

to establish, as a complete defense to any claim for damages, that it acted in good faith and took measures that were reasonable under the circumstances to prevent the Y2K failure from occurring or from causing the damages upon which the claim is based.

(b) **DEFENDANT'S STATE OF MIND.**—In a Y2K action making a claim for money damages in which the defendant's actual or constructive awareness of an actual or potential a Y2K failure is an element of the claim, the defendant is not liable unless the plaintiff, in addition to establishing all other requisite elements of the claim, proves by clear and convincing evidence that the defendant knew, or recklessly disregarded a known and substantial risk, that the failure would occur in the specific facts and circumstances of the claim.

(c) **FORESEEABILITY.**—In a Y2K action making a claim for money damages, the defendant is not liable unless the plaintiff proves by clear and convincing evidence, in addition to all other requisite elements of the claim, that the defendant knew, or should have known, that the defendant's action or failure to act would cause harm to the plaintiff in the specific facts and circumstances of the claim.

(d) **CONTROL NOT DETERMINATIVE OF LIABILITY.**—The fact that a Y2K failure occurred in an entity, facility, system, product, or component that was within the control of the party against whom a claim for money damages is asserted in a Y2K action shall not constitute the sole basis for recovery of damages in that action.

(e) **PRESERVATION OF EXISTING LAW.**—The provisions of this section are in addition to, and not in lieu of, any requirement under applicable law as to burdens of proof and elements necessary for prevailing in a claim for money damages.

### SEC. 303. LIABILITY OF OFFICERS AND DIRECTORS.

(a) **IN GENERAL.**—A director, officer, trustee, or employee of a business or other organization (including a corporation, unincorporated association, partnership, or non-profit organization) shall not be personally liable in any Y2K action making a tort or other noncontract claim in that person's capacity as a director, officer, trustee, or employee of the business or organization for more than the greater of—

(1) \$100,000; or  
(2) the amount of pre-tax compensation received by the director, officer, trustee, or employee from the business or organization during the 12 months immediately preceding the act or omission for which liability was imposed.

(b) **EXCEPTION.**—Subsection (a) does not apply in any Y2K action in which it is found by clear and convincing evidence that the director, officer, trustee, or employee—

(1) intentionally made misleading statements regarding any actual or potential year 2000 problem; or

(2) intentionally withheld from the public significant information there was a legal duty to disclose to the public regarding any actual or potential year 2000 problem of that business or organization which would likely result in actionable Y2K failure.

(c) **STATE LAW, CHARTER, OR BYLAWS.**—Nothing in this section supersedes any provision of State law, charter, or a bylaw authorized by State law, in existence on January 1, 1999, that establishes lower limits on the liability of a director, officer, trustee, or employee of such a business or organization.

### TITLE IV—Y2K CLASS ACTIONS

#### SEC. 401. MINIMUM INJURY REQUIREMENT.

In any Y2K action involving a claim that a product or service is defective, the action

may be maintained as a class action in Federal or State court as to that claim only if—

(1) it satisfies all other prerequisites established by applicable Federal or State law or applicable rules of civil procedure; and

(2) the court finds that the alleged defect in a product or service is material as to the majority of the members of the class.

#### SEC. 402. NOTIFICATION.

(a) **NOTICE BY MAIL.**—In any Y2K action that is maintained as a class action, the court, in addition to any other notice required by applicable Federal or State law, shall direct notice of the action to each member of the class by United States mail, return receipt requested. Persons whose receipt of the notice is not verified by the court or by counsel for one of the parties shall be excluded from the class unless those persons inform the court in writing, on a date no later than the commencement of trial or entry of judgment, that they wish to join the class.

(b) **CONTENTS OF NOTICE.**—In addition to any information required by applicable Federal or State law, the notice described in this subsection shall—

(1) concisely and clearly describe the nature of the action;

(2) identify the jurisdiction where the case is pending; and

(3) describe the fee arrangement of class counsel.

#### SEC. 403. FORUM FOR Y2K CLASS ACTIONS.

(a) **JURISDICTION.**—The District Courts of the United States have original jurisdiction of any Y2K action, without regard to the sum or value of the matter in controversy involved, that is brought as a class action if—

(1) any member of the proposed plaintiff class is a citizen of a State different from the State of which any defendant is a citizen;

(2) any member of the proposed plaintiff class is a foreign Nation or a citizen of a foreign Nation and any defendant is a citizen or lawful permanent resident of the United States; or

(3) any member of the proposed plaintiff class is a citizen or lawful permanent resident of the United States and any defendant is a citizen or lawful permanent resident of a foreign Nation.

(b) **PREDOMINANT STATE INTEREST.**—A United States District Court in an action described in subsection (a) may abstain from hearing the action if—

(1) a substantial majority of the members of all proposed plaintiff classes are citizens of a single State;

(2) the primary defendants are citizens of that State; and

(3) the claims asserted will be governed primarily by the laws of that State.

(c) **LIMITED CONTROVERSIES.**—A United States District Court in an action described in subsection (a) may abstain from hearing the action if—

(1) the value of all matters in controversy asserted by the individual members of all proposed plaintiff classes in the aggregate does not exceed \$1,000,000, exclusive of interest and costs;

(2) the number of members of all proposed plaintiff classes in the aggregate is less than 100; or

(3) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief.

(d) **DIVERSITY DETERMINATION.**—For purposes of applying section 1322(b) of title 28, United States Code, to actions described in subsection (a) of this section, a member of a

proposed class is deemed to be a citizen of a State different from a corporation that is a defendant if that member is a citizen of a State different from each State of which that corporation is deemed a citizen.

(e) **REMOVAL.**—

(1) **IN GENERAL.**—A class action described in subsection (a) may be removed to a district court of the United States in accordance with chapter 89 of title 28, United States Code, except that the action may be removed—

(A) by any defendant without the consent of all defendants; or

(B) any plaintiff class member who is not a named or representative class member of the action for which removal is sought, without the consent of all members of the class.

(2) **TIMING.**—This subsection applies to any class before or after the entry of any order certifying a class.

(3) **PROCEDURE.**—

(A) **IN GENERAL.**—Section 1446(a) of title 28, United States Code, shall be applied to a plaintiff removing a case under this section by treating the 30-day filing period as met if a plaintiff class member who is not a named or representative class member of the action for which removal is sought files notice of removal within 30 days after receipt by such class member of the initial written notice of the class action provided at the trial court's direction.

(B) **APPLICATION OF SECTION 1446.**—Section 1446 of title 28, United States Code, shall be applied—

(i) to the removal of a case by a plaintiff under this section by substituting the term "plaintiff" for the term "defendant" each place it appears; and

(ii) to the removal of a case by a plaintiff or a defendant under this section—

(I) by inserting the phrase "by exercising due diligence" after "ascertained" in the second paragraph of subsection (b); and

(II) by treating the reference to "jurisdiction conferred by section 1332 of this title" as a reference to subsection (a) of this section.

(f) **APPLICATION OF SUBSTANTIVE STATE LAW.**—Nothing in this section alters the substantive law applicable to an action described in subsection (a).

(g) **PROCEDURE AFTER REMOVAL.**—If, after removal, the court determines that no aspect of an action that is subject to its jurisdiction solely under the provisions of section 1332(b) of title 28, United States Code, may be maintained as a class action under Rule 23 of the Federal Rules of Civil Procedure, the court shall strike the class allegations from the action and remand the action to the State court. Upon remand of the action, the period of limitations for any claim that was asserted in the action on behalf of any named or unnamed member of any proposed class shall be deemed tolled to the full extent provided under Federal law.

### TRIAL OF PRESIDENT WILLIAM JEFFERSON CLINTON

Mr. REED. Mr. President, I ask unanimous consent that my opinion memorandum relating to the impeachment of President Clinton be printed in the RECORD.

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

[In the Senate of the United States sitting as a Court of Impeachment]

OPINION MEMORANDUM OF UNITED STATES SENATOR JOHN F. REED, FEBRUARY 12, 1999

#### I. CONCLUSION

Based on the evidence in the record, the arguments of the House Managers and the arguments of counsels for the President, I conclude as follows: The President has disgraced himself and dishonored his office. He has offended the justified expectations of the American people that the Presidency be above the sordid episodes revealed in the record before us. However, the House Managers have failed to prove that the President's conduct amounts to the Constitutional standard of "other high Crimes and Misdemeanors" subjecting him to removal from office.

#### II. STATEMENT OF THE CASE

On December 19, 1998, the United States House of Representatives passed H. Res. 611,<sup>1</sup> "Impeaching William Jefferson Clinton, President of the United States, for high Crimes and Misdemeanors." The House Resolution contains two Articles of Impeachment declaring that, first, the President committed perjury before a Federal Grand Jury on August 17, 1998, and, second, the President obstructed justice in connection with the civil litigation of Paula Jones.<sup>2</sup>

Pursuant to Article I, Section 3 of the United States Constitution, the United States Senate convened a Court of Impeachment on January 9, 1999, and each Senator took an oath to render "fair and impartial justice."<sup>3</sup> As Alexander Hamilton stated in *Federalist No. 65*, "what other body would be likely to feel *confidence enough in its own situation* to preserve, unawed and uninfluenced, the necessary impartiality between an *individual* accused and the *representatives of the people, his accusers*?"<sup>4</sup>

The obligation of the Senate is to accord the President, as the accused, the right to conduct his defense fairly and, while respecting the House's exclusive Constitutional prerogative to bring Articles of Impeachment, to put the House to the proof of its case. At the core of our task is the fundamental understanding that our system of government recognizes the rights of defendants and the responsibilities of the prosecution to prove its case. Such a basic tenet of our law and our experience as a free people does not evaporate in the rarified atmosphere of a Court of Impeachment simply because the accused is the President and the accusers are the House of Representatives.

The House of Representatives submitted a certified, written record of over 6,000 pages. By unanimously adopting S. Res. 16, on January 8, 1999, the Senate agreed to proceed with the Court of Impeachment based on "the record which will consist of those publicly available materials that have been submitted." The Senate Resolution also provided that, following the presentations of the

House managers, the response of the President's attorneys, and a period of questions by Senators, it would be in order to consider a Motion to Dismiss and a Motion to Depose Witnesses.

