IN THE SENATE OF THE UNITED STATES
SITTING AS A COURT OF IMPEACHMENT

In Re
Impeachment of
William Jefferson Clinton
President of the United States

TRIAL MEMORANDUM OF PRESIDENT WILLIAM JEFFERSON CLINTON

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I. INTRODUCTION

Twenty-six months ago, more than 90 million Americans left their homes and work places to travel to schools, church halls and other civic centers to elect a President of the United States. And on January 20, 1997, William Jefferson Clinton was sworn in to serve a second term of office for four years.

The Senate, in receipt of Articles of Impeachment from the House of Representatives, is now gathered in trial to consider whether that decision should be set aside for the remaining two years of the President's term. It is a power contemplated and authorized by the Framers of the Constitution, but never before employed in our nation's history. The gravity of what is at stake -- the democratic choice of the American people -- and the solemnity of the proceedings dictate that a decision to remove the President from office should follow only from the most serious of circumstances and should be done in conformity with Constitutional standards and in the interest of the Nation and its people.

The Articles of Impeachment that have been exhibited to the Senate fall far short of what the Founding Fathers had in mind when they placed in the hands of the Congress the power to impeach and remove a President from office. They fall far short of what the American people demand be shown and proven before their democratic choice is reversed. And they even fall far short of what a prudent prosecutor would require before presenting a case to a judge or jury.

Take away the elaborate trappings of the Articles and the high-flying rhetoric that has accompanied them, and we see clearly that the House of Representatives asks the Senate to remove the President from office because he:

- used the phrase "certain occasions" to describe the frequency of his improper intimate contacts with Ms. Monica Lewinsky. There were, according to the House Managers, eleven such contacts over the course of approximately 500 days.

Should the will of the people be overruled and the President of the United States be removed from office because he used the phrase "certain occasions" to describe eleven events over some 500 days? That is what the House of Representatives asks the Senate to do.

- used the word "occasional" to describe the frequency of inappropriate telephone conversations between he and Monica Lewinsky. According to Ms. Lewinsky, the President and Ms. Lewinsky engaged in between ten and fifteen such conversations spanning a 23-month period.

Should the will of the people be overruled and the President of the United States be removed from office because he used the word "occasional" to describe up to 15 telephone calls over a 23-month period? That is what the House of Representatives asks the Senate to do.

- said the improper relationship with Ms. Lewinsky began in early 1996, while she recalls that it began in November 1995. And he said the contact did not include touching certain parts of her body, while she said it did.

Should the will of the people be overruled and the President of the United States be removed from office because two people have a different recollection of the details of a

wrongful relationship -- which the President has admitted? That is what the House of Representatives asks the Senate to do.

The Articles of Impeachment are not limited to the examples cited above, but the other allegations of wrongdoing are similarly unconvincing. There is the charge that the President unlawfully obstructed justice by allegedly trying to find a job for Monica Lewinsky in exchange for her silence about their relationship. This charge is made despite the fact that no one involved in the effort to find work for Ms. Lewinsky -- including Ms. Lewinsky herself -- testifies that there was any connection between the job search and the affidavit. Indeed, the basis for that allegation, Ms. Lewinsky's statements to Ms. Tripp, was expressly repudiated by Ms. Lewinsky under oath.

There is also the charge that the President conspired to obstruct justice by arranging for Ms. Lewinsky to hide gifts that he had given her, even though the facts and the testimony contain no evidence that he did so. In fact, the evidence shows that the President gave her new gifts on the very day that the articles allege he conspired to conceal his gifts to her.

In the final analysis, the House is asking the Senate to remove the President because he had a wrongful relationship and sought to keep the existence of that relationship private.

Nothing said in this Trial Memorandum is intended to excuse the President's actions. By his own admission, he is guilty of personal failings. As he has publicly stated, "I don't think there is a fancy way to say that I have sinned." He has misled his family, his friends, his staff, and the Nation about the nature of his relationship with Ms. Lewinsky. He hoped to

avoid exposure of personal wrongdoing so as to protect his family and himself and to avoid public embarrassment. He has acknowledged that his actions were wrong.

By the same token, these actions must not be mischaracterized into a wholly groundless excuse for removing the President from the office to which he was twice elected by the American people. The allegations in the articles and the argument in the House Managers' Trial Memorandum do not begin to satisfy the stringent showing required by our Founding Fathers to remove a duly elected President from office, either as a matter of fact or law.

