

he reminded Ms. Lewinsky of their cover stories in the same conversation in which he suggested that she file an affidavit, and 3) he relied on Ms. Lewinsky's false affidavit in his own testimony denying their relationship. Finally, when Ms. Lewinsky asked President Clinton if he wanted to see her signed affidavit, he said he didn't need to see it because he had "seen fifteen others like it". This response remains one of the more puzzling in this case and leaves open the possibility that the President tampered with other witnesses in the Jones civil rights case.

We also now know that the President's personal secretary, Betty Currie, hid presents under her bed that had been subpoenaed in the Jones case. These are the gifts the President had given to Monica Lewinsky during their relationship. Ms. Lewinsky has testified that Bettie Currie definitely called her about the gifts, and the only way Ms. Currie could have known about the gifts is if the President instructed her to pick them up. While the President's lawyers deny this explanation, the only phone record we know about is a phone call made from Betty Currie to Ms. Lewinsky on the day she picked up the gifts. The President's lawyers have failed to produce any concrete evidence to contradict this explanation. Concealing gifts that are under subpoena in a legal proceeding is illegal and it obstructs the administration of justice.

Moreover, the conclusion that it was in fact President Clinton who directed Betty Currie to conceal the presents is bolstered by the fact that the President corruptly attempted to influence Ms. Currie's testimony in a federal civil rights suit. President Clinton made several false statements to Betty Currie on Sunday, January 18, 1997, the day after he testified in the Jones lawsuit. Ms. Currie, who explained that it was very unusual for the President to ask her to come in to work on a Sunday, testified that President Clinton made a series of false statements to her as if asking for her consent. Specifically, the President stated to Ms. Currie: 1) "You were always there when she [Monica Lewinsky] was there, right? We were never really alone." 2) "You could see and hear everything." 3) "Monica came on to me, and I never touched her, right?" 4) She wanted to have sex with me and I couldn't do that." All of these statements were false, and all of them occurred the day after Judge Wright had expressly forbidden any of the parties deposed or their attorneys from discussing the deposition with anyone.

The President's lawyers have argued that the President made these statements to refresh his recollection or to find out what Ms. Currie knew in the event of a press avalanche. Neither of these explanations is plausible. It is impossible to refresh one's recollection with false, leading questions. It is also

impossible to find out what someone else knew if you tell them what they are supposed to believe. The plausibility of either of these explanations is entirely discounted when you consider that the President called Betty Currie in a second time, on January 20th to "remind" her of these statements. The most likely explanation for these statements is far more sinister. That President was intending to influence the testimony of a likely witness in a federal civil rights proceeding. President Clinton was, in fact, trying to get Betty Currie to join him in his web of deception and obstruction of justice.

The inescapable conclusion I have come to is that the President of the United States set upon a deliberate, premeditated plan to deceive the court in two separate legal proceedings and to encourage others to deceive the court as well. The President first defended himself by claiming to be the unfortunate victim of a vast right wing conspiracy. Only after the physical evidence uncovered the truth about his affair did the President claim he was only trying to protect his family from these embarrassing revelations. Neither of these excuses justifies the President's actions. A defendant in a legal proceeding does not have the right to perjure himself because he questions the motives of the plaintiff. There are proper legal procedures and remedies available to any defendant who believes he has been the victim of a lawsuit predicated on frivolous legal theories or springing from personal malice. It is, however, never legitimate to respond to even a frivolous lawsuit by lying under oath.

There has been a great debate on how the President's actions will impact our nation, especially if those actions go unpunished. Last year I read of a town in Midwestern America that had experienced a number of killings in the first two months of the year. A consultant was hired to find the cause of these brutal acts. I believe the findings in his report should cause all of us to take pause. He explained that first a window is broken and nobody fixes it. That leads to a lawn that isn't mowed. Through a series of similar instances, the kids think nobody cares about them. If we let the President off for intentionally violating the rule of law, what do we tell our children when they are caught breaking the law? That we have one law for the rulers and another for the ruled? Do we tell them they have to follow the law until they become powerful enough, or clever enough, or rich enough to violate the law with impunity? What do we tell the federal judges who have lost their robes and gavels for committing perjury? What do we tell military officers who have lost their livelihood for violating their oaths and rules of their office? What do we tell average citizens who have lost their jobs, their freedom, and

their fortunes for violating their oaths to tell the truth in a court of law? If the legacy we leave to our children is one of cynical duplicity, I fear that even an ever-increasing Dow Jones' average will be incapable of salvaging our next generation, or even, I fear, our civilization.

I must conclude that while the power of impeachment and removal is a strong measure and one that should never be taken gently, it is an indispensable remedy in our government for those public officers who have so violated their public trust as to be unworthy to continue holding offices of public trust. The great Supreme Court Justice and Constitutional scholar Joseph Story perhaps best summarized the impeachment mechanism as one which "holds out a deep and immediate responsibility, as a check upon arbitrary power; and compels the chief magistrate, as well as the humblest citizen, to bend to the majesty of the laws." Those who would disregard this rule of law for their own personal or political ends must not be allowed to remain in offices of public trust. For this reason, I will vote to convict President Clinton on both articles of impeachment.

I thank the chair and yield the floor.

OPINION OF SENATOR RUSSELL D. FEINGOLD IN THE TRIAL OF WILLIAM JEFFERSON CLINTON

Mr. FEINGOLD. Mr. President, I ask unanimous consent that my opinion in the recently concluded impeachment trial of President William Jefferson Clinton be printed in the RECORD.