On January 27, 1999, the Senate voted 56 to 44, against dismissing the Articles of Impeachment. On the same day, by the same margin, the Senate passed a resolution, S. Res. 30, allowing the Managers to depose three witnesses: Ms. Monica S. Lewinsky, Mr. Vernon E. Jordan, Jr., and Mr. Sidney Blumenthal. These depositions were taken on February 1, 2, and 3, 1999, respectively.

After Senators were provided an opportunity to view the videotaped depositions, the Senate reconvened as a Trial of Impeachment on February 4, 1999. At that time a motion by the House Managers to call Ms. Lewinsky to the floor of the Senate as a witness was rejected by a vote of 30 to 70. Voting 62 to 38, the Senate agreed to permit portions of the video to be used on the floor of the Senate during both a six-hour "evidentiary" session and for closing arguments. The White House declined to offer a motion to call witnesses. The Senate then rejected a motion by Democratic Leader Daschle to proceed directly to a vote on the Articles of Impeachment.

On Saturday, February 6, 1999, the Senate heard six hours of presentation, evenly divided, concerning the evidence obtained in the three depositions. On Monday, February 8, 1999, the Senate heard closing arguments from the House Managers and Counsel for the President. The following day, the Senate voted on a motion to open deliberations to the public. That motion received 59 votes, several short of the supermajority required to change Senate Impeachment Rules. The Senate then voted to adjourn to closed deliberations. A final vote was taken on the Articles on Friday, February 12, 1999.

#### III. THE CONSTITUTIONAL STANDARD

"The Senate shall have the sole Power to try all Impeachments."<sup>5</sup> With these few words, the Framers of the Constitution entrusted the Senate with the most awesome power within a democratic society. We are the final arbiters of whether the conscious and free choice of the American people in selecting their President will stand.

##### 1. "Other High Crimes and Misdemeanors"

The Constitutional grounds for Impeachment indicate both the severity of the offenses necessary for removal and the essential political character of these offenses. "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."<sup>6</sup> The clarity of "Treason" and "Bribery" is without doubt. No more heinous example of an offense against the Constitutional order exists than betrayal of the nation to an enemy or betrayal of duty for personal enrichment. With these offenses as predicate, it follows that "other high Crimes and Misdemeanors" must likewise be restricted to serious offenses that strike at the heart of the Constitutional order.

Certainly, this is the view of Alexander Hamilton, one of the trio of authors of the *Federalist Papers*, the most respected and authoritative interpretation of the Constitution. In *Federalist No. 65*, Hamilton describes impeachable offenses as "those 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 peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."<sup>7</sup>

This view is sustained with remarkable consistency by other contemporaries of Hamilton. George Mason, a delegate to the Federal Constitutional Convention, declared that "high Crimes and Misdemeanors" refer to "great and dangerous offenses" or "attempts to subvert the Constitution."<sup>8</sup> James Iredell served as a delegate to the North Carolina Convention that ratified the Constitution, and he later served as a Justice of the United States Supreme Court. During the Convention debates, Iredell stated:

"The power of impeachment is given by this Constitution, to bring great offenders to punishment. . . . This power is lodged in those who represent the great body of the people, because the occasion for its exercise will arise from *acts of great injury to the community*, and the objects of it may be such as cannot be easily reached by an ordinary tribunal."<sup>9</sup>

Iredell's understanding sustains the view that an impeachable offense must cause "great injury to the community." Private wrongdoing, without a significant, adverse effect upon the nation, cannot constitute an impeachable offense. James Wilson, a delegate to the Federal Constitutional Convention and, like Iredell, later a Supreme Court Justice, wrote that Impeachments are "proceedings of a political nature . . . confined to political characters, to political crimes and misdemeanors, and to political punishments."<sup>10</sup>

Later commentators expressed similar views. In 1833, Justice Story quoted favorably from the scholarship of William Rawle in which Rawle concluded that the "legitimate causes of impeachment . . . can have reference only to public character, and official duty . . . . In general, those offenses, which may be committed equally by a private person, as a public officer, are not the subject of impeachment."<sup>11</sup>

This line of reasoning is buttressed by the careful and thoughtful work of the House of Representatives during the Watergate proceedings. The Democratic staff of the House Judiciary Committee concluded that: "[b]ecause impeachment of a President is a grave step for the nation, it is to be predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties of president office."<sup>12</sup>

This view was echoed by many on the Republican side. Minority members of the Judiciary Committee declared: "the Framers . . . were concerned with preserving the government from being overthrown by the treachery or corruption of one man. . . . [I]t is our judgment, based upon this constitutional

<sup>7</sup> *The Federalist No. 65*, at 396 (emphasis in original).

<sup>8</sup> Max Farrand, ed., *The Records of the Federal Convention of 1787*, at 550 (1966).

<sup>9</sup> Jonathon Elliot, *Debates on the Adoption of the Federal Constitution* at 113 (1974).

<sup>10</sup> Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis* at 21 (1996).

<sup>11</sup> Joseph Story, *Commentaries on the Constitution* § 799 at 269-70 quoting William Rawle, *A View of the Constitution of the United States* at 213 (2d ed. 1829).

<sup>12</sup> Constitutional Grounds for Presidential Impeachment, Report by the Staff of the Impeachment Inquiry, House Comm. on Judiciary, 93rd Cong., 2d Sess. at 26 (1974).

<sup>1</sup> H. Res. 611, 105th Cong., 2d Sess., (1998) (enacted).

<sup>2</sup> In the course of deliberations in the House, no witnesses to the underlying events were called. The House Judiciary Committee held four hearings and called only one material witness, the Independent Counsel, Kenneth Starr. Mr. Starr testified that he was not present when any of the witnesses testified before the Grand Jury. The President's attorneys were allowed two days to present their defense, and they called a series of expert witnesses.

<sup>3</sup> Rule XXV, *Procedure and Guidelines for Impeachment Trials in the United States Senate*, Prepared by Floyd Riddick and Robert Dove, 99th Cong., 2d Sess., S. Doc. 99-33 (August 15, 1986) at 6.

<sup>4</sup> *The Federalist No. 65*, at 398 (Alexander Hamilton) (Clinton Rossiter, ed., 1961) (Emphasis in original).

<sup>5</sup> U.S. Const., art. I, § 3, cl. 7.

<sup>6</sup> U.S. Const., art. II, § 4.

history, that the Framers of the United States Constitution intended that the President should be removable by the legislative branch only for serious misconduct dangerous to the system of government."<sup>13</sup>

### 2. *The Constitutional Debates*

Adding impressive support to these consistent views of the meaning of the term, "high Crimes and Misdemeanors," is the history of the deliberations of the Constitutional Convention. This history demonstrates a conscious movement to narrow the terminology as a means of raising the threshold for the Impeachment process.

Early in the debate on the issue of Presidential Impeachment in July of 1787, it was suggested that impeachment and removal could be founded on a showing of "malpractice," "neglect of duty" or "corruption."<sup>14</sup> By September of 1787, the issue of Presidential Impeachment had been referred to the Committee of Eleven, which was created to resolve the most contentious issues. The Committee of Eleven proposed that the grounds for Impeachment be "treason or bribery."<sup>15</sup> This was significantly more restricted than the amorphous standard of "malpractice," too restricted, in fact, for some delegates. George Mason objected and suggested that "maladministration" be added to "treason and bribery."<sup>16</sup> This suggestion was opposed by Madison as returning to the vague, initial standard. Mason responded by further refining his suggestion and offered the term "other high Crimes and Misdemeanors against the State."<sup>17</sup> The Mason language was a clear reference to the English legal history of Impeachment. And, it is instructive to note that Mason explicitly narrowed these offenses to those "against the State." The Convention itself further clarified the standard by replacing "State" with the "United States."<sup>18</sup>

At the conclusion of the substantive deliberations on the Constitutional standard of Impeachment, it was obvious that only serious offenses against the governmental system would justify Impeachment and subsequent removal from office. However, the final stylistic touches to the Constitution were applied by the Committee of Style. This Committee has no authority to alter the meaning of the carefully debated language, but could only impose a stylistic consistency through, among other things, the elimination of redundancy. In their zeal to streamline the text, the words "against the United States" were eliminated as unnecessary to the meaning of the passage.<sup>19</sup>

The weight of both authoritative commentary and the history of the Constitutional Convention combines to provide convincing proof that the Impeachment process was reserved for serious breaches of the Constitutional order which threaten the country in a direct and immediate manner.

### 3. *The Independence of Impeachment and Criminal Liability*

Article One, Section three of the United States Constitution provides that "[j]udgment in Cases of Impeachment shall

not extend further than to removal from Office, and disqualification to hold and enjoy any Office or 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."<sup>20</sup> As James Wilson wrote, "[i]mpeachments, and offenses and offenders impeachable, [do not] come . . . within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims; and are directed to different objects; for this reason, the trial and punishment of an offense on an impeachment, is no bar to a trial and punishment of the same offence at common law."<sup>21</sup> The independence of the Impeachment process from the prosecution of crimes underscores the function of Impeachment as a means to remove a President from office, not because of criminal behavior, but because the President poses a threat to the Constitutional order. Criminal behavior is not irrelevant to an Impeachment, but it only becomes decisive if that behavior imperils the balance of power established in the Constitution.

### 4. *Conclusion*

Authoritative commentary on the Constitution, together with the structure of the Constitution allowing independent consideration of criminal charges, makes it clear that the term, "other high Crimes and Misdemeanors," encompasses conduct that involves the President in the impermissible exercise of the powers of his office to upset the Constitutional order. Moreover, since the essence of Impeachment is removal from office rather than punishment for offenses, there is a strong inference that the improper conduct must represent a continuing threat to the people and the Constitution. It cannot be an episode that either can be dealt with in the Courts or raises no generalized concerns about the continued service of the President.

### IV. JUDICIAL IMPEACHMENTS

The House Managers urge that the standards applied to judges must also be applied identically to the President. Their argument finds particular urgency with respect to Article I and its allegations of perjury. Several judges have been removed for perjury, and the House Managers suggest that this experience transforms perjury into a per se impeachable offense.<sup>22</sup>

This reasoning disregards the unique position of the President. Unlike Federal judges, the President is elected by popular vote for a fixed term. Popular elections are the most obvious and compelling checks on Presidential conduct. No such "popular check" is imposed on the Judiciary. Federal judges are deliberately insulated from the public pressures of the moment to ensure their independence to follow the law rather than a changeable public mood. As such, Impeachment is the only means of removing a judge. Moreover, the removal of one of the 839 Federal judges can never have the traumatic effect of the removal of the President. To suggest that a Presidential Impeachment and a judicial Impeachment should be treated identically strains credulity.