A. The Constitutional Standard for Impeachment Has Not Been Satisfied

There is strong agreement among constitutional and legal scholars and historians that the substance of the articles does not amount to impeachable offenses. On November 6, 1998, 430 Constitutional law professors wrote:

> Did President Clinton commit "high Crimes and Misdemeanors" warranting impeachment under the Constitution? We . . . believe that the misconduct alleged in the report of the Independent Counsel . . . does not cross the threshold. . . . [I]t is clear that Members of Congress could violate their constitutional responsibilities if they sought to impeach and remove the President for misconduct, even criminal misconduct, that fell short of the high constitutional standard required for impeachment.

On October 28, 1998, more than 400 historians issued a joint statement warning that because impeachment had traditionally been reserved for high crimes and misdemeanors in the exercise of executive power, impeachment of the President based on the facts alleged in the OIC Referral would set a dangerous precedent. "If carried forward, they will leave the Presidency permanently disfigured and diminished, at the mercy as never before of caprices of any Congress. The Presidency, historically the center of leadership during our great national ordeals, will be crippled in meeting the inevitable challenges of the future."

We address why the charges in the two articles do not rise to the level of 'high Crimes and Misdemeanors" in Section III, Constitutional Standard and Burden of Proof.

B. The President Did Not Commit Perjury or Obstruct Justice

Article I alleges perjury before a federal grand jury. Article II alleges obstruction of justice. Both perjury and obstruction of justice are statutory crimes. In rebutting the allegations contained in the articles of impeachment, this brief refers to the facts as well as to laws, legal principles, court decisions, procedural safeguards, and the Constitution itself. Those who seek to remove the President speak of the "rule of law." Among the most fundamental rules of law are the principles that those who accuse have the burden of proof, and those who are accused have the right to defend themselves by relying on the law, established procedures, and the Constitution. These principles are not "legalisms" but rather the very essence of the "rule of law" that distinguishes our Nation from others.

We respond, in detail, to those allegations whose substance we can decipher in Section IV, The President Should Be Acquitted on Article I, and in Section V, The President Should Be Acquitted on Article II.

C. Compound Charges and Vagueness

If there were any doubt that the House of Representatives has utterly failed in its constitutional responsibility to the Senate and to the President, that doubt vanishes upon reading the Trial Memorandum submitted by the House Managers. Having proffered two articles of impeachment, each of which unconstitutionally combines multiple offenses and fails to give even minimally adequate notice of the charges it encompasses, the House -- three days before the Managers are to open their case -- is still expanding, not refining, the scope of those articles. In further violation of the most basic constitutional principles, their brief advances, merely as

"examples," nineteen conclusory allegations -- eight of perjury under Article I and eleven of obstruction of justice under Article II, some of which have never appeared before, even in the Report submitted by the Judiciary Committee ("Committee Report"), much less in the Office of Independent Counsel ("OIC") Referral or in the articles themselves.[1] If the target the Managers present to the Senate and to the President is *still* moving now, what can the President expect in the coming days? Is there any point at which the President will be given the right accorded a defendant in the most minor criminal case -- to know with certainty the charges against which he must defend?

The Senate, we know, fully appreciates these concerns and has, in past proceedings, dealt appropriately with articles far less flawed than these. The constitutional concerns raised by the House's action are addressed in Section VI, The Structural Deficiencies of the Articles Preclude a Constitutionally Sound Vote.

II. BACKGROUND

A. The Whitewater Investigative Dead-End

The Lewinsky investigation emerged in January 1998 from the long-running Whitewater investigation. On August 5, 1994, the Special Division of the United States Court of Appeals for the District of Columbia Court Circuit appointed Kenneth W. Starr as Independent Counsel to conduct an investigation centering on two Arkansas entities, Whitewater Development Company, Inc., and Madison Guaranty Savings and Loan Association.

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[1] For example, the House Managers add a charge that the President engaged in "legalistic hair-splitting [in his response to the 81 questions] in an obvious attempt to skirt the whole truth and to deceive and obstruct" the Committee. This charge was specifically rejected by the full House of Representatives when it rejected Article IV.