There being no objection, the opinion was ordered to be printed in the RECORD, as follows:

OPINION OF SENATOR RUSSELL D. FEINGOLD

- I. Introduction
- II. Analysis of Alleged Federal Crimes
 - A. Standard of Proof
 - B. Perjury
 - C. Obstruction of Justice
- III. High Crimes and Misdemeanors
- IV. Conclusion

Only 154 Senators have ever been sworn to sit in a Court of Impeachment for the trial of an American president. For this senator, to sit in judgment of this President was a sorrowful experience. The President and I began our careers in Washington together in January 1993. On the crisp, winter day of his first inauguration, I was moved by the poetry of Maya Angelou, which celebrated the "pulse of . . . [a] new day" in American politics and culture. All along in this process, I have regretted that his presidency has come to this, but have sought not to personalize that regret in a way that would affect my judgment. Taking the oath of impartiality on January 7 helped me to do that, but let me say, I very much regret that the President's conduct brought us to this day.

This somber experience requires a senator to blend three different considerations: (1) the historical purposes of impeachment and the record of past impeachments; (2) the current legal and political merits and implications of these impeachment proceedings; and

(3) the potential impact of the current impeachment proceedings on future impeachments and the stability of the American constitutional system.

In attempting to reconcile these considerations, a senator has only the Andrew Johnson impeachment trial to look to for precise precedents for a presidential impeachment trial. Each senator is expected to render independently his or her judgment about the applicable law and then to apply that law to his or her own individual understanding of the facts of the case. This Opinion is an explanation of my attempt to meet that challenge.

I. INTRODUCTION

Strive as they may to minimize its import, the House Managers and those advocating removal of the President must recognize that the single most salient fact in this entire case is that on November 5, 1996, 47,402,357 Americans voted to reelect William Jefferson Clinton. That decision was the right and the responsibility of the American people.

By contrast, impeachment and removal from office prior to the expiration of a president's four year term of office must be viewed as an extreme and radical remedy, given that it overrides the solemn, quadrennial decision of the American people. For us to remove a duly elected president could well be the most momentous constitutional event in the history of our country, save the Civil War. The people choose their leaders in America, and we must not lightly reverse their will. To overrule the voters, the offense must be grave and the case must be very strong.

Too much of the rhetoric in this impeachment debate has focused on whether the President should be permitted to keep "his" job, in light of his unacceptable behavior. The question is better phrased as whether the President's conduct is sufficiently egregious to require the Congress to undo the decision of more than 47 million Americans to give him that job in the first place. Nor is it a valid argument or palliative to suggest that the same number of Americans also voted for Vice President Albert Gore Jr., and that he would become president upon President Clinton's removal. This argument is far too dependent on the particular nature of the unusual positive connection between this President, this Vice-President, and the American people. It flies in the face of the few actual examples of past presidents who faced the prospect of impeachment.

In 1868, President Johnson, an unpopular president who had been President Lincoln's vice-president, himself had no vice president. A member of the Senate would have succeeded him had he been convicted. In the case of President Nixon, whose resignation merely substituted for a nearly certain removal from office in an impeachment trial, Gerald R. Ford was elevated to the presidency. He had never been elected popularly to an office higher than the House of Representatives. In any event, the political similarity of a vice-president to a president cannot be taken seriously as an argument that conviction will be less wrenching for the country or damaging to the institution of the presidency. The crucial fact in this case remains that on November 5, 1996, the American people hired one man and one man alone to be their president, and they have a right to expect that their decision will be honored and preserved, except in the most dire circumstances.

This principle does not apply in the same way to the impeachment of judges. Elected presidents and appointed judges are chosen

differently and their removal must be considered differently. They are starkly different in the nature and scope of their duties and in the sources of their constitutional legitimacy.

In the American constitutional system, it cannot soundly be argued that every precedent from past impeachments of judges must control in the impeachment of an elected president. I do not suggest here a lower standard of behavior for presidents. Rather, I believe that our system requires a higher standard for removal of an elected president than for an appointed judge. Judges serve for life "during good behavior." That is a long time, with no means of removing a judge except impeachment. Presidents are chosen by the people in a sacred democratic process. If the people become displeased with the president they have chosen, they need only wait for the next election or the end of his term.

Thus, the analogy of an elected president to an appointed judge is weak. Weaker still are the arguments that the President must be removed because a corporate manager or military officer would be removed under similar circumstances. Corporate life is an arena of private behavior and corporate positions do not proceed from popular elections. Personnel decisions in the boardroom are of no broad constitutional consequence. Military officers likewise are not chosen by the voters. The corporate and military analogies cannot justify overturning a presidential election.

Yet, while overturning an election is the most severe constitutional sanction in our democracy, this President has chosen to conduct himself in such a manner as to run the risk that the U.S. Senate reasonably could conclude that he has committed "high Crimes and Misdemeanors." That is not the conclusion I ultimately reach. But at least with regard to one of the charges in Article II, the President came perilously close to committing an impeachable offense. Even without his removal, this is a tragic occurrence in our nation's history and a personal disappointment to me as one who holds the abilities and many of the accomplishments of this President in high esteem.

This impeachment process has led members of the Senate to consult the relatively scant history of American impeachments. Much of the history relates to the impeachment of federal judges, and this was of some limited relevance to these proceedings. Of the greatest relevance, however, are the histories of the impeachment and acquittal of Andrew Johnson in 1868, and the virtual impeachment and conviction of President Nixon, who resigned in the face of near certain removal in 1974.

Based on my reading and study, the actions of President Clinton lie somewhere between the conduct of the presidents in the Johnson and Nixon episodes. The general historical view appears to be that the case against President Johnson lacked a credible basis for removal, the primary accusation being that President Johnson removed a cabinet secretary from office in circumvention of the law. President Johnson disputed the constitutionality of the statute he was alleged to have violated, and apparently had a good basis for that view. The United States Supreme Court ultimately struck down a similar statute as unconstitutional. *Myers v. United States*, 272 U.S. 52 (1926). Johnson argued that he was the victim of a partisan Congress, determined to punish him for his policies. History has adopted that view. The President's defenders point to the Johnson case and they argue that the impeachment of

President Clinton is the same sort of partisan exercise, unfounded in fact or law.

The President's accusers point to the case of President Nixon. In contrast to the relatively weak case against President Johnson, most regard President Nixon's actions in covering up his and others' efforts to interfere with the 1972 presidential election to be a classic example of the type of conduct that the framers sought to discourage with the "high Crimes and Misdemeanors" provision. President Nixon's misdeeds almost certainly would have led to his impeachment and conviction if he had not resigned. His alleged crimes were clearly committed in the course of his public duties, subverting the Constitution, compromising the integrity of the processes of government, and using agents of the government for illegal political purposes. The President's accusers argue that the same is true of President Clinton.

With all due respect to historians and constitutional scholars who may know more or feel differently, it is my sense that the case against President Clinton is the first close or "hard" case of presidential impeachment in our nation's long history. This case lies in the middle. It is a hard case and senators may see it either way.

In the ordinary practice of law, there is a saying that "hard cases make bad law." Some people may invoke that phrase when they complain that the President has "gotten away with it." Others may invoke it with concern that we have somehow made it easier to impeach, if not convict, a president. I have tried to remember that adage as we have made our procedural and evidentiary decisions along the way. Our actions in this trial and our decision today may hold even greater significance for our nation's constitutional structure than the past two presidential impeachments, as wrenching and important as each of those was in our nation's history and in its time. I hope, in the end, that this hard case has made good law.

II. ANALYSIS OF ALLEGED FEDERAL CRIMES

A. Standard of proof

In drafting the two Articles of Impeachment against President Clinton, the House of Representatives sought to portray certain conduct by the President as meeting the constitutional standard of "High Crimes and Misdemeanors." In the specific language employed by the House in the Articles, and in the forceful arguments advanced by the House Managers on the Senate floor, a strategic choice was made. A particular approach was adopted that the House Managers clearly believe puts their case in its strongest light. They could simply have recited and attempted to prove certain conduct by the President and then argued, independent of the strictures of modern criminal law, that the President had committed "High Crimes and Misdemeanors" as that term has been understood throughout this nation's constitutional history.

Perhaps to make the facts of the case more easily understandable, or perhaps because the conduct alone may lack the gravity to justify the removal from office of the President of the United States, the House Managers chose another course, laden with the opprobrium of the modern statutory federal criminal law. Rather than simply alleging a course of general presidential misconduct, they placed enormous reliance on their assertion that the President committed the serious federal crimes of perjury and obstruction of justice. Indeed, in his opening statement on January 15, House Manager McCollum stated quite directly:

"The first thing you have to determine is whether or not the President committed

crimes. It is only if you determine he committed the crimes of perjury, obstruction of justice, and witness tampering that you will move to the question of whether he is removed from office. In fact, no one, none of us, would argue to you that the President should be removed from office unless you conclude that he committed the crimes that he is alleged to have committed."

The very names of these crimes connote in modern America the type of conduct that is hard to reconcile with the continuation in office of the chief law enforcement officer of this nation. The House Managers' strategy was clever. It had an emotional power deeply rooted in the nation's abhorrence of disrespect for the law. It also placed the triers of fact and law in the position of potentially having to justify a decision that the President committed these federal crimes, but that these particular instances of alleged perjury and obstruction of justice did not constitute "High Crimes and Misdemeanors" as intended by the Framers.

I see nothing inappropriate in this approach and, in some ways, it assisted me in organizing my thoughts about this case. An obligation, however, does attend the House Managers' decision to rely on proving that the President committed actual federal statutory crimes. That obligation relates to the standard of proof.

I cannot justify concluding that the President should be removed from office for committing these federal crimes unless the case is proved by the same standard of proof that any federal prosecutor would be required to meet in a federal criminal case. This standard requires that the President be shown to have committed one of the two crimes alleged "beyond a reasonable doubt," as that standard of proof is understood in our criminal justice system. The "beyond a reasonable doubt" standard is guaranteed to defendants in criminal cases by the due process clause of the Constitution. *Victor v. Nebraska*, 511 U.S. 1 (1994). To apply any lesser standard in this trial would be unfair not only to the President, but also to the tens of millions of Americans whose right to have the President finish his term could be overridden by a mere likelihood or possibility that he actually committed such serious crimes.

In other words, the House Managers are free to use the "sword" of the language of the federal criminal law but cannot simultaneously deprive the president of the "shield" that same criminal law provides any defendant by requiring the prosecution to prove its case by the highest standard of proof in our legal system.

B. Perjury

Article I charges the President with committing numerous acts of perjury in his Grand Jury testimony of August 17, 1998. To convict an individual of perjury under 18 U.S.C. § 1621 or § 1623, the prosecution in a criminal case must prove beyond a reasonable doubt that the defendant: (1) knowingly or willfully made a (2) false, (3) material declaration (4) under oath (5) in a proceeding before or ancillary to any court or grand jury of the United States. To be perjurious, the false statements must be knowingly or willfully false and material to the proceeding in which they are given. Literally true statements, even if misleading, are not perjurious. And if a witness honestly believes that his or her testimony is true at the time the testimony is given, it is not perjurious, even if it is later shown to have been false.

Before turning to the allegations of perjury in Article I, I must comment on the failure of the House to specify the perjurious

statements on which it based its charge. The President's counsel made a convincing argument that if Article I were offered as an indictment in a criminal case, it would be dismissed out of hand for this failure. And despite being alerted to this deficiency in the President's answer and his opening trial memorandum, the House Managers steadfastly refused to be specific and complete in their discussion of the perjury charges, constantly referring to alleged acts of perjury as mere examples.

As a Senator who has tried to apply a thorough and impartial legal analysis to these charges, I have found this refusal to specify the alleged perjurious statements somewhat frustrating. Unfortunately, even at the conclusion of this trial, it is still very difficult to be sure of what the full list of alleged perjuries includes. Indeed, it is even difficult to be sure if the House Managers continue to rely on all of the charges they raised in their trial memorandum and opening presentation.

The House listed four "categories" of perjury before the Grand Jury. With respect to the first category, "the nature and details of his relationship with a subordinate Government employee," I find that some of the examples that the House Managers raised in their trial memorandum and in presenting their case in the trial are truly frivolous. The Grand Jury was investigating perjury and obstruction of justice in the civil case pursued by Paula Jones. Once the President admitted that his relationship with Monica Lewinsky included inappropriate sexual conduct, of what possible materiality to the Grand Jury's inquiry was the question of how many times such conduct occurred?

The testimony of the President concerning whether he engaged in conduct with Ms. Lewinsky that would have been considered "sexual relations" as that term was defined in the Jones case is the one instance of testimony in this category cited by the House Managers that was clearly material to the Grand Jury's investigation of possible perjury in the deposition. As to the specific facts at issue, we still have only the conflicting testimony of the two witnesses, Ms. Lewinsky and the President. While there are good common sense reasons to doubt the President's version of a wholly non-reciprocal sexual relationship, perjury has not been proven beyond a reasonable doubt. Even if we accept Ms. Lewinsky's version of what kind of touching occurred, the ultimate question of whether President Clinton's statements on this issue in the Grand Jury were actually false turns on the question of what his intent was in engaging in those particular acts with Ms. Lewinsky. I simply cannot say that there is no reasonable doubt on this point. Even Ms. Lewinsky stated in her deposition that the President's intent was something on which she did not feel comfortable commenting.

A second category of alleged perjury consists of statements by the President before the Grand Jury concerning his earlier testimony in the deposition in the Jones case. This is "bootstrapping." It is particularly troubling because the House of Representatives, and even one of the House Managers, rejected an Article of Impeachment that alleged that the President committed perjury in the Jones deposition. I reject the House Managers' argument that the President reaffirmed his entire Jones deposition before the Grand Jury and therefore should be found guilty of perjury in the Grand Jury if any of his deposition testimony was false. The basis for this breathtaking position, as

laid out by House Manager Rogan in response to Senator Nickles' question, is the statement made by the President in response to a question from the Independent Counsel concerning what the oath he swore to tell the truth in the Jones deposition meant to him. He said, "I believed then that I had to answer the questions truthfully, that's correct." In my mind, that was not a reaffirmation of his entire Jones deposition testimony sufficient to make any perjury in that deposition perjury "by reference" before the Grand Jury.

The President did state a few times in the Grand Jury that he intended to answer the Jones' lawyers questions in the deposition in a misleading but technically true manner, and House Manager McCollum highlighted a few of those statements in his closing argument concerning this category of perjury. For purposes of the charge of perjury before the Grand Jury in these statements, the key issue is not whether the President succeeded in negotiating the line between perjury and misleading but true testimony, but whether he intended to negotiate that line. Frankly, my reading of his testimony in the Jones deposition is that it was, in fact, his intent to tell the truth. In the Jones deposition, he was cagey and evasive, but he appeared to be trying mightily not to tell an out and out lie. Even though he may very well have crossed the line on a number of occasions, I have to find that there is reasonable doubt that the President was committing perjury in the Grand Jury when he said that his intent was to testify truthfully in the Jones deposition.

The third part of Article I deserves only brief mention. It boils down to the charge that the President lied when he said he wasn't paying attention when his lawyer offered Monica Lewinsky's affidavit in the Jones deposition and argued that it meant that "there is absolutely no sex of any kind, in any manner, shape, or form, with President Clinton." The only evidence that the House Managers offered to support their charge of perjury is the videotape of the deposition in which President Clinton is seen looking, we are told, in the direction of his lawyer when this conversation occurred. The House Managers tried to bolster this shockingly thin reed on which to base a perjury charge with a similarly inconclusive affidavit from a law clerk to Judge Susan Webber Wright. This is perhaps the weakest of the many inferences about the President's state of mind that the House Managers urge us to accept in order to convict. I am virtually certain that a perjury charge based on this kind of evidence would not be pursued by a federal prosecutor, and absolutely certain that a jury would not find guilt on such a charge beyond a reasonable doubt. I certainly cannot.

The fourth and final part of Article I alleges that the President committed perjury when he testified in the Grand Jury concerning "his corrupt efforts to influence the testimony of witnesses and to impede the discovery of evidence" in the Jones case. This presumably refers to the President's statements to the Grand Jury concerning the gift exchange and his conversations with Betty Currie and other aides after his Jones deposition. With respect to the President's testimony about the gifts, I find it significant that Monica Lewinsky revealed for the first time in her Senate deposition that she had told the FBI shortly after the President's deposition that one of his statements about the gifts "sounded familiar." Her Senate deposition was the first time that anyone

learned about that FBI interview. Surely this was "exculpatory information" that the Independent Counsel and the House Managers had the responsibility to disclose to the President's counsel and bring to our attention.

The President denied that he instructed Betty Currie to pick up the gifts from Monica Lewinsky. By charging the President with perjury for that statement, the House Managers have essentially tried to convert their obstruction charge into a perjury charge. But there is an unresolved conflict of testimony on the issue of who initiated the hiding of the gifts. As I will explain later, that conflict raises reasonable doubt in my mind about that portion of the obstruction charge. It is similarly dispositive of the perjury charge, which essentially amounts to a claim that the President lied when he said he did not obstruct justice by urging Betty Currie to pick up the gifts.

The President stated in the Grand Jury that in his conversations with aides after his deposition in the Jones case he attempted to be literally truthful, but misleading, in order to conceal his affair with Ms. Lewinsky. The questioning here by the Independent Counsel was far too general to support a perjury conviction for his statement in the Grand Jury that he "said things that were true" to his aides. He certainly said many things that were true to his aides, and he told some lies. The clear import of his testimony was that he was trying to conceal his relationship with Ms. Lewinsky from his aides while being generally truthful to them. I do not believe that the President willfully or knowingly lied when he said this to the Grand Jury, nor do I believe that these statements were material to the Grand Jury's inquiry, since he was never asked about and he never denied making specific statements to his aides that were not true.

As I will discuss later with respect to Article II, the President's conversations with Betty Currie give me the most pause and cause me the most concern in this whole matter. While it may be hard to believe the President's explanation in the Grand Jury that he was "trying to figure out what the facts were," his intent in having the oblique and tortured conversation with Ms. Currie is not clear enough to find beyond a reasonable doubt that he committed perjury in the Grand Jury when he discussed that conversation.

In sum, I do not believe that the House Managers have proved the elements of perjury beyond a reasonable doubt. But I also must say that even if one or two of these charges did meet that test, I would have some skepticism about Article I. It was a highly unusual situation that led to the President's appearance before the Grand Jury. Targets of criminal investigations are almost never subpoenaed to testify in the Grand Jury, and when they are subpoenaed, they invariably invoke their Fifth Amendment rights. Here, of course, the President did not invoke his right against self-incrimination but instead answered questions about the charges against him. And now he faces charges that he committed perjury when he denied committing the crimes of perjury in the deposition and obstruction of justice that the Grand Jury was investigating. I am uncomfortable with these prosecutorial tactics, which come very close, it seems to me, to using the Grand Jury not only to investigate potential crimes but to trap the President into committing them.

C. Obstruction of justice

In Article II, the House charged President Clinton with obstruction of justice and wit-

ness tampering. Once again, to successfully convict defendants in criminal cases of these charges, prosecutors must prove each of the elements of the crime beyond a reasonable doubt. And that is the standard I believe is most appropriate here.

In the case of obstruction, the elements of a violation of 18 U.S.C. § 1503 are that: (1) a judicial proceeding was pending; (2) the defendant knew it was pending; and (3) the defendant corruptly endeavored to influence, obstruct, or impede the due administration of justice in the proceeding. The courts have indicated that the requirement that the defendant "corruptly endeavor to influence" provides the element of intent in this crime. To "corruptly endeavor to influence" is to act voluntarily and deliberately with the purpose of improperly influencing or obstructing the administration of justice.

Witness tampering under 18 U.S.C. § 1512 requires proof that the defendant (1) corruptly persuaded or attempted to do so or engaged in misleading conduct toward another person (2) with intent (a) to influence or prevent that person's testimony in an official proceeding; or (b) to cause or induce any person to withhold testimony or physical evidence from an official proceeding.

The charges against the President in Article II have been referred to by the House Managers as the "seven pillars of obstruction." Some of these charges are more easily interpreted as allegations that the federal witness tampering statute has been violated. In any event, the crucial disputed element in all the charges against the President is intent to influence or obstruct the proceeding. The House Managers made little effort to distinguish between the two criminal statutes, which both include that element. Indeed, if the intent element of these crimes were proven, some of the alleged improper conduct of the President could fall under both statutes, which is one reason I have referred to the case against the President as a close one, with regard to Article II.

The House Managers have regularly urged the Senate to look at the entirety of the charges against the President and not to pick apart the individual allegations. I think the more appropriate analysis, however, is to look at each allegation and determine if the elements of obstruction are proven beyond a reasonable doubt. In many cases, the House Managers seem to take the position that the intent to obstruct or influence can be inferred from a pattern of behavior. But each allegation cannot be considered part of a "pattern of obstruction" unless it meets the elements of obstruction (or witness tampering) on its own. Otherwise, Article II become a series of "bootstraps," which are alleged to add up to obstruction of justice without any specific action actually constituting a violation of federal law.

Nonetheless, there is no question in my mind that Article II is the more serious of the two articles of impeachment, because the factual allegations are more troubling and because it charges conduct that involved a number of individuals, in and out of government, other than the President. If the allegations are true, this conduct would undermine respect for the rule of law and injure our system of justice even more deeply than perjury, which, of course, is a serious violation as well. Because I took these charges very seriously, I wanted to give the House Managers every reasonable opportunity to prove them. I supported the issuance of subpoenas to witnesses for depositions and the presentation of the witnesses' testimony to the Senate because I wanted to be very clear in

my own mind about what had taken place before deciding whether to acquit or convict on this particular article.

The first two obstruction charges against the President arise out of his late night telephone conversation with Monica Lewinsky on December 17, 1997. The House Managers charge that during that call the President encouraged Ms. Lewinsky to file a false affidavit and to lie if called upon to testify in the Jones case. While I may agree with House Manager Graham that a telephone call at the hour of 2:30 a.m. is not likely to be a casual call, the burden on the House Managers is to prove that the President committed a crime during the call, not merely to invite an inference that he was "up to no good." And the direct evidence—testimony from Ms. Lewinsky—does not support the Managers' theory. She testified repeatedly that she never, "ever" discussed the contents of her affidavit with the President. In addition, according to Ms. Lewinsky, the discussion of "cover stories" in the December 17 phone call was not in connection with her possible affidavit or testimony in the Jones case.

There simply is not enough evidence that the President intended to influence Ms. Lewinsky's affidavit or testimony to find that the law was broken. According to Ms. Lewinsky, they discussed the possibility of her filing an affidavit in order to avoid testifying, but did not discuss the details of that affidavit. She testified that she thought the contents of affidavit could include a "range of things," running from the innocuous to the deceitful. Indeed, the main evidence offered by the House Managers seems to be that the President and Ms. Lewinsky over the period of the relationship developed "cover stories" and planned to conceal their affair. The House Managers suggest that we must infer from the mention of these cover stories during the December 17 conversation a signal to Ms. Lewinsky that they should be employed in the affidavit or in Ms. Lewinsky's testimony if she were called.

The "cover stories" had been developed over a year earlier. The House Managers argue that they were transformed into obstruction of justice and witness tampering when Ms. Lewinsky became a witness in the Jones case by their mere mention in the telephone conversation of December 17. That is an interesting theory, but evidence of the President's intent to obstruct justice in that conversation is simply lacking. I do not believe a federal criminal prosecution would ever be brought with such a slim factual foundation, notwithstanding the earnest statements to the contrary by a number of the House Managers who are former prosecutors.

Another allegation refuted by the depositions taken by the House Managers was the charge based on the efforts of Vernon Jordan to secure Monica Lewinsky a job. Jordan admitted that he sought a job for Ms. Lewinsky at the request of the President. However disturbing the conduct and whatever innuendo it invites, it was not against the law for the President to seek to aid a woman with whom he had carried on an illicit relationship. It only amounts to obstruction of justice or witness tampering if it is proven that the job assistance was offered with the intent of preventing her from testifying or influencing her testimony in the Jones case. Numerous facts cut against this allegation: (1) the President's efforts to help Ms. Lewinsky find a job started long before she was a witness in the Jones case; (2) Vernon Jordan's intensified efforts predated

by at least a week his knowledge that she had been subpoenaed; (3) both Ms. Lewinsky and Mr. Jordan testified that they thought that the job search and the submission of Ms. Lewinsky's affidavit were not connected.

Vernon Jordan's role in this whole story is nonetheless troubling. It is clear he made extraordinary efforts to help Ms. Lewinsky obtain employment, and he kept the President informed of his progress. But I cannot conclude beyond a reasonable doubt that his efforts must be attributed to a plan on the part of the President to prevent Ms. Lewinsky from testifying truthfully in the Jones case. Just as plausible is that the President's motive to help Ms. Lewinsky was loyalty or guilt, or to make it less likely that she would reveal the relationship, which had long since ceased to be sexual, to one of her friends or the press.

Another charge in Article II deals with the President's failure to prevent his lawyer from relying on Ms. Lewinsky's misleading affidavit during the Jones deposition. But evidence of the President's intent to obstruct justice is completely lacking here. As a witness in a deposition, the President did not have a duty to monitor his lawyer's statements. One can only imagine what the President was thinking about as he listened to the lawyers and Judge Wright debate whether he was going to have to answer questions about his relationship with Ms. Lewinsky.

Before turning to the most serious allegations of obstruction and witness tampering, let me comment on the final charge in Article II, which concerns the President's statements to aides who later were called before the Grand Jury to testify. This charge has been a sideshow and a distraction from the beginning. While the charge is listed in Article II as one of the "means used to implement" the "course of conduct or scheme designed to delay, impede, cover up, and conceal the existence of evidence and testimony" in the Jones case, it actually alleges an effort to obstruct the Grand Jury investigation. Furthermore, it assumes that in the days when the Lewinsky story was breaking, the President's conversations with his aides were aimed at influencing their eventual testimony in the Grand Jury, rather than dealing with the public firestorm that was enveloping the White House and the enormous personal embarrassment and humiliation that the President faced as his affair became public.

There is much for the Congress and the nation to criticize about the President's behavior in this matter. Concealing the truth and the intimate details of this relationship from his close aides ranks well down on the list for me. I am much more outraged by his very public, very forceful denial of the affair to the American people on national television. Yet that denial does not appear to be part of a scheme to obstruct the Grand Jury. And the fact that the President's more elaborate lie about the nature of his relationship with Ms. Lewinsky in his conversation with Sidney Blumenthal found its way into press accounts is essentially irrelevant to the question of whether the President committed a crime. Yet the House Managers spent hours and hours trying to substantiate their claim that there was a White House effort, masterminded by the President, to discredit and attack Ms. Lewinsky. They even called Sidney Blumenthal as a witness and explored this issue in depth with him. Then, on the day our deliberations started, they sought to introduce new evidence and take new depositions because they believe that Mr. Blumenthal was untruthful in his deposition.

After all this, the House Managers still have not explained what crime is lurking in the conspiracy they think they have found. The President cannot be impeached and removed from office for being a "bully," or being "mean," or because his Administration has a muscular spin operation. On this charge, not only is there a reasonable doubt that the President intended to obstruct justice when he misled his aides about his relationship with Ms. Lewinsky, there is no evidence at all that he did.

Let me turn to the two charges of Article II that I view as the most serious and substantial—the concealment of gifts given by the President to Ms. Lewinsky and the President's two conversations with his personal secretary, Betty Currie, after he was deposed in the Jones case.

It is significant that both of these allegations involve Ms. Currie. And the gift concealment allegation raises what is probably the most serious factual dispute in this case—the question of whether it was Ms. Lewinsky or Ms. Currie who suggested hiding the gifts. Yet even when given the opportunity to call a limited number of witnesses for depositions, the House Managers chose not to call Betty Currie. I was troubled by this at the time, particularly since the testimony of Sidney Blumenthal seemed so tangential to the case. Other than Monica Lewinsky, Betty Currie was the most important witness in this case, and the House Managers chose not to depose her.

While I was inclined to give the House Managers the benefit of the doubt on their witness selection, I am prohibited from giving them the benefit of the doubt on whose testimony to believe on key disputes of fact. Without seeing Ms. Currie testify, I have no basis on which to compare her credibility to that of Ms. Lewinsky on the issue of who initiated the hiding of the gifts. Furthermore, Ms. Lewinsky testified that she was concerned about the Jones lawyers' request for the gifts long before her December 28 meeting with the President and her delivery of the gifts to Ms. Currie later that day.

I was struck by Ms. Lewinsky's testimony on this point in her Senate deposition. She seemed indefinite when she reaffirmed her earlier testimony that Betty Currie had called her about the gifts, rather than vice versa. In this instance, I appreciated the opportunity to view Ms. Lewinsky's demeanor when she testified. She seemed significantly less certain about who raised the idea of hiding the gifts. I certainly do not conclude that she was lying, but her memory of the sequence of events did not seem as clear on this point as it was on many of the issues discussed in the deposition. The fact that the President gave Ms. Lewinsky even more gifts on December 28 lends additional weight to the theory that it was Ms. Lewinsky who wanted to hide the gifts, not the President.

With an unresolved direct conflict between the testimony of the two primary witnesses on this allegation, I simply cannot find beyond a reasonable doubt that the President masterminded the gift exchange to obstruct the Jones case.

Finally, we come to what for me has been the most difficult charge of Article II—the President's alleged "coaching" of Betty Currie. Neither the President's testimony in the Grand Jury concerning these conversations nor his lawyers' valiant efforts to explain them were wholly convincing. For the President to call his secretary into the Oval Office on a Sunday—the day after his deposition in the Jones case—and feed her a number of falsehoods about his relationship with Ms. Lewinsky is very alarming.

The central issue, however, is the President's intent. Knowing that the secret of his relationship with Lewinsky was out, but not yet knowing who had told the Jones lawyers about it, the President could very well have been concerned mostly about public exposure and what his wife would soon learn. He knew that Betty Currie was aware of his friendship with Ms. Lewinsky, but he did not know how much she knew or had surmised about what went on behind closed doors. Since all of that activity had ended quite a long time before, it is not inconceivable that the President was trying to find out what Ms. Currie knew or even influence what Ms. Currie would say to other White House staff, without being specifically concerned with her being a witness in the Jones case.

It is worth noting here that I am unconvinced by the argument frequently made by the House Managers that Monica Lewinsky was a crucial witness in the Jones case whose testimony might have changed the course of that litigation. Despite the fact that Monica Lewinsky was at one time a White House intern and later a White House employee, there is no allegation of sexual harassment in the relationship, and Ms. Lewinsky consistently characterized her interaction with the President as affectionate and consensual.

The Jones case later was dismissed on legal grounds that were wholly unrelated to any issue on which Ms. Lewinsky could have shed light. Thus, it is my view that the President hoped that Ms. Lewinsky would not have to testify in the Jones case because he did not want their affair to become public, not because he was concerned about the impact of her testimony on Paula Jones' claims. When he called Ms. Currie into his office on January 18, he knew that someone had told the Jones lawyers about Monica Lewinsky. In that context, it is at least plausible that he was concerned about the imminent explosion of press attention and the political damage that would result from it, rather than his legal situation.

Whatever our suspicions about the President's intentions in his conversations with Ms. Currie, the available evidence does not entitle us to a convincing inference about his state of mind that would support a finding of guilt. Therefore, although I still have concerns about this allegation of witness tampering, and I believe it was a serious charge to which the President's defense was weak, I do not believe that the House Managers have carried their burden to show beyond a reasonable doubt that the President's intent was to obstruct justice in the Jones case. I cannot reach this conclusion, however, without expressing my deepest concern and sadness that I am able to say only that the President apparently just barely avoided committing the crime of obstruction of justice in his conversations with Betty Currie.

III. HIGH CRIMES AND MISDEMEANORS

Many Senators chose to reach the issue of the "impeachability" of the offenses charged against the President as a threshold question of law prior to hearing the House Managers' full case. Many voted for Senator BYRD's motion to dismiss on this basis. For two reasons, I believed it was appropriate to allow the facts of the case to be more fully presented and put into evidence before making a legal judgment.

First, I believed that as a matter of deference and respect for the constitutional role of the House of Representatives, the case, including evidence, should be presented before the Senate reached a judgment. The Constitution gives the House the sole power of

impeachment, and a determination of whether certain offenses constitute "Treason, Bribery, or other high Crimes and Misdemeanors" is necessarily a part of the House's decision to impeach a president. While the Senate's exclusive power to try, convict, and remove a president makes it the final arbiter of whether the conduct alleged is "impeachable," I believe it is incumbent on the Senate to permit the House Managers a reasonable opportunity to set out their case against the President before making a decision on that question. Whatever misgivings I may have about the way the House exercised its constitutional power to impeach in this instance, I felt compelled to permit the House Managers a reasonable opportunity to make their case before I would exercise my role as both a trier of fact and a judge of law.

Second, the historical and legal authorities on the question of what constitutes "other high Crimes and Misdemeanors" are varied and not wholly consistent. I believed that I could apply those authorities with more certainty to a clear and complete set of facts, after hearing the evidence, than to a set of allegations that might never be proved. I recognize that when courts entertain motions to dismiss in civil cases, they assume that all facts alleged in a complaint are true and determine the scope and impact of the particular statute or legal doctrine on which the claim for relief is based. But in this case, I felt more comfortable reaching the legal question of "impeachability" after hearing the evidence. I was comfortable allowing this limited deference to the prerogatives of the House Managers in the interest of a thorough and constitutional process.

Having decided that the House Managers failed to prove that the President committed the federal crimes they alleged, the question remains whether the underlying acts themselves, whether criminal or not, constitute conduct that under the Constitution constitute "high Crimes and Misdemeanors" that should result in the President's removal from office. On the issue of what constitutes "high Crimes and Misdemeanors," as in many other issues in this impeachment and trial, there has been heated and polarizing rhetoric. The House Managers and their supporters argued vigorously that the criminal acts they charged were, on their face, high crimes. White House counsel and many historians and legal scholars argued the contrary, that these acts could in no way be considered high crimes.

Other than bribery and treason, the Constitution itself gives no exhaustive or exclusive list of those offenses for which presidents should be removed from office. We are given only the phrase "other high Crimes and Misdemeanors" for guidance. The key to understanding the meaning of this phrase in my view are the words "other" and "high."

As University of Chicago Law School Professor Joseph Isenbergh has written:

"* * * without the word 'high' attached to it, the expression 'crimes and misdemeanors' is nothing more than a description of public wrongs, offenses that are cognizable in some court of criminal jurisdiction."

Isenbergh notes that in the 18th Century, the word "high" when attached to the word "crime" or "misdemeanor," described a crime aiming at the state or the sovereign rather than a private person, and thus a "high Crime or Misdemeanor" was not simply a serious crime, but one aimed at the highest powers of the state. This concept had been asserted by William Blackstone and others, and was well understood by the Framers of the Constitution.

Indeed, Alexander Hamilton wrote in *Federalist Paper No. 65* that the crimes to be considered in a court of impeachment are:

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

Writing at the time of the Nixon impeachment, Yale University Law Professor Charles Black commented that the crimes enumerated in the Constitution, treason and bribery, are crimes that "so seriously threaten the order of political society as to make pestilent and dangerous the continuance in power of their perpetrator." In my view, "other high Crimes and Misdemeanors" must be interpreted as crimes or acts of a similar gravity and impact on society as those enumerated crimes.

To determine whether the conduct that led to impeachment for these crimes meets the definition of a high crime, the underlying circumstances must govern and a determination must be made if the offense, in Black's words, "threatens the order of political society." While it is certainly true that an act need not be criminal in a technical sense to constitute a threat to the well-being of the State, the acts in this case were not assaults on the State or the liberties of the people that threaten the order of political society, as contemplated by the Framers. This conduct does not justify overturning the will of the people as expressed in the 1996 election.

IV. CONCLUSION

As I listened carefully to the trial proceedings over the past month, I was impressed with the efforts of counsel for both sides in making their cases. Even understanding the role of counsel as advocates, however, I was troubled by the exaggerated claims with regard to the strength of each side of the case.

The House Managers referred to the evidence in support of removal as "overwhelming," while the President's counsel described the House Managers' evidence as "nonexistent." I find neither statement to be true and maybe a little reminiscent of the heated words of the Senator Charles Sumner of Massachusetts in his Opinion following the impeachment trial of President Andrew Johnson:

"In the judgment which I now deliver I cannot hesitate. To my vision the path is clear as day. Never in history was there a great case more free from all just doubt. If Andrew Johnson is not guilty, then never was a political offender guilty before; and, if his acquittal is taken as a precedent, never can a political offender be found guilty again. The proofs are mountainous. Therefore, you are now determining whether impeachment shall continue a beneficent remedy in the Constitution, or be blotted out forever, and the country handed over to the terrible process of revolution as its sole protection."

I cannot view the Clinton impeachment case from either extreme. This, unfortunately, was a close case that raised the very real specter of the nullification of an American presidential election. It is, however, at such a moment, when the high standard for impeachment and conviction becomes especially important.

The reason I describe the decision of the American people to elect a president as the most salient fact in this case is not simply because it is the right of the American people to choose their president. It is also be-

cause of the constitutional goal of our Founding Fathers to create a system of political stability. Just as the Framers wished to avoid the uncertainty of a parliamentary system, we today in this last year of the twentieth century should be concerned about political instability and the threat that excessive partisanship poses to our constitutional order.

I see the four year elected term of our president as a unifying force in our country. Yet this is the second time in my adult life that a President of the United States has undergone a serious impeachment process. And I am only 45 years old. In the nearly two hundred years prior to the case of President Nixon, this happened only once.

Are these two recent impeachments a fluke? Is it coincidence that two of our recent presidents were thought by some to be sufficiently unfit to be president to warrant this procedure? I wonder how we will feel about the stability of our system if another presidential impeachment occurs sometime in the next ten or twenty years.

I see a danger in this. I see a danger in this in an increasingly diverse country. I see a danger in this in an increasingly divided country. I see a danger when national elections seem never to be over. I see a danger when the lead House Manager in his concluding remarks in this trial asserts that we are engaged in a "culture war" in this country. I hope that is not where we are, and I hope that is not where we are heading.

In making a decision of this magnitude, it is best not to err at all. If we must err, however, we should err on the side of avoiding such divisions, and of respecting the will of the people. Senator James W. Grimes of Iowa, one of the seven Republicans who voted to acquit President Andrew Johnson in 1868, said in his Opinion at the conclusion of the trial:

"I cannot agree to destroy the harmonious working of the Constitution for the sake of getting rid of an unacceptable President. Whatever may be my opinion of the incumbent, I cannot consent to trifle with the high office he holds. I can do nothing which, by implication, may be construed into an approval of impeachment as a part of future political machinery."

Spoken almost 131 years ago, these words express nearly perfectly my sentiments on the grave constitutional questions I was required to address in this case.

MEASURES REFERRED

The following bills, previously received from the House of Representatives for the concurrence of the Senate, were read the first and second times by unanimous consent and referred as indicated:

H.R. 68. An act to amend section 20 of the Small Business Act and make technical corrections in title III of the Small Business Investment Act; to the Committee on Small Business.

H.R. 98. An act to amend chapter 443 of title 49, United States Code, to extend the aviation war risk insurance program and to amend the Centennial of Flight Commemoration Act to make technical and other corrections; to the Committee on Governmental Affairs.

H.R. 169. An act to amend the Packers and Stockyards Act, 1921, to expand the pilot investigation or the collection of information regarding prices paid for the procurement of cattle and sheep for slaughter of muscle cuts