There is an additional Constitutional factor to consider. The Constitution requires that judicial service be conditioned on "good Behavior."<sup>23</sup> This adds a further dimension

to the consideration of the removal of a judge from office. Although "good Behavior" is not a separate grounds for Impeachment, this Constitutional standard thoroughly permeates any evaluation of judicial conduct.

We expect judges to be above politics. We expect them to be inherently fair. We expect their judgment to be unimpeded by personal considerations. And, we demand that their conduct, both public and private, reflect these lofty expectations. Judges are subject to the most exacting code of conduct in both their public life and their private life.<sup>24</sup> Without diminishing the expectations of Presidential conduct, it is fair to say that we expect and demand a more scrupulous standard of conduct, particularly personal conduct, from judges. A large part of these heightened expectations for judges emerges directly from their particular role in our government. They immediately and critically determine the rights of individual citizens. The fates and lives of individual Americans are literally in their hands. They personify more dramatically than anyone, including the President, the fairness and reasonableness of the law. Should they falter, the foundation of "equal justice under law" is more seriously strained than the failings of any other citizen.

The differences between a Presidential Impeachment and a judicial Impeachment are not merely theoretical. The Senate treats a Presidential Impeachment differently from a judicial Impeachment in both procedure and substance. The Senate routinely allows a select committee to receive testimony in the trial of a judge.<sup>25</sup> Such a delegation of responsibility would be unthinkable in the trial of a President. But of even more telling effect are the substantive differences between Presidential and judicial Impeachments. For example, Judge Harry Claiborne was impeached and removed subsequent to his criminal conviction for filing a false income tax return.<sup>26</sup> In contrast, the inquiry into the Watergate break-in disclosed similar violations of the Federal Tax Code by President Nixon. Yet, the Judiciary Committee of the House of Representatives declined to approve an Article of Impeachment with respect to President Nixon's apparent violation of the Internal Revenue Code. A major factor in declining to press this Article was the widespread feeling that such private misconduct was not relevant to a Presidential Impeachment. According to Representative Ray Thornton (D-AR), "there [had] been a breach of faith with the American people with regard to incorrect income tax returns . . . But . . . these charges may be reached in due course in the regular process of law. This committee is not a tax court

<sup>24</sup>The Judicial Conference of the United States publishes a Code of Conduct for United States Judges, as prepared by the Administrative Office of the United States Courts. Canon 2 of the Code requires federal judges to "avoid impropriety and the appearance of impropriety in all activities." (March, 1997). This Canon requires a Judge to act at all times in "a manner that promotes public confidence in the integrity and impartiality of the judiciary." Perceived violations of the Code could result in a complaint to the Judicial Conference, which can make referrals to the House Judiciary Committee.

<sup>25</sup>Rule XI, Procedure and Guidelines for Impeachment Trials in the United States Senate, Prepared by Floyd Riddick and Robert Dove, 99th Cong., 2d Sess., S. Doc. 99-33 (August 15, 1986) at 4.

<sup>26</sup>Proceedings of the United States Senate in the Impeachment Trial of Harry E. Claiborne, A Judge of the United States District Court for the District of Nevada, 99th Cong., 2d Sess., S. Doc. No. 99-48 (1986) at 291-98.

<sup>13</sup>Impeachment of Richard M. Nixon, President of the United States, Report of the House Comm. on the Judiciary, 93rd Cong., 2d Sess., H. Rep 93-1305 at 364-65 (Aug. 20, 1974) (Minority Views of Messrs. Hutchinson, Smith, Sandman, Wiggins, Dennis, Mayne, Lott, Moorhead, Maraziti and Latta).

<sup>14</sup>Farrand, *The Records of the Federal Convention of 1787*, at 64-69.

<sup>15</sup>Id.

<sup>16</sup>Id.

<sup>17</sup>Id. (emphasis added).

<sup>18</sup>Id.

<sup>19</sup>Id.

<sup>20</sup>U.S. Const., art. I §3, cl. 7 (emphasis added).

<sup>21</sup>James D. Andrews, ed., *The Works of James Wilson* at 408 (1896).

<sup>22</sup>For example, both Judge Walter L. Nixon, Jr. and Judge Alcee L. Hastings were convicted on charges based in perjury.

<sup>23</sup>"The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior . . ." U.S. Const., art. III, §1.

nor should it endeavor to become one."<sup>27</sup> Republican Representative Tom Railsback (R-IL) pointed out that there was "a serious question as to whether something involving [the President's] personal tax liability has anything to do with his conduct of the office of the President."<sup>28</sup>

The reconciliation of this disparate treatment is found by once again recalling the Constitution and not by simply adopting the facile notion that if Impeachment applies to judges then it must apply identically to the President. The function of Impeachment is to remove a "civil officer" who so abuses the particular duties and responsibilities of his office that he poses a threat to the Constitutional order. Furthermore, the Constitution provides an additional condition on the performance of judges with the "good Behavior" standard. The particular duties of the Judiciary together with their obligation to demonstrate "good Behavior," renders comparison with the President inexact at best.<sup>29</sup>

The Managers' argument is ultimately unpersuasive. Rather than reflexively importing prior decisions dealing with judicial Impeachments, we are obliged to consider the President's behavior in the context of his unique Constitutional duties and without the condition to his tenure of "good Behavior."

#### V. THE STANDARD OF PROOF

Judicial proceedings, by definition, resolve an issue in dispute. A party seeks an outcome, provided for by the rule of law, and petitions for that result. The petitioning party has the burden of producing evidence. After hearing the evidence, the trier of fact, to some degree of certainty, reaches a conclusion. The critical factor is often the degree of certainty necessary.

American jurisprudence utilizes three standards of certainty: evidence beyond a reasonable doubt, clear and convincing evidence, and a preponderance of the evidence. The standard is determined by the gravity of the issue in dispute and the degree of harm resulting from an incorrect decision.

Generally, proof beyond a reasonable doubt, or to a moral certainty, is required to convict an individual of a criminal offense.

<sup>27</sup>The Evidentiary Record of the Impeachment of President William Jefferson Clinton, [hereinafter *The Record*] S. Doc. 106-3, 106th Cong., 1st Sess., Vol. XVII, at 10 (January 8, 1999) (quoting Hearings Before the House Comm. on the Judiciary Pursuant to H. Res. 803, 93d Cong., 2d Sess. 549 (1974) (Statement of Congressman Ray Thornton)).

<sup>28</sup>*Id.* (Statement of Congressman Railsback).

<sup>29</sup>Various legal scholars and authoritative commentary make this point. In support of the "Judicial Integrity and Independence Act," which would have established a non-Impeachment procedure for removing judges, Senator Lott submitted an article by conservative legal scholars Bruce Fein and William Bradford Reynolds. Messrs. Fein and Reynolds concluded "federal judges are also subject to Article III §4, which stipulates that judges shall serve only during 'good Behavior.' This is a stricter standard of conduct than the Impeachment standard. . . ." 135 Cong. Rec. S15269 (daily ed. July 19, 1989) (quoting Fein and Reynolds, *Judges on Trial: Improving Impeachment*, Legal Times, October 30, 1989.) Senator Lott also submitted a statement, by then Assistant Attorney General William Rehnquist, supporting similar legislation in 1970, which stated that "the terms 'treason, bribery and other high Crimes and Misdemeanors' are narrower than the malfeasance in office and failure to perform the duties of the office, which may be grounds for forfeiture of office held during good behavior." 135 Cong. Rec. S 15270 (daily ed. July 19, 1989) (quoting *The Judicial Reform Act: Hearings on S. 1506 Before the Subcomm. on Improvements in Judicial Machinery of the Comm. on the Judiciary*, 91st Congress, 2d Sess. (April 9, 1970) (Statement of Asst. Attorney General William H. Rehnquist, Office of Legal Counsel)).

*Black's Law Dictionary* defines reasonable doubt as "a doubt as would cause prudent men to hesitate before acting in matters of importance to themselves."<sup>30</sup> Sample federal jury instructions provide that "[a] reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her own affairs."<sup>31</sup>

Clear and convincing evidence is utilized in cases involving a deprivation of individual rights not rising to criminal offenses, such as the termination of parental rights. Finally, general civil cases, which pit private parties against each other, are adjudicated on the preponderance of the evidence, i.e., more likely than not. Frequently the burden of proof is determinative of the outcome.

In an Impeachment Trial, each Senator has the obligation to establish the burden of proof he or she deems proper. The Founding Fathers believed maximum discretion was critical for Senators confronting the gravest of constitutional choices. Differentiating Impeachment from criminal trials, Alexander Hamilton argued, in *Federalist No. 65*, that Impeachments "can never be tied down by such strict rules . . . as in common cases serve to limit the discretion of courts in favor of personal security."<sup>32</sup> In this regard, Hamilton also recognized that an Impeached official would be subject to the comprehensive rules of criminal prosecution after Impeachment.<sup>33</sup>

Senate precedent maintains this discretion. In the 1986 Impeachment Trial of Judge Claiborne, the Senate overwhelmingly rejected a motion by the Judge to adopt "beyond a reasonable doubt" as the standard of proof necessary to convict and remove.<sup>34</sup> That vote has been interpreted by subsequent courts of Impeachment as "a precedent confirming each Senator's freedom to adopt whatever standard of proof he or she preferred."<sup>35</sup>

The constitutional gravity of an Impeachment trial suggests that the evidentiary bar be high. As I have discussed previously, the Founders viewed Impeachment as a remedy to be utilized only in the gravest of circumstances by a supermajority of Senators. The Constitution gives to the people the right to remove a President through the electoral process every four years. Only in the most extreme of examples, when the constitutional order is threatened, is Congress to intervene and remove our only nationally elected representative. Nullification of a popularly elected President is a grave action only to be taken with high certainty.

Constitutional analysis strongly suggests that in a Presidential Impeachment trial a burden of proof at least equivalent to "clear and convincing evidence" and more likely equal to "beyond a reasonable doubt" must be employed.<sup>36</sup> Had the charges of this case involved threats to our constitutional order

<sup>30</sup>*Black's Law Dictionary* at 1265 (6th ed. 1990) (citing *U.S. v. Chas. Pfizer & Co., Inc.*, 367 F.Supp. 91, 101(S.D. N.Y. 1973)).