In the spring of 1997, OIC investigators, without any expansion of jurisdiction, interviewed Arkansas state troopers who had once been assigned to the Governor's security detail, and "[t]he troopers said Starr's investigators asked about 12 to 15 women by name, including Paula Corbin Jones. . . ." Woodward & Schmidt, "Starr Probes Clinton Personal Life," *The Washington Post* (June 25, 1997) at A1 (emphasis added). "The nature of the questioning marks a sharp departure from previous avenues of inquiry in the three-year old investigation . . . . Until now, . . . what has become a wide-ranging investigation of many aspects of Clinton's governorship has largely steered clear of questions about Clinton's relationships with women . . . ."[2] One of the most striking aspects of this new phase of the Whitewater investigation was the extent to which it focused on the *Jones* case. One of the troopers interviewed declared, "'[t]hey asked me about Paula Jones, all kinds of questions about Paula Jones, whether I saw Clinton and Paula together and how many times.'"[3]

In his November 19, 1998, testimony before the House Judiciary Committee, Mr. Starr conceded that his agents had conducted these interrogations and acknowledged that at that time, he had not sought expansion of his jurisdiction from either the Special Division or the Attorney General.[4] Mr. Starr contended that these inquiries were somehow relevant to his Whitewater investigation: "we were, in fact, interviewing, as good prosecutors, good

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[2] *Ibid.* Trooper Roger Perry, a 21-year veteran of the Arkansas state police, stated that he "was asked about the most intimate details of Clinton's life: 'I was left with the impression that they wanted me to show he was a womanizer . . . . All they wanted to talk about was women.'" *Ibid.* (ellipsis in original).

[3] *Ibid.*

[4] Transcript of November 19, 1998 House Judiciary Committee Hearing at 377-378.

investigators do, individuals who would have information that may be relevant to our inquiry about the President's involvement in Whitewater, in Madison Guaranty Savings and Loan and the like."[5] It seems irrefutable, however, that the OIC was in fact engaged in an unauthorized attempt to gather embarrassing information about the President -- information wholly unrelated to Whitewater or Madison Guaranty Savings and Loan, but potentially relevant to the lawsuit filed by Paula Jones.

B. The Paula Jones Litigation

The Paula Jones lawsuit made certain allegations about events she said had occurred three years earlier, in 1991, when the President was Governor of Arkansas. Discovery in the case had been stayed until the Supreme Court's decision on May 27, 1997, denying the President temporary immunity from suit.[6] Shortly thereafter, Ms. Jones' legal team began a public relations offensive against the President, headed by Ms. Jones' new spokesperson, Ms. Susan Carpenter-McMillan, and her new counsel affiliated with the conservative Rutherford Institute.[7] "'I will never deny that when I first heard about this case I said, "Okay, good. We're

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[5] *Ibid.* at 378.

[6] *Clinton v. Jones*, 520 U.S. 681 (1997).

[7] Ms. Jones was described as having "accepted financial support of a Virginia conservative group," which intended to "raise $100,000 or more on Jones's behalf, although the money will go for expenses and not legal fees." "Jones Acquires New Lawyers and Backing," *The Washington Post* (October 2, 1998) at A1. Jones' new law firm, the Dallas-based Rader, Campbell, Fisher and Pyke, had "represented conservatives in antiabortion cases and other causes." *Ibid.* *See also* "Dallas Lawyers Agree to Take on Paula Jones' Case -- Their Small Firm Has Ties to Conservative Advocacy Group," *The Los Angeles Times* (Oct. 2, 1997) (Rutherford Institute a "conservative advocacy group.").

gonna get that little slimeball,"' said Ms. Carpenter-McMillan."[8] While Ms. Jones' previous attorneys, Messrs. Gilbert Davis and Joseph Cammarata, had largely avoided the media, as the *Jones* civil suit increasingly became a partisan vehicle to try to damage the President, public personal attacks became the order of the day.[9] As is now well known, this effort led ultimately to the Jones lawyers being permitted to subpoena various women, to discover the nature of their relationship, if any, with the President, allegedly for the purpose of determining whether they had information relevant to the sexual harassment charge. Among these women was Ms. Lewinsky.

In January 1998, Ms. Linda Tripp notified the OIC of certain information she believed she had about Ms. Lewinsky's involvement in the *Jones* case. At that time, the OIC investigation began to intrude formally into the *Jones* case: the OIC met with Ms. Tripp through the week of January 12, and with her cooperation taped Ms. Lewinsky discussing the *Jones* case

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[8] "Cause Celebre: An Antiabortion Activist Makes Herself the Unofficial Mouthpiece for Paula Jones," *The Washington Post* (July 23, 1997) at C1. Ms. Carpenter-McMillan, "a cause-oriented, self-defined 'conservative feminist'", described her role as "flaming the White House" and declared "'Unless Clinton wants to be terribly embarrassed, he'd better cough up what Paula needs. Anybody that comes out and testifies against Paula better have the past of a Mother Teresa, because our investigators will investigate their morality.'" "Paula Jones' Team Not All About Teamwork," *USA Today* (Sept. 29, 1997) at 4A.

[9] After Ms. Jones' new team had been in action for three months, one journalist commented:

> In six years of public controversy over Clinton's personal life, what is striking in some ways is how little the debate changes. As in the beginning, many conservatives nurture the hope that the past will be Clinton's undoing. Jones's adviser, Susan Carpenter-McMillan, acknowledged on NBC's 'Meet the Press' yesterday that her first reaction when she first heard Jones's claims about Clinton was, "Good, we're going to get that little slime ball."

Harris, "Jones Case Tests Political Paradox," *The Washington Post* (Jan. 19, 1998) at A1.

and the President. Ms. Tripp also informed the OIC that she had been surreptitiously taping conversations with Ms. Lewinsky in violation of Maryland law, and in exchange for her cooperation, the OIC promised Ms. Tripp immunity from federal prosecution, and assistance in protecting her from state prosecution.[10] On Friday, January 16, after Ms. Tripp wore a body wire and had taped conversations with Ms. Lewinsky for the OIC, the OIC received jurisdiction from the Attorney General and formalized an immunity agreement with Ms. Tripp in writing.

The President's deposition in the *Jones* case was scheduled to take place the next day, on Saturday, January 17. As we now know, Ms. Tripp met with and briefed the lawyers for Ms. Jones the night before the deposition on her perception of the relationship between Ms. Lewinsky and the President -- doing so based on confidences Ms. Lewinsky had entrusted to her.[11] She was permitted to do so even though she had been acting all week at the behest of the OIC and was dependent on the OIC to use its best efforts to protect her from state prosecution. At the deposition the next day, the President was asked numerous questions about his relationship with Ms. Lewinsky by lawyers who already knew the answers.

The *Jones* case, of course, was not about Ms. Lewinsky. She was a peripheral player and, since her relationship with the President was concededly consensual, irrelevant to Ms. Jones' case. Shortly after the President's deposition, Chief Judge Wright ruled that evidence pertaining to Ms. Lewinsky would not be admissible at the *Jones* trial because "it is not essential

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[10] Supplemental Materials to the Referral to the United States House of Representatives Pursuant to Title 28, United States Code Section 595(c), H. Doc. 105-316 (hereinafter "Supp.") at 3758-3759, 4371-4373 (House Judiciary Committee) (Sept. 28, 1998).

[11] Baker, "Linda Tripp Briefed Jones Team on Tapes: Meeting Occurred Before Clinton Deposition," *The Washington Post* (Feb. 14, 1998) at A1.

to the core issues in this case."[12] The Court also ruled that, given the allegations at issue in the *Jones* case, the Lewinsky evidence "might be inadmissible as extrinsic evidence" under the Federal Rules of Evidence because it involved merely the "specific instances of conduct" of a witness.[13]

On April 1, 1998, the Court ruled that Ms. Jones had no case and granted summary judgment for the President. Although Judge Wright "viewed the record in the light most favorable to [Ms. Jones] and [gave] her the benefit of all reasonable factual inferences,"[14] the Court ruled that, as a matter of law, she simply had no case against President Clinton, both because "there is no genuine issue as to any material fact" and because President Clinton was "entitled to a judgment as a matter of law." *Id.* at 11-12. After reviewing all the proffered evidence, the Court ruled that "the record taken as a whole could not lead a rational trier of fact to find for" Ms. Jones. *Id.* at 39.

C. The President's Grand Jury Testimony About Ms. Lewinsky

On August 17, 1998, the President voluntarily testified to the grand jury and specifically acknowledged that he had had a relationship with Ms. Lewinsky involving "improper intimate contact," and that he "engaged in conduct that was wrong." App. at 461.[15] He described how the relationship began and how he had ended it early in 1997 -- long before

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[12] Order, at 2, *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark.) (Jan. 29, 1998).

[13] *Ibid*.

[14] *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark.), Memorandum Opinion and Order (April 1, 1998), at 3 n.3.

[15] Appendices to the Referral to the United States House of Representatives Pursuant to Title 28, United States Code Section 595(c), H. Doc. 105-311 (hereinafter "App.") at 461 (House Judiciary Committee) (Sept. 18, 1998).

any public attention or scrutiny. He stated to the grand jury "it's an embarrassing and personally painful thing, the truth about my relationship with Ms. Lewinsky," App. at 533, and told the grand jurors, "I take full responsibility for it. It wasn't her fault, it was mine." App. at 589-90.

The President also explained how he had tried to navigate the deposition in the *Jones* case months earlier without admitting what he admitted to the grand jury -- that he had been engaged in an improper intimate relationship with Ms. Lewinsky. *Id.* at 530-531. He further testified that the "inappropriate encounters" with Ms. Lewinsky had ended, at his insistence, in early 1997. He declined to describe, because of considerations of personal privacy and institutional dignity, certain specifics about his conduct with Ms. Lewinsky,[16] but he indicated his willingness to answer,[17] and he did answer, the other questions put to him about his relationship with her. No one who watched the videotape of this grand jury testimony had any doubt that the President admitted to having had an improper intimate relationship with Ms. Lewinsky.

D. Proceedings in the House of Representatives

On September 9, 1998, Mr. Starr transmitted a Referral to the House of Representatives that alleged eleven acts by the President related to the Lewinsky matter that, in

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[16] "While I will provide the grand jury whatever other information I can, because of privacy considerations affecting my family, myself, and others, and in an effort to preserve the dignity of the office I hold, this is all I will say about the specifics of these particular matters." App. at 461.

[17] "I will try to answer, to the best of my ability, other questions including questions about my relationship with Ms. Lewinsky, questions about my understanding of the term 'sexual relations,' as I understood it to be defined at my January 17th, 1998 deposition; and questions concerning alleged subornation of perjury, obstruction of justice, and intimidation of witnesses." App. at 461.

the opinion of the OIC, "may constitute grounds for an impeachment."[18] The allegations fell into three broad categories: lying under oath, obstruction of justice, and abuse of power.

The House Judiciary Committee held a total of four hearings and called but one witness: Kenneth W. Starr. The Committee allowed the President's lawyers two days in which to present a defense. The White House presented four panels of distinguished expert witnesses who testified that the facts, as alleged, did not constitute an impeachable offense, did not reveal an abuse of power, and would not support a case for perjury or obstruction of justice that any reasonable prosecutor would bring. White House Counsel Charles F.C. Ruff presented argument to the Committee on behalf of the President, which is incorporated into this Trial Memorandum by reference.[19]

On December 11 and 12, the Judiciary Committee voted essentially along party lines to approve four articles of impeachment. Republicans defeated the alternative resolution of censure offered by certain Committee Democrats. Almost immediately after censure failed in the Committee, the House Republican leadership declared publicly that no censure proposal would be considered by the full House when it considered the articles of impeachment.[20]

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[18] Referral from Independent Counsel Kenneth W. Starr in Conformity with the Requirements of Title 28, United States Code, Section 595(c), at 1 (House Judiciary Committee) (printed September 11, 1998).

[19] Also incorporated by reference into this Trial Memorandum are the four prior submissions of the President to the House of Representatives: Preliminary Memorandum Concerning Referral of Office of Independent Counsel (September 11, 1998) (73 pages); Initial Response to Referral of Office of Independent Counsel (September 12, 1998) (42 pages); Memorandum Regarding Standards of Impeachment (October 2, 1998) (30 pages); Submission by Counsel for President Clinton to the Committee on the House Judiciary of the United States House of Representatives (December 8, 1998) (184 pages).

[20] *See* Baker & Eilperin, "GOP Blocks Democrats' Bid to Debate Censure in House: Panel Votes Final, Trimmed Article of Impeachment," *The Washington Post* (Dec. 13, 1998) at A1.

On December 19, 1998, voting essentially on party lines, the House of Representatives approved two articles of impeachment: Article I, which alleged perjury before the grand jury, passed by a vote of 228 to 206 and Article III, which alleged obstruction of justice, passed by a vote of 221 to 212. The full House defeated two other Articles: Article II, which alleged that the President committed perjury in his civil deposition, and Article IV, which alleged abuse of power. Consideration of a censure resolution was blocked, even though members of both parties had expressed a desire to vote on such an option.

From beginning to end the House process was both partisan and unfair. Consider:

- The House released the entire OIC Referral to the public without ever reading it, reviewing it, editing it, or allowing the President's counsel to review it;
- The Chairman of the House of Judiciary Committee said he had "no interest in not working in a bipartisan way";[21]
- The Chairman also pledged a process the American people would conclude was fair;[22]
- The Speaker-Designate of the House endorsed a vote of conscience on a motion to censure;[23]

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21 *Associated Press* (March 25, 1998).

22 "This whole proceeding will fall on its face if it's not perceived by the American people to be fair." *Financial Times* (Sept. 12, 1998).

23 "The next House Speaker, Robert Livingston, said the coming impeachment debate should allow lawmakers to make a choice between ousting President Clinton and imposing a lesser penalty such as censure. The Louisiana Republican said the House can't duck a vote on articles of impeachment if reported next month by its Judiciary Committee. But an 'alternative measure is possible' he said, and the GOP leadership should 'let everybody have a chance to vote on the option of their choice.'" *Wall Street Journal* (Nov. 23, 1998).

- Members of the House were shown secret "evidence" in order to influence their vote -- evidence which the President's counsel still has not been able to review.

III. THE CONSTITUTIONAL STANDARD AND BURDEN OF PROOF FOR DECISION

A. The Offenses Alleged Do Not Meet the Constitutional Standard of High Crimes and Misdemeanors

1. The Senate Has a Constitutional Duty to Confront the Question Whether Impeachable Offenses Have Been Alleged

It is the solemn duty of the Senate to consider the question whether the articles state an impeachable offense.[24] That Constitutional question has not, in the words of one House Manager, "already been resolved by the House."[25] To the contrary, that question now awaits the Senate's measured consideration and independent judgment. Indeed, throughout our history, resolving this question has been an essential part of the Senate's constitutional obligation to "try all Impeachments." U.S. Const. Art. I, § 3, cl. 7. In the words of John Logan, a House Manager in the 1868 proceedings:

> It is the rule that all questions of law or of fact are to be decided, in these proceedings, by the final vote upon the guilt or innocence of the accused. It is also the rule, that in determining this general issue senators must consider the sufficiency or insufficiency in law or in fact of every article of accusation."[26]

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[24] In the impeachment trial of Andrew Johnson, the President's counsel answered (to at least one article) that the matters alleged "do not charge or allege the commission of any act whatever by this respondent, in his office of President of the United States, nor the omission by this respondent of any act of official obligation or duty in his office of President of the United States." 1 *Trial of Andrew Johnson* (1868) ("TAJ") 53.

[25] *See* Statement of Rep. Bill McCollum: "[A]re these impeachable offenses, which I think has already been resolved by the House. I think constitutionally that's our job to do." Fox News Sunday (January 3, 1999).

[26] Closing argument of Manager John H. Logan, 2 TAJ 18 (emphasis added). *See also* Office of Senate Legal Counsel, *Memorandum on Impeachment Issues* at 25-26 (Oct. 7,

We respectfully suggest that the articles exhibited here do not state wrongdoing that constitutes impeachable offenses under our Constitution.

2. The Constitution Requires a High Standard of Proof of "High Crimes and Misdemeanors" for Removal

a. The Constitutional Text and Structure Set an Intentionally High Standard for Removal

The Constitution provides that the President shall be removed from office only upon "Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Constitution, Art. II, section 4. The charges fail to meet the high standard that the Framers established.[27]

The syntax of the Constitutional standard "Treason, Bribery or other high Crimes and Misdemeanors" (emphasis added) strongly suggests, by the interpretive principle *noscitur a sociis*,[28] that, to be impeachable offenses, high crimes and misdemeanors must be of the seriousness of "Treason" and "Bribery."

1988) ("Because the Senate acts as both judge and jