be subpoenaed, I have not reached the important question of whether, even if the House Managers manage to prove their case beyond a reasonable doubt, the offenses charged would be "impeachable" and require the President to be removed from office. That is an important question that I decided should be addressed in the context of a final vote on the articles after the evidentiary record is complete. Therefore, I want to be clear that my vote against the

motion does not mean I am leaning in favor of a final vote to convict the President. I am not.

But I have determined, after much thought, that we must continue to move forward and not truncate the proceeding at this point. I believe that it is appropriate for the House Managers, and if they so choose, the President's Counsel, to be able to depose and possibly to present the live testimony of at least a small number of witnesses. And I want to hear final arguments and deliberate with my colleagues before rendering a final verdict on the articles.

I reached my decision on witnesses for a number of reasons. First, although I recognize that this is not a typical, ordinary criminal trial, it is significant and in my mind persuasive that in almost all criminal trials witnesses are called by the prosecution in trying to prove its case. Because I have decided that the House Managers probably must be held to the highest standard of proof—beyond a reasonable doubt—I believe that they should have every reasonable opportunity to meet that standard and prove their case.

Furthermore, witnesses have been called every time in our history that the Senate has held an impeachment trial. (In two cases, the impeachment of Sen. Blount in 1797 and the impeachment of Judge English in 1926, articles of impeachment passed by the House were dismissed without a trial.) Now I recognize that an unusually exhaustive factual record has been assembled by the Independent Counsel, including numerous interviews with, and grand jury testimony from, key witnesses. That distinguishes this case from a number of past impeachments. But in at least the three judicial impeachments in the 1980s, the record of a full criminal trial (two resulting in conviction and one in acquittal) was available to the Senate and still witnesses testified.

In this case, the House Managers strenuously argued that witnesses should be called. It would call the fairness of the process into question were we to deny the House Managers the opportunity to depose at least those witnesses that might shed light on the facts in a few key areas of disagreement in this case. I regard this as a close case in some respects, and the best course to follow is to allow both sides a fair opportunity to make the case they wish to make.

This does not mean that I support an unlimited number of witnesses or an unnecessarily extended trial. Furthermore, at this point, I am reserving judgment on the question of whether live testimony on the Senate floor should be permitted. I believe the Senate has the power, and should exercise the power, to assure that any witnesses called to deliver live testimony have evidence that is truly relevant to present.

In this regard, I think we should allow somewhat greater latitude to the President's counsel since he is the defendant in this proceeding. I am inclined to give a great deal of deference to requests by the President's counsel to conduct discovery and even call additional witnesses if they feel that is necessary. But at least with respect to the House Manager's case, while we must be fair in allowing them to depose the witnesses they say they need to prove their case, we need not allow them to broaden their case beyond the acts alleged in the articles or inordinately extend the trial with witnesses who cannot reasonably be expected to provide evidence relevant to our decision on those articles.

Finally, let me reiterate. My vote against the motion to dismiss should not be interpreted as a signal that I intend to vote to convict the President. Nor does it mean that I would not support a motion to adjourn or a motion to dismiss offered at some later stage of this trial, although I strongly prefer that this trial conclude with a final vote on the articles. It only means that I do not believe that dismissing the case at this moment is the appropriate course for the Senate to follow.●

MOTION OF THE HOUSE MANAGERS FOR THE APPEARANCE OF WITNESSES AT DEPOSITIONS AND TO ADMIT EVIDENCE

● Mr. LEAHY. Mr. President, the House Managers want to conduct depositions of at least four people and their requests to admit affidavits could very well lead to the depositions of at least three others and, indeed, many more witnesses. The three people they expressly ask be subpoenaed are Monica Lewinsky, Vernon Jordan and Sidney Blumenthal. All three have previously testified before the Starr grand jury and Ms. Lewinsky has been interviewed or testified at least 23 times on these matters over the last year.

The fourth deponent requested by the House Managers is none other than the President of the United States. Although they characterize their request as a "petition" that the President be requested to appear, in their Memorandum, the House Republican Managers are less coy about their request. They note that "obtaining testimony from the witness named in the motion, and additionally from the President himself" is what they seek.

The House Managers' request is unprecedented in impeachments. The Senate has never formally requested or demanded that a respondent testify in his own impeachment trial. Should the President decide that he wants to speak to the Senate, that would be his choice. But I cannot support an effort that would have the Senate reject over 200 years of our jurisprudence and begin requiring an accused to prove his innocence.