<sup>31</sup>Edward J. Devitt, Charles B. Blackmar, Michael A. Wolff, Kevin F. O'Maley, *Federal Jury Practice and Instructions*, §12.10 Presumption of Innocence, Burden of Proof, and Reasonable Doubt (West 1992).

<sup>32</sup>*The Federalist No. 65*, at 398.

<sup>33</sup>*Id.* at 399.

<sup>34</sup>132 Cong. Rec. S15507 (daily ed. October 7, 1986).

<sup>35</sup>Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis*, at 42 (1996).

<sup>36</sup>See Charles L. Black, Jr., *Impeachment: A Handbook*, at 14-19 (1974)

not readily characterized by criminal charges, I would have been forced to further parse an exact standard. However, for all practical purposes, the Managers have themselves established the burden of proof in this case.<sup>37</sup>

The Articles, embodied in H. Res. 611, accuse the President of perjury and obstruction of justice. This allegation of specific criminal wrongdoing is repeated in their Trial Brief.<sup>38</sup> Indeed, in their presentation, the Managers have stated, "none of us, would argue . . . that the President should be removed from the office unless you conclude he committed the crimes that he is alleged to have committed. . . ." <sup>39</sup> The House Managers invited the Senate to arrive at a conclusion beyond a reasonable doubt before voting to convict the President. I take them at their word.

After reading their Trial Brief, listening to their presentation of the evidence, viewing depositions, and considering their closing argument, I conclude that the President is not guilty of any of the allegations beyond a reasonable doubt. I reach this conclusion mindful of the admonishment of the Founders that Impeachment is not a punitive, but rather a constitutional remedy. Having concluded that the charges, even if proven, do not rise to the level of "high Crimes and Misdemeanors" an analysis of the specific charges is unnecessary. However, given the gravity of the charges alleged, an explanation is appropriate.

#### VI. PERJURY ALLEGATIONS OF ARTICLE I

Article I alleges that the President committed perjury before a federal Grand Jury on August 17, 1998. The charge must be measured against the fact that the full House of Representatives rejected an article of Impeachment charging the President with perjury in a civil deposition. House Judiciary Committee Republicans, citing case law, have asserted that "perjury in a civil proceeding is just as pernicious as perjury in criminal proceedings."<sup>40</sup> The Article before the Senate is further undercut by the fact that the Article fails to cite, with specificity, testimony alleged to be false.

Perjury is a statutory crime, set forth in the U.S. Code at 18 U.S.C. §1621, §1623. It requires proof that an individual has, while under the oath of an official proceeding, knowingly made a false statement about facts material to the proceeding. As seasoned federal prosecutors testified before the House Judiciary Committee, perjury is a specific intent crime requiring proof of the defendant's state of mind, i.e., the charge cannot be based solely upon unresponsive, misleading, or evasive answers.<sup>41</sup> Both the House

<sup>37</sup>The adoption of a standard of "beyond a reasonable doubt" in this matter should not be construed as implying that the same standard must be utilized in each and every Impeachment proceeding. Conduct of "civil officers" in the performance of their official duties might pose such an immediate threat to the Constitution that a less exacting standard could properly be used. Any choice of a standard of proof must, at a minimum, consider the nature of the allegations and the impact of the alleged behavior on the operation of the government.

<sup>38</sup>Trial Memorandum of the United States House of Representatives, In Re Impeachment of President William Jefferson Clinton, [hereinafter HMTB] (Submitted pursuant to S. Res. 16) at 1.

<sup>39</sup>145 Cong. Rec. S260 (daily ed. Jan. 15, 1999) (Statement of Mr. Manager McCollum).

<sup>40</sup>Impeachment of William Jefferson Clinton, President of the United States, Report of the Comm. on the Judiciary, 105th Cong. 2d Sess., H. Rep. 105-830 (December 15, 1998) at 118 [hereafter Clinton Report].

<sup>41</sup>The Record, supra note 27, Volume X at 284 (Statement of Thomas P. Sullivan, Former U.S. Attorney, Northern District of Illinois).

Managers and Counsel for the President have referred to the statutes referenced above and agree on the elements necessary to convict on a charge of perjury.

I find it hard to accept the proposition by the President's Counsel that Mr. Clinton "testified truthfully before the Grand Jury."<sup>42</sup> Rather than truthful, his testimony appears to be motivated by a desire not to commit perjury, i.e., making intentionally false statements about material facts. This dance with the law is not what one expects of a President. However, it is important to realize that in beginning his Grand Jury testimony, the President read a statement in which he admitted being "alone" with Ms. Lewinsky and engaging in "inappropriate intimate"<sup>43</sup> contact with her. Thus, unlike the testimony he provided in the Jones civil deposition, the President admitted an improper, consensual relationship with Ms. Lewinsky. It is against this backdrop that the House Managers allege perjury.

The Managers allege in H. Res. 611, which reported the Articles of Impeachment to the Senate, that the President "willfully provided perjurious . . . testimony . . . concerning one or more of the following: (1) the nature and details of his relationship with" Ms. Lewinsky; (2) "prior perjurious . . . testimony" given in the Jones deposition; (3) "prior false and misleading statements he allowed his attorney to make" in the Jones deposition; and (4) "his corrupt efforts to influence the testimony of witnesses and to impede the discovery of evidence" in Jones. The facts refute some of these charges, while legal analysis, precedent and common sense preclude pursuit of the others.

#### 1. The Nature and Details of the Clinton/Lewinsky Relationship

With regard to the first charge of perjury, the Managers fail to cite specific perjurious language in the Article; however, their Trial Brief provides several allegations. It asserts that the President's denial that he touched Ms. Lewinsky in certain areas with a specific intent is "patently false."<sup>44</sup>

The most troubling evidence that the President lied in this instance is Ms. Lewinsky's testimony to the contrary. While Ms. Lewinsky has more credibility than the President concerning the intimacies of their relationship, experienced prosecutors, appointed by both Democrats and Republicans, have testified that conflicting testimony of this type would not be prosecuted for two reasons. First, "he said, she said" discrepancies regarding perjury are difficult to prove beyond a reasonable doubt without third party corroboration.<sup>45</sup> This is particularly true in this case, where first Inde-

pendent Counsel Starr and now the House Managers choose to believe Ms. Lewinsky when she helps their case, but impugn her testimony when she refutes their accusations. Second, testimony concerning sex in a civil proceeding would not normally warrant criminal prosecution.<sup>46</sup> Indeed, in her Senate deposition, Ms. Lewinsky was unwilling to portray the President's testimony as untruthful.<sup>47</sup>

In further support of the perjury allegation regarding the "nature and details" of the Clinton-Lewinsky relationship, the Managers also alleged that the President's Grand Jury testimony concerning his relationship with Ms. Lewinsky was perjurious because (1) his recollection of when the approximately two-year affair began differs from Ms. Lewinsky's by a few months; (2) he admitted to occasionally having inappropriate banter on the phone with Ms. Lewinsky when it occurred as many as seventeen times; and (3) he described his relationship with Ms. Lewinsky as beginning as a "friendship."<sup>48</sup>

Disregarding the futility of attempting to judge the veracity of these statements, they appear to be totally immaterial to the Grand Jury given that the President admitted an affair with Ms. Lewinsky. Indeed, the triviality of these charges are indicative of the inability of the House Managers to utilize any sense of proportionality in adjudicating the unacceptable behavior of the President. This weakness is magnified by the fact that the House Managers have asserted that conviction on any one of their allegations of perjury warrant conviction.<sup>49</sup>

It is difficult to believe that anyone would charge an individual with perjury, never mind advocate the removal of a popularly-elected President, based upon an interpretation of the words "occasionally" or "friendship." It is staggering that the Managers, after forcing Ms. Lewinsky to testify under oath during this trial, would press her on the details and timing of her first intimate contacts with the President in order to "prove" the relationship did not begin as a "friendship."<sup>50</sup> As demonstrated by the frustration of the American people with this line of inquiry, the resources, both human and financial, expended by the Managers were not warranted by the substance of the charge.

#### 2. Perjury Concerning the President's Deposition Testimony in Jones

The Managers' second charge of perjury is that before the Grand Jury the President repeated false testimony he gave in the Jones deposition. This argument appears to be an

<sup>46</sup>The Record, supra note 27, Volume X at 284 (Statement of Thomas P. Sullivan, Former U.S. Attorney, Northern District of Illinois); see also Id. at 325, 332, 333 (testimony of Ronald K. Noble and William F. Weld).

<sup>47</sup>During her Senate deposition, Manager Bryant asked Ms. Lewinsky if, contrary to his defense, the President's contact with her fit into that described in the Jones deposition. In response Ms. Lewinsky said, "I'm not trying to be difficult, but there is a portion of . . . [the] definition [used in the Jones deposition] that says, you know, with intent, and I don't feel comfortable characterizing what someone else's intent was. I can tell you that I—my memory of this relationship and what I remember happened fell within that definition . . . but I'm just not comfortable commenting on someone else's intent or state of mind or what they thought." 145 Cong. Rec. S1221 (daily ed. Feb. 4, 1999) (Senate deposition of Ms. Lewinsky).

<sup>48</sup>See HMTB, supra note 38, at 57; see also Clinton Report, supra note 40 at 34.

<sup>49</sup>H. Res. 611.

<sup>50</sup>145 Cong. Rec. S1213 (daily ed. Feb. 4, 1999) (Transcript of Lewinsky Deposition in which Mr. Manager Bryant is questioning Ms. Lewinsky about the timing and intimate details of her relationship).

attempt to convict the President for lies he told in his Jones deposition, an Article which the full House of Representatives rejected. Ultimately, this subsection of Article I collapses on itself.

In their Trial Brief the Managers also assert that the President reaffirmed or adopted his entire deposition testimony before the Grand Jury. This is simply not true. To make this assertion the Managers use the President's Grand Jury testimony that "I was determined to walk through the mine field of this deposition without violating the law, and I believe I did."<sup>51</sup> Before the Grand Jury the President refuted his deposition testimony that he was never alone with Ms. Lewinsky.<sup>52</sup> In addition to being inaccurate, these charges were rejected by the full House. Not even Independent Prosecutor Starr alleged that the President committed perjury concerning this issue.

#### 3. Perjury With Respect to Mr. Bennett's Offer of the Lewinsky Affidavit

The third charge asserted by the Managers to substantiate Article I is that the President lied before the Grand Jury when he testified that "I'm not even sure I paid attention to what he [Mr. Bennett] was saying."<sup>53</sup> The President made this statement to the Grand Jury after being asked about Mr. Bennett's representation to the Jones court that Ms. Lewinsky's deposition verified that there was "no sex of any kind in any manner" between her and the President.

On page 62 of their Trial Brief the Managers assert that this testimony is perjurious because "it defied common sense" and the fact that the video of the deposition "shows the President looking directly at Mr. Bennett." This evidence fails to provide any insight on the President's state of mind and thus cannot meet the standard of proof that the President knowingly made a false statement.

#### 4. Perjury in Denying the Obstruction of Justice Charges

Finally, in subpart four of Article I, the Managers allege that the President lied when he denied both tampering with witnesses and impeding discovery in the Jones case. This allegation bootstraps every allegation made in Article II into an additional charge of perjury.

First, the Managers charge that the President lied when he told the Grand Jury that he instructed Ms. Lewinsky that if gifts were subpoenaed they would have to be turned over. I will address Article II's charge of obstruction later. With regard to the charge that he committed perjury, Ms. Lewinsky provided testimony in her Senate deposition which requires rejection of the allegation. Ms. Lewinsky has testified that when she asked the President if she should give the subpoenaed gifts to someone, "maybe Betty," the President either failed to reply or said "I don't know," or "let me think about that."<sup>54</sup> However, after the President's Grand Jury testimony, Ms. Lewinsky was pressed on the issue. When a FBI agent asked if she recalled the President telling her that she must turn over gifts in her possession should they be subpoenaed by the Jones attorneys, Ms. Lewinsky said, "You know, that

<sup>51</sup>HMTB, supra note 38, at 60.

<sup>52</sup>In his opening statement before the Grand Jury the President began, "When I was alone with Ms. Lewinsky. . . ." The Independent Counsel followed-up and asked if he was alone with Ms. Lewinsky. The President answered, "yes." The Record, supra note 43 at 460-62, 481.

<sup>53</sup>HMTB, supra note 38, at 62.

<sup>54</sup>HMTB, supra note 38, at 64 (quoting Grand Jury testimony of Ms. Lewinsky).

<sup>42</sup>Trial Memorandum of President William Jefferson Clinton, In Re Impeachment of President William Jefferson Clinton, [hereinafter PCTB] (Submitted January 13, 1999, pursuant to S. Res. 16) at 38.

<sup>43</sup>The full text of the President's statement before the Grand Jury can be found in The Record, supra note 27, Volume III, Part 1 of 2, at 460-62; See also PCTB, supra note 42, at 39; See also HMTB, supra note 38, at 52-60.

<sup>44</sup>HMTB, supra note 38, at 53.

<sup>45</sup>The Trial Brief of the House Managers states that the President's testimony is "directly contradicted by the corroborated testimony of Monica Lewinsky." Id. By "corroborated" the Managers refer to the fact that the Office of Independent Counsel (OIC) was extremely thorough in questioning all of Ms. Lewinsky's friends and associates to whom she described the intimate details of her contact with the President. Legally, the fact that Ms. Lewinsky relayed her recollection of the facts to various third parties does not provide additional, independent evidence of the nature of her contact with the President.

sounds a little bit familiar to me."<sup>55</sup> On its face, Ms. Lewinsky's testimony would seem to make it more likely than not that the President told her to turn over whatever gifts she had.

There are two remaining allegations in the final subpart of Article I. First, it is alleged that the President committed perjury when he told the Grand Jury that on January 18, 1998, he made statements to Ms. Currie to "refresh his memory." Second, the Managers allege that he lied when he testified to the Grand Jury that facts he relayed to his aides in denying an affair were "true" but "misleading."

I am troubled by the inability of the President to be completely forthright concerning both his relationship with Ms. Lewinsky and subsequent attempts to conceal this affair from his family, friends, staff, constituents, and Ms. Jones. In no way do I condone this behavior. However, seasoned federal prosecutors have made it known that the statements of this type, made by the President or an average citizen, would not, indeed should not, be prosecuted as perjury. The power and prestige of the federal government should not be brought to bear on a citizen regarding testimony in a civil case pertaining to an improper sexual affair. The Impeachment Trial has borne this out. Discrepancies in testimony between two individuals, and only those two, seldom satisfy the standard of proof beyond a reasonable doubt (or by preponderance of the evidence, for that matter.) Moreover, citizens are uncomfortable with such a role for government.

The Managers have alleged that a failure to convict the President on perjury grounds will destroy civil rights jurisprudence and allow any future President to lie with impunity. Both the Managers and our government weathered untruths during both the Iran-Contra investigation and the ethics investigation of former Speaker Gingrich. Citizens may well lack confidence in the ability of President Clinton to be honest about his personal life, this is not, however, a threat to our government. The President, as a citizen, remains subject to both criminal and civil sanctions. The Managers have failed to meet the burden of proof they set regarding the perjury charges brought against President William Jefferson Clinton.

#### VII. OBSTRUCTION ALLEGATIONS OF ARTICLE II

Article II alleges that the President obstructed justice by engaging "personally, and through his subordinates and agents, in a course of conduct or scheme designed to delay, impede, cover up and conceal the existence of evidence and testimony related to a Federal civil rights action brought against him in a duly instituted judicial proceeding."<sup>56</sup> The focal point of these allegations is the *Jones* litigation. Article II outlines seven specific "acts" that the President used to implement this "course of conduct or scheme." These "acts" will be analyzed to determine if they established a foundation for a finding of "high Crimes and Misdemeanors."

As an initial point, it is necessary to set out the elements of the crime of obstruction of justice, as set forth at 18 U.S.C. §1503. The components of the offense include: (1) there existed a pending judicial proceeding; (2) the accused knew of the proceeding; and (3) the defendant acted "corruptly" with the specific intent to obstruct and interfere with

the proceeding or due administration of justice.<sup>57</sup>

The critical question in regard to the allegations is whether the President acted with the specific intent to interfere with the administration of justice. Absent a demonstrable "act" coupled with a demonstrable "specific intent," no crime occurs. The House Managers point to the seven following acts as the basis of their claim.

#### 1. *The Lewinsky Affidavit*

The Article alleges that "[o]n or about December 17, 1997, William Jefferson Clinton corruptly encouraged a witness in a Federal civil rights action brought against him to execute a sworn affidavit in that proceeding that he knew to be perjurious, false and misleading."<sup>58</sup> The allegations go to the Affidavit prepared by Monica Lewinsky in conjunction with the *Jones* litigation.

The best evidence of the President's involvement in this affidavit is the testimony of Monica Lewinsky. Ms. Lewinsky has repeatedly and consistently stated that no one asked her or instructed her to lie.

"[N]o one ever asked me to lie and I was never promised a job for my silence."<sup>59</sup>

"Neither the President nor Mr. Jordan (or anyone on their behalf) asked or encouraged Ms. L[e]winsky to lie."<sup>60</sup>

"Neither the President or JORDAN ever told LEWINSKY that she had to lie."<sup>61</sup>

"Neither the President nor anyone ever directed LEWINSKY to say anything or to lie."<sup>62</sup>

Despite these repeated denials, the House Managers persist in arguing that the President influenced Ms. Lewinsky to file a false affidavit in a early morning phone call on December 17, 1997. They hang their case on a portion of the conversation that involved a discussion of the filing of an affidavit in response to a subpoena from the *Jones* lawyers and another portion of the conversation that dealt with the "cover story" that both the President and Ms. Lewinsky had been using to disguise their affair. Ms. Lewinsky has testified that, in a call on December 17, 1997, the President said "Well, maybe you can sign an affidavit."<sup>63</sup> The House Managers argue that this statement alone must convict because both the President and Ms. Lewinsky knew that a truthful affidavit could never be filed given the clandestine nature of their relationship.<sup>64</sup> This theory disregards the testimony of both the President and Ms. Lewinsky.<sup>65</sup>

<sup>57</sup> 18 U.S.C. §1503. The House Managers periodically urge that the President is guilty of witness tampering. The crime of witness tampering is set forth at 18 U.S.C. §1512. This statute requires proof that a defendant knowingly engaged in intimidation, physical force, threats, misleading conduct, or corrupt persuasion with the specific intent to influence, delay, or prevent testimony or cause any person to withhold objects or documents from an official proceeding. Like the obstruction of justice charge, witness tampering requires proof of a specific intent to interfere with a witness.

<sup>58</sup> H. Res. 611.

<sup>59</sup> *The Record*, supra note 27, Volume III, Part 1 at 1161 (Lewinsky Grand Jury testimony 8/20/98).

<sup>60</sup> *Id.* at 718 (handwritten proffer of Lewinsky, given to OIC 2/1/98).

<sup>61</sup> *Id.* at 1398 (FBI Interview with Lewinsky 7/27/98).

<sup>62</sup> *Id.* at 1400.

<sup>63</sup> *Id.* (Grand Jury Testimony of Ms. Lewinsky on 8/6/98) (quoted in *HMTB*, supra note 38, at 22.)

<sup>64</sup> "Both parties knew that the Affidavit would need to be false and misleading to accomplish the desired result." *HMTB*, supra note 38, at 22.

<sup>65</sup> The President testified that "I've already told you that I felt strongly that she could issue, that she could execute an affidavit that would be factually truthful, that might get her out of having to testify. . . . And did I hope she'd be able to get out

Any lingering doubt about the nature of the telephone conversation on December 17, 1997, was erased by the videotaped testimony of Ms. Lewinsky before the Senate. The House Managers repeatedly argued that the President not only influenced the content of her affidavit, but that the President was knowledgeable of those contents. In a response to Mr. Manager Bryant's question, however, Ms. Lewinsky unequivocally stated that "[h]e didn't discuss the content of my affidavit with me at all, ever."<sup>66</sup> The House Managers argued that the telephone call on December 17, 1997, was a deliberate attempt by the President to compel Ms. Lewinsky to submit an affidavit that would explicitly encompass their pre-existing cover story. Again, in response to Mr. Manager Bryant's questions, Ms. Lewinsky stated:

"Q: Now, you have testified in the Grand Jury. I think your closing comments was that no one ever asked you to lie, but yet in that very conversation of December 17th, 1997, when the President told you that you were on the witness list, he also suggested that you could sign an affidavit and use misleading cover stories. Isn't that correct?"

"A: Uh—well, I—I guess in my mind, I separated necessarily signing affidavit and using misleading cover stories. So, does—"

"Q: Well, those two—"

"A: Those three events occurred, but they don't—they weren't linked for me."<sup>67</sup>

The House Managers argued that Ms. Lewinsky could have only filed the affidavit as a result of pressure from the President. They reasoned that only the President could benefit from Ms. Lewinsky's affidavit. Ms. Lewinsky totally refuted their view. Again, in another exchange with Mr. Manager Bryant, Ms. Lewinsky stated:

"Q: But you didn't file the affidavit for your best interest, did you?"

"A: Uh, actually, I did.

"Q: To avoid testifying.

"A: Yes.

"Q: Why—why didn't you want to testify? Why would not you—why would you have wanted to avoid testifying?"

"A: First of all, I thought it was nobody's business. Second of all, I didn't want to have anything to do with Paula Jones or her case. And—I guess those two reasons."<sup>68</sup>

After Ms. Lewinsky's videotaped testimony, it is clear that she filed the affidavit of her own volition to satisfy her own needs. The President did not influence the content of the affidavit. His remark in the December 17, 1997, conversation was, at the most, a terse response to her request rather than an elaborate directive to Ms. Lewinsky. There is no credible evidence that the President orchestrated an attempt to file a false affidavit.

of testifying on an affidavit? Absolutely. Did I want her to execute a false affidavit? No, I did not." *The Record*, supra note 27, Volume X at 571.

Ms. Lewinsky testified to the Grand Jury on 8/6/98, that "I thought that signing an affidavit could range from anywhere—the point of it would be to deter or to prevent me from being deposed and so that that could range from anywhere between maybe just somehow mentioning, you know, innocuous things or going as far as maybe having to deny any kind of relationship." *Id.* at 844. In her Senate Deposition Mr. Manager Bryant asked Ms. Lewinsky, "The night of the phone call, he's [the President is] suggesting you could file an affidavit. Did you appreciate the implications of filing a false affidavit with the court?" Ms. Lewinsky replied, "I don't think I necessarily thought at that point it would have to be false, so, no, probably not." 145 Cong. Rec. at S1218 (daily ed. February 4, 1999).

<sup>66</sup> 145 Cong. Rec. at S1307 (daily ed. February 6, 1999).

<sup>67</sup> *Id.* at S1306.

<sup>68</sup> *Id.*

<sup>55</sup> 145 Cong. Rec. S1228 (daily ed. February 6, 1999) (Senate Deposition Testimony of Ms. Lewinsky).

<sup>56</sup> H. Res. 611.

## 2. The Lewinsky Testimony

The House Managers assert that during that same early morning telephone conversation on December 17, 1997, the President "corruptly" encouraged Ms. Lewinsky to give "perjurious, false and misleading testimony if and when called to testify personally in that proceeding."<sup>69</sup>

Once again, this allegation completely fails to consider the sworn testimony of Ms. Lewinsky that "no one ever asked me to lie and I was never promised a job for my silence."<sup>70</sup> Moreover, Ms. Lewinsky's videotaped testimony before the Senate provides even more detail to her previous statements.

The House Managers suggest that the "cover story" developed by Ms. Lewinsky and the President to disguise their relationship was explicitly urged upon Ms. Lewinsky by the President in response to the subpoena. There is little evidence to support this view. Indeed, the available evidence undermines the position of the House Managers. The following Grand Jury testimony of Ms. Lewinsky indicates that there was no explicit linkage between their ongoing denials of a relationship and the *Jones* litigation.

"Q [JUROR]: It is possible that you also had these discussions [about denying the relationship] after you learned that you were a witness in the Paula Jones case?"

"A: I don't believe so. No.

"Q: Can you exclude that possibility?"

"A: I pretty much can. I really don't remember it. I mean, it would be very surprising for me to be confronted with something that would show me different but I—I was 2:30 in the—I mean, the conversation I'm thinking of mainly would have been December 17th, which was—

"Q: The telephone call.

"A: Right. And it was—you know, 2:00, 2:30 in the morning. I remember the gist of it and I—I really don't think so.

"Q: Thank you."<sup>71</sup>

The House Managers have presented no credible evidence to overcome the sworn testimony of the parties.

## 3. Concealment of Gifts

The Articles alleges that "[o]n or about December 28, 1997, William Jefferson Clinton corruptly engaged in, encouraged, or supported a scheme to conceal evidence that had been subpoenaed in a Federal civil rights action brought against him." The allegation refers to the transfer of gifts from Ms. Lewinsky to Betty Currie on December 28, 1997.

The House Managers argue that the President directed Ms. Currie to contact Ms. Lewinsky and arrange for the collection of personal gifts that he gave Ms. Lewinsky and for their subsequent concealment in Ms. Currie's home. There is conflicting evidence whether Ms. Currie or Ms. Lewinsky arranged for the pick-up of gifts. Regardless of who initiated the gift transfer, however, there is insufficient evidence that the President was involved in the transfer.

The chain of events leading to the transfer of gifts began with a meeting between the President and Ms. Lewinsky on December 28, 1997. Ms. Lewinsky indicated in one of her Grand Jury appearances that in the course of the meeting she raised the topic of the nu-

merous personal gifts that the President had given her in light of the *Jones* subpoena. According to her Grand Jury testimony, Ms. Lewinsky recalled: "[A]t some point I said to him, 'Well, you know, should I—maybe I should put the gifts away outside my house somewhere or give them to someone, maybe Betty.' And he sort of said—I think he responded, 'I don't know' or 'Let me think about that.' And left that topic."<sup>72</sup>

The next link in the chain is the most confusing. There is no question that Betty Currie picked up a box of gifts from Monica Lewinsky on the afternoon of December 28, 1997. However, there is still an unresolved dispute concerning who initiated this activity. Both Ms. Currie and the President denied ever having any conversation in which the President instructed Ms. Currie to retrieve the gifts from Ms. Lewinsky. Ms. Currie has repeatedly testified that it was Ms. Lewinsky who contacted her about the gifts. On the other hand, Ms. Lewinsky testified that Ms. Currie called her to initiate the transfer.

The Managers and the Committee Report cited the following passage from Ms. Lewinsky's Grand Jury testimony.

"Q: What did [Betty Currie] say?"

"A: She said, "I understand you have something to give me." Or, "The President said you have something to give me." Along those lines. . . .

"Q: When she said something along the lines of "I understand you have something to give me," or, "The President says you have something for me," what did you understand her to mean?"

"A: The gifts."<sup>73</sup>

The uncontradicted evidence is that the President and Ms. Currie did not discuss the gifts. The uncontradicted evidence is that the President did not initiate the discussion of gifts with Ms. Lewinsky and made no substantive response to her discussion of the gifts. The unresolved issue is whether Ms. Lewinsky or Ms. Currie initiated the transfer of gifts. Ms. Lewinsky's videotaped testimony before the Senate does not resolve the issue of who initiated the gift transfer. It does, however, add critical details that suggest that Ms. Lewinsky, of her own volition, decided to surrender certain "innocuous" items to the *Jones* lawyers, while concealing other gifts. First, Ms. Lewinsky had already decided *before* the meeting with the President, on December 28, 1997, to conceal items from the *Jones* lawyers. As she told House Manager Bryant in Senate deposition testimony: on December 22, 1997, six days before her meeting with the President, she brought

<sup>72</sup> *Id.* Volume III, Part 1 at 872 (Lewinsky Grand Jury testimony 8/6/98). Ms. Lewinsky discussed this exchange with the President at least ten different times during her multiple interviews and appearances as a witness. In a subsequent appearance before the Grand Jury on August 20, 1998, she again recalled this discussion and stated "And he—I don't remember his response. I think it was something like, "I don't know, or 'Hmm,' or—*there really was no response.*" *Id.* at 1122 (emphasis added). It is clear from her testimony that there was no discussion of the concealment of gifts with the President.

<sup>73</sup> *Clinton Report*, *supra* note 40 at 67-68 (quoting *The Record*, *supra* note 27, Volume III at 874-75 (Lewinsky Grand Jury testimony 8/6/98); see also *HMTB*, *supra* note 38, at 32-33. However, Ms. Lewinsky's recollection of references to the President in this conversation were later cast in doubt by her subsequent testimony. In her Grand Jury testimony, Ms. Lewinsky was quoted as:

Q: [Juror]: Do you remember Betty Currie saying that the President had told her to call?

A: Right now, I don't. I don't remember. . . .

*The Record*, *supra* note 27, Volume III at 1141 (Lewinsky Grand Jury testimony 8/20/98).

the gifts that she was willing to surrender to a meeting with Vernon Jordan.

"Q: Did, uh, you bring with you to the meeting with Mr. Jordan, and for the purpose of carrying it, I guess, to Mr. Carter, items in response to this request for production?"

"A: Yes.

"Q: Did you discuss these items with Mr. Jordan?"

"A: I think I showed them to him. . . .

"Q: Okay. How did you select those items?"

"A: Uh, actually, kind of in an obnoxious way, I guess . . . they were innocuous. . . .

"Q: In other words, it wouldn't give away any kind of special relationship?"

"A: Exactly.

"Q: And was that your intent?"

"A: Yes.

"Q: Did you discuss how you selected those items with anybody?"