The presumption of innocence is a core concept in our rule of law and should not be so cavalierly abandoned. The petition of the House Managers is a clever but destructive effort to stand this trial on its head. As a former prosecutor and trial attorney, I appreciate the temptation to turn the tables on an accused person to make up for a weak case, but the Senate should not condone it. The burden of proof is on the House to establish why the Senate should convict and remove from office the person the American people elected to serve as their President.

I commend President Clinton for focusing on his duties as President and on moving the country forward. That the Congress remains immersed in this impeachment trial is distraction enough from the functions of our federal government. We have heard hours of argument from the House Republican Managers and the response of the President's lawyers. Senator BYRD has, pursuant to our Unanimous Consent Resolution governing these proceedings, offered a motion to dismiss to bring this entire matter to conclusion. If, on the other hand, the majority in the Senate wishes to continue these proceedings, that is the majority's prerogative.

The House Managers apparently want to excuse the weaknesses in their case by blaming the Senate for not calling the President to the stand or the President for not volunteering to run the gauntlet of House Managers. Having had the House reject their proposed article of impeachment based on the President's deposition in the Jones case, the House Managers are left to pursue their shifting allegations of perjury before the grand jury. Their allegations of perjury have devolved to semantical differences and the choice of such words as "occasional" and "on certain occasions." Their view of perjury allows them to take a part of a statement out of context and say that it is actionable for not explicating all relevant facts and circumstances. They view perjury by a standard that would condemn most presentations, even some of their own presentations before the Senate.

In addition to their request that the President be deposed, the House Republican Managers also propose to include in this record affidavits and other materials apparently not part of the record provided by Mr. Starr or considered by the House. Ironically, in so doing, they have chosen to proceed by affidavit. They must know that by proffering the declaration of an attorney for Paula Jones about that case and the link between that now settled matter and the Starr investigation, they are necessarily opening this area to possible extensive discovery that could result in the depositions of additional witnesses, as well.

Does anyone think that the Senate record can fairly be limited to the prof-

ferred declaration of Mr. Holmes without giving the President an opportunity to depose him and other relevant witnesses after fair discovery? The links between the Jones case and the Starr investigation will be fair game for examination in the fullness of time if the Holmes declaration proffered by the House Managers is accepted.

The Holmes declaration is at variance with the House Managers' proffer. The declaration suggests that the Jones lawyers made a collective decision, whereas the House Managers suggest that the decision to subpoena Ms. Currie was Mr. Holmes' decision. Mr. Holmes declares that no Washington Post article played any part in his decisionmaking to subpoena Ms. Currie and that the "does not recall" any attorney in his firm saying anything about such an article "in the discussions in which we decided to subpoena Ms. Currie." This could lead to discovery from a number of Jones lawyers.

The Holmes declaration says that the Jones lawyers "had received what [they] considered to be reliable information that Ms. Currie was instrumental in facilitating Monica Lewinsky's meetings with Mr. Clinton and that Ms. Currie was central to the 'cover story' Mr. Clinton and Ms. Lewinsky had developed to use in the event their affair was discovered." That assertion was strongly omitted from the House Republican Managers' proffer. That assertion raises questions about what the Jones lawyers knew, when they knew it and whether there was any link to the Starr investigation. If the purpose of the declaration is to rebut the notion that Ms. Currie was subpoenaed because the Jones lawyers were following the activities of the Starr investigation, this declaration falls far short of the mark. It raises more questions than it resolves.

I am surprised to see a judicial clerk submit an affidavit in this case. The one thing that is clear from Mr. Ward's affidavit is that it does not support the conclusions drawn in the House Managers' proffer. Mr. Ward says only that President Clinton was looking directly at Mr. Bennett at one moment during the argument by the lawyers during the deposition. He does not aver, as the House Managers suggest he would competently testify, that "he saw President Clinton listening attentively to Mr. Bennett's remarks."

While the affidavit of Barry Ward cannot convert the President's silence into statements, it does provide one perspective on the President's deposition in the Jones case. Accepting that proffered evidence may, however, prompt the President's lawyers to want to examine other perspectives to give the Senate a more complete picture and a fairer opportunity to consider