"A: No."<sup>74</sup>

Not only did Ms. Lewinsky decide unilaterally to withhold certain gifts, she also decided unilaterally to conceal these gifts, not at the behest of the President, but out of her own concern for privacy. In response to a question posed by Mr. Manager Bryant, Ms. Lewinsky stated, "I was worried someone might break into my house or concerned that they actually existed, but I wasn't concerned about turning them over because I knew I wasn't going to, for the reason you stated."<sup>75</sup>

The final detail added by Ms. Lewinsky's videotaped testimony may be the most significant. The President testified to the Grand Jury that Ms. Lewinsky raised the issue of gifts he responded: "You have to give them whatever you have."<sup>76</sup> When questioned by an FBI agent after the President's testimony, Ms. Lewinsky said that the words in the President's testimony, "sounds [sic] a little bit familiar to me."<sup>77</sup>

## 4. The Lewinsky Job Search

The Article alleges that "[b]eginning on or about December 7, 1997, and continuing through and including January 14, 1998, William Jefferson Clinton intensified and succeeded in an effort to secure job assistance to a witness in a Federal civil rights action against him in order to corruptly prevent the truthful testimony of that witness in that proceeding at a time when the truthful testimony of that witness would have been harmful to him."<sup>78</sup>

This allegation focuses on the efforts to find employment for Ms. Lewinsky. Of critical importance is the undisputed fact that these efforts began long before Ms. Lewinsky was identified as a potential witness in the *Jones* case. Ms. Lewinsky herself initiated the search for employment based on her dissatisfaction with her job at the Pentagon and her perception that she would not be able to return to work in the White House. Ms. Lewinsky suggested that Vernon Jordan be enlisted to aid her, and his involvement

<sup>74</sup> 145 Cong. Rec. S1222 (daily ed. February 4, 1999) (deposition of Ms. Lewinsky).

<sup>75</sup> 145 Cong. Rec. S1309 (daily ed. February 6, 1999) (deposition of Ms. Lewinsky as replayed during the trial). Manager Bryant's question is compound and slightly confusing. Ms. Lewinsky's response, combined with her testimony that she avoided testifying for reasons in her own best interest, makes clear that she had come to an independent conclusion not to provide gifts to the *Jones* attorneys.

<sup>76</sup> This statement has been dismissed by the House Managers as self-serving at best. However, Ms. Lewinsky's Senate Deposition testimony lends significant corroboration to the President's claim. See *supra*, note 55, p. 23.

<sup>77</sup> *Id.*

<sup>78</sup> H. Res. 611.

<sup>69</sup> H. Res. 611.

<sup>70</sup> *The Record*, *supra* note 27, Volume X at 1161 (quoting Ms. Lewinsky's Grand Jury testimony on 8/20/98). See also *PCTB*, *supra* note 42, at 56-57.

<sup>71</sup> *The Record*, *supra* note 27, Volume X at 1119-90 (quoting Ms. Lewinsky's Grand Jury testimony on 8/20/98).

was obtained at Ms. Lewinsky's request by Mr. Jordan's long-time friend Betty Currie.<sup>79</sup>

The allegation of the House Managers crashes on the same unshakable and uncontradicted statement that has bedeviled them from the start. Monica Lewinsky's unchallenged statement is that "no one ever asked me to lie and I was never promised a job for my silence."<sup>80</sup>

Unable to refute her statement, the House Managers attempted to weave a pattern of circumstantial evidence. Each attempt of the House Managers rapidly unraveled.

Mr. Manager Hutchinson argued with great force and skill in his opening presentation that December 11, 1997, was the critical date in the case against the President. It was on that date that Judge Wright ordered the President to answer certain questions about "other women." As Mr. Manager Hutchinson argued on the Floor: "And so, what triggered—let's look at the chain of events. The judge—the witness list came in, the judge's order came in, that triggered the President into action and the President triggered Vernon Jordan into action. That chain reaction here is what moved the job search along . . . Remember what else happened on the day [December 11] again. That was the same day that Judge Wright ruled that the questions about other relationships could be asked by the Jones attorneys."<sup>81</sup>

The thrust of the House Managers' argument is that the President learned that Ms. Lewinsky was on the witness list on December 6, 1997. He met with Mr. Jordan on December 7, 1997, to enlist Mr. Jordan in the Lewinsky job search, and, with the Judge's order on December 11, 1997, making Ms. Lewinsky's testimony more likely, Mr. Jordan "intensified" what had been a dormant record of assistance. This scenario is demonstrably false.

The House Judiciary Committee Report acknowledges that the meeting between the President and Mr. Jordan on December 7, 1997, had nothing to do with Ms. Lewinsky.<sup>82</sup> Because of this lack of interest by the President and Mr. Jordan in Ms. Lewinsky's job search, the House Managers had to seize an event that could plausibly trigger the "intensification" of the job search which allegedly occurred on December 11, 1997.

Although December 11, 1997, was the date of a meeting between Mr. Jordan and Ms. Lewinsky, the record shows that this meeting was arranged prior to that date without the participation of the President. As early Thanksgiving, Mr. Jordan and Ms. Lewinsky had a conversation in which Mr. Jordan told her that "he was working on her job search" and asked her to contact him again" around the first week of December."<sup>83</sup> In response to a request from Ms. Lewinsky, Betty Currie called Vernon Jordan on December 5, 1997, to request a meeting. (This was one day before the President became aware of the appearance of Ms. Lewinsky's name on the witness list.) Mr. Jordan told Ms. Currie to have Ms.

Lewinsky call him to arrange a meeting. Ms. Lewinsky did so on December 8, 1997, confirming a meeting with Mr. Jordan on December 11, 1997.

Since the appearance of Ms. Lewinsky on the witness list did not prompt any accelerated action on the job search and since the meeting of Ms. Lewinsky and Mr. Jordan was contemplated and initiated before the release of the witness list, the House Managers were forced to grasp for some other triggering event. Unwisely, as clearly stated in Mr. Manager Hutchinson's remarks, they chose the issuance of Judge Wright's order.

Judge Wright initiated a conference call with lawyers in the Jones case at 6:33 pm (EST) on December 11, 1997. At 7:50 pm (EST), she concluded the conference by informing the parties that she would issue an "order to compel" testimony about "other women." At that moment, Vernon Jordan was somewhere over the Atlantic Ocean on United flight 946 bound for Amsterdam. His meeting with Ms. Lewinsky had concluded hours before. Obviously, the meeting with Ms. Lewinsky, the calls on her behalf, the "intensification" of the job search, had nothing to do with Judge Wright's order.

Nothing so illustrates the fragility of the House Managers' case as this dubious and discredited attempt to characterize Judge Wright's order as a catalyst for an illegal job search. Forced to beat a hasty retreat by the revelation of this attempted legal slight of hand, the House Managers reversed course and argued, unconvincingly, that they always saw the triggering event as the release of the witness list on December 5, 1997, or the President's receipt of the list on December 6, 1997.<sup>84</sup>

This assertion, however, contradicts the evidence that there was no discussion about Ms. Lewinsky during the meeting between the President and Mr. Jordan on December 7, 1997, and the evidence that the December 11, 1997, meeting was arranged by Ms. Lewinsky and Mr. Jordan without knowledge of the witness list or Judge Wright's order and without the assistance of the President.

Ms. Lewinsky received the active assistance of Mr. Jordan to obtain interviews and favorable recommendations with three prominent New York firms. She succeeded in obtaining a job at one of these firms, Revlon. According to representatives of these firms, they felt no pressure to hire Ms. Lewinsky.<sup>85</sup> (Behavior that undercuts the suggestions of the House Managers that Mr. Jordan was engaged in a high stakes effort to find Ms. Lewinsky a job at all costs.)

Mr. Jordan emphatically denied that he acted to silence Ms. Lewinsky. "Unequivocally, indubitably, no."<sup>86</sup>

The President denied that he attempted to buy her silence. "I was not trying to buy her silence or get Vernon Jordan to buy her silence."<sup>87</sup> But, Ms. Lewinsky said it best: "I was never promised a job for my silence."<sup>88</sup>

#### 5. Allowing False Statements by his Attorneys

The Article alleges that the President "corruptly allowed his attorney to make false and misleading statements to a Federal judge characterizing an affidavit . . ." <sup>89</sup> This allegation rests on the President's silence during the Jones deposition while his attorney, Mr. Robert Bennett, cited the Lewinsky affidavit to Judge Wright as a representation that "there is no sex of any kind in any manner, shape or form."<sup>90</sup>

There is no doubt about the President's silence. There is, however, doubt about the President's state of mind; whether he was aware of the interchange between his counsel and Judge Wright; and whether he formed the specific intent to use his silence to allow a falsehood to be advanced.

The President consistently denied his awareness of this exchange and testified that he was concentrating on his testimony:

"I'm not even sure I paid much attention to what he was saying. I was thinking, I was ready to get on with my testimony here and they were having these constant discussions all through the deposition. . . ."

\* \* \* \* \*

"I was not paying a great deal of attention to this exchange. I was focusing on my own testimony. . . ."

\* \* \* \* \*

"I'm quite sure that I didn't follow all the interchanges between the lawyers all that carefully. . . ."

\* \* \* \* \*

"I am not even sure that when Mr. Bennett made that statement that I was concentrating on the exact words he used. . . ."

\* \* \* \* \*

"When I was there, I didn't think about my lawyers. I was, frankly, thinking about myself and my testimony and trying to answer the questions. . . ."

\* \* \* \* \*

"I didn't pay any attention to this colloquy that went on. I was waiting for my instructions as a witness to go forward. I was worried about my own testimony."<sup>91</sup>

The President's statements are clearly self-serving. The only evidence introduced by the House Managers to refute the President's assertions is an invitation to the Senate to look at the videotape of the President's deposition in the Jones case and "read his mind," and an affidavit from Barry W. Ward, Judge Wright's clerk. Mr. Ward confirms what may be inferred from the tape. "From my position at the conference table, I observed President Clinton looking directly at Mr. Bennett while this statement was being made."<sup>92</sup> But, Mr. Ward's "mind reading" abilities are probably on a par with the Senate's. As he indicated in an article in the Legal Times after the date of his Affidavit,

<sup>86</sup>The Record, supra note 27, Volume IV, Part 2 at 1827 (Jordan Grand Jury testimony on 5/5/98).

<sup>87</sup>Id., Volume III, part 1 at 576 (Clinton Grand Jury testimony on 8/17/98).

<sup>88</sup>Id. at 1161 (Lewinsky Grand Jury testimony 8/20/98).

<sup>89</sup>H. Res. 611.

<sup>90</sup>Clinton Report, supra note 40, at 72.

<sup>91</sup>The Record, supra note 27, Volume III, Part 1 at 476-513 (Clinton Grand Jury testimony on 8/17/98).

<sup>92</sup>Ward Affidavit.

<sup>79</sup>In one of the more unusual aspects of this case, it appears that the idea to enlist Mr. Jordan's assistance came from Linda Tripp's "advice" to Ms. Lewinsky. See *PCTB*, supra note 42, note 103, at 78.

<sup>80</sup>Supra, note 70 at 29.

<sup>81</sup>145 Cong. Rec. S234 (daily ed. Jan. 14, 1999) (presentation of Manager Hutchinson).

<sup>82</sup>Clinton Report, supra note 40, at 11. This fact alone casts serious doubt on the theory of the House Managers. If Ms. Lewinsky's appearance on the witness list was disturbing to the President, and he was participating in the job search to silence Ms. Lewinsky, why would he avoid discussing this matter with Mr. Jordan?

<sup>83</sup>The Record, supra note 27, Volume III at 1465 (Lewinsky OIC interview 7/31/98).

<sup>84</sup>It is interesting to note that the Article alleges that the incriminating events began on December 7, 1997, and continued thereafter until January 14, 1998. Once again, these constantly shifting dates illustrate the ad hoc nature of this argument.

<sup>85</sup>The FBI investigators working for Mr. Starr recorded the following testimony of representatives of Revlon, American Express and Young and Rubicam: "On December 11, 1997, HALPERIN received a telephone call from VERNON JORDAN [who recommended Ms. Lewinsky]. . . . There was no implied time constraint for fast action. HALPERIN did not think there was anything unusual about Jordan's request." The Record, supra note 27, Volume IV, Part 1 at 1286 (FBI Interview with Richard Halperin, Executive VP and Special Counsel, Mac Andrews & Forbes (holding company for Revlon) 3/27/98); "Fairbairn said . . . there was no perceived pressure exerted by JORDAN." Id. at 1087 (FBI Interview with Ursula Fairbairn, Executive Vice President, Human Resources and Quality, American Express, 2/4/98). "JORDAN did not engage in a 'sales pitch' about LEWINSKY." Id. at 1222 (FBI Interview with Peter Georgescu, CEO of Young and Rubicam, 3/25/98).

Mr. Ward concluded, "I have no idea if he was paying attention. He could have been thinking about policy initiatives, for all I know."<sup>93</sup> The House Managers have not presented sufficient evidence to sustain the burden of proof with respect to this allegation.

#### 6. *The Conversations with Betty Currie*

The Article alleges that "[o]n or about January 18 and January 20-21, 1998, William Jefferson Clinton related a false and misleading account of events relevant to a Federal civil rights action brought against him to a potential witness in that proceeding. . . ."<sup>94</sup> This allegation embraces two conversations between the President and Betty Currie, his executive secretary. On January 18, 1998, the day after his deposition in the *Jones* case, the President met with Ms. Currie and asked her a series of leading questions that he promptly answered himself by declaring "Right?"<sup>95</sup> He had a similar conversation on January 20, 1998.

The House Managers argue that the President knew that these rhetorical questions were false and the only purpose for raising these questions was to influence the testimony of Ms. Currie.<sup>96</sup>

What is clear from the evidence is the fact that Ms. Currie was not influenced by the President's statements. Ms. Currie testified to that effect to the Grand Jury on July 22, 1998.

"Q: Now, back again to the four statements that you testified the President made to you that were presented as statements, did you feel pressured when he told you those statements?"

"A: None whatsoever.

"Q: What did you think, or what was going through your mind about what he was doing?"

"A: At the time I felt that he was—I want to use the word shocked or surprised that this was an issue, and he was just talking."<sup>97</sup>

Ms. Currie added in her testimony:

"Q: That was your impression, that he wanted you to say—because he would end each of the statements with "Right?", with a question.

"A: I do not remember that he wanted me to say "Right." He would say, "Right?" and I could have said, "Wrong."

"Q: But he would end each of those questions with a "Right?" and you could either say whether it was true or not true.

"A: Correct.

"Q: Did you feel any pressure to agree with your boss?"

"A: None."<sup>98</sup>

What is unclear from the evidence is the President's intent in making these statements. The President has testified: "I do not remember how many times I talked to Betty

Currie or when. I don't. I can't possibly remember that. I do remember, when I first heard about this story breaking, trying to ascertain what the facts were, trying to ascertain what Betty's perception was. I remember that I was highly agitated, understandably, I think."<sup>99</sup>

The President's assertion is not without plausibility. He initiated the conversation after the *Jones* deposition where he learned that all of the details of his relationship with Monica Lewinsky were known by the *Jones* lawyers and shortly would be public knowledge. He faced an immediate public and political disaster. Although he knew what went on, he had to know what Betty Currie knew, not to influence her testimony but to determine the potential gaps in this story. Ms. Currie was the key "go-between" with Ms. Lewinsky and her recollection had to be confirmed. More precisely, the President had to know if his story would be contradicted by Ms. Currie.

Given the facts, the President's explanation is as plausible as that advanced by the House Managers. They have not established beyond a reasonable doubt that the President had the specific intent to transform these events into the crimes of obstruction of justice or witness tampering.

#### 7. *The Corruption of Potential Grand Jury Witnesses*

The final subpart of the second Article of Impeachment states that "[o]n or about January 21, 23, and 26, 1998, William Jefferson Clinton made false and misleading statements to potential witnesses in a Federal Grand Jury proceeding in order to corruptly influence the testimony of those witness." The Managers have alleged that this caused the Grand Jury to receive "false and misleading information."

In his Referral, Independent Counsel Starr outlines denials about an affair with Ms. Lewinsky that the President made to members of his senior staff: John Podesta, Erskine Bowles, Sidney Blumenthal, and Harold Ickes.<sup>100</sup> The lies that the President told ranged from immaterial<sup>101</sup> to despicable.<sup>102</sup> These lies call into question the President's character and judgment regarding this personal affair, but they most certainly do not rise to the level of criminal behavior.

In order to constitute obstruction of justice, the President would have had to specifically intended these individuals to go before the Grand Jury and lie. It is just as plausible, if not more plausible, that the President was simply trying to conceal and deny the affair from the public at large. The President spoke to his staff because of the appearance of press articles; their conversations had nothing whatsoever to do with the Grand Jury. As the Democratic Minority of the House Judiciary Committee pointed out: "does anyone really think the President

would have admitted to this relationship . . . if no Grand Jury had been sitting?"<sup>103</sup> Independent Counsel Starr called senior aides to the President before the Grand Jury because his prosecutors knew that the President, in furtherance of the public denials he was making, would have lied to his aides. Under the OIC and House Manager's theory, by publically denying the affair, the President tampered with all the grand jurors, who must have known of his denials. This simply cannot be the case. The President is dishonorable for lying to his aides and putting them in legal jeopardy in this way, but he is not a criminal.

### MESSAGES FROM THE HOUSE

At 12:30 p.m., a message from the House of Representatives, delivered by Mr. Hays, one of its reading clerks, announced that the House has passed the following bills, in which it requests the concurrence of the Senate:

H.R. 92. An act to designate the Federal building and United States courthouse located at 251 North Main Street in Winston-Salem, North Carolina, as "Hiram H. Ward Federal Building and United States Courthouse."

H.R. 149. An act to make technical corrections to the Omnibus Parks and Public Lands Management Act of 1996 and to other laws related to parks and public lands.

H.R. 158. An act to designate the United States courthouse located at 316 North 26th Street in Billings, Montana, as the "James F. Battin United States Courthouse."

H.R. 171. An act to authorize appropriations for the Coastal Heritage Trail Route in New Jersey, and for other purposes;

H.R. 193. An act to designate a portion of the Sudbury, Assabet, and Concord Rivers as a component of the National Wild and Scenic Rivers System.

H.R. 233. An act to designate the Federal building at 700 East San Antonio Street in El Paso, Texas, as the "Richard C. White Federal Building."

H.R. 396. An act to designate the Federal building located at 1301 Clay Street in Oakland, California, as the "Ronald V. Dellums Federal Building."

### MEASURES REFERRED

The following bills were read the first and second times by unanimous consent and referred as indicated:

H.R. 92. An act to designate the Federal building and United States courthouse located at 251 North Main Street in Winston-Salem, North Carolina, as "Hiram H. Ward Federal Building and United States Courthouse"; to the Committee on Energy and Natural Resources.

H.R. 149. An act to make technical corrections to the Omnibus Parks and Public Lands Management Act of 1996 and to other laws related to the parks and public lands; to the Committee on Energy and Natural Resources.

H.R. 158. An act to designate the United States courthouse located at 316 North 26th Street in Billings, Montana, as the "James F. Battin United States Courthouse"; to the Committee on Environment and Public Works.

<sup>103</sup>Clinton Report, supra note 40, at 385 (Minority Views).

<sup>93</sup>Legal Times, February 1, 1999.

<sup>94</sup>H. Res. 611.

<sup>95</sup>HMTB, supra note 38, at 65.

<sup>96</sup>Ms. Currie was not a witness in the *Jones* proceeding at the time of these conversations. House Managers argue that the President knew she would be called as a witness because of his constant references to Ms. Currie in his *Jones* deposition. Moreover, Ms. Currie became a witness on January 23, 1998, when the *Jones* lawyers added her to their witness list. White House counsels argue that Ms. Currie's addition to the witness list was not prompted by the President's testimony, but by information secretly provided to the *Jones* lawyers by Linda Tripp. They further add that it cannot be reasonably assumed that the President was aware that Ms. Currie was likely to be called as a witness. Obstruction and witness tampering statutes require knowledge that the individual is or will be a witness. This argument remains unresolved, but a lack of resolution injects further uncertainty as to the allegations.

<sup>97</sup>The Record, supra note 27, Volume III, Part 1 at 668 (Currie Grand Jury testimony on 7/22/98).

<sup>98</sup>Id.

<sup>99</sup>The Record, supra note 27, Volume III, Part 1 at 593 (Clinton Grand Jury testimony on 8/17/98).

<sup>100</sup>Referral from Independent Counsel Kenneth W. Starr to the House of Representatives, House Doc. 105-310, at 198-203 (September 11, 1998).

<sup>101</sup>Mr. Podesta testified that the President told him that after Ms. Lewinsky left the White House (to work at the Department of Defense), she returned to visit Ms. Currie and that Ms. Currie was with them at all times. *Id.* at 88 (quoting Podesta Grand Jury Testimony of 6/16/98).

<sup>102</sup>In his Senate Deposition Testimony Mr. Blumenthal testified that he related to the Grand Jury that on 1/21/98 the President told him that Ms. Lewinsky had "come on to" him, he [the President] had "rebuffed" her, and that Ms. Lewinsky then "threatened" him with telling people that the two had an affair. See 145 Cong. Rec. S1248 (daily ed. February 4, 1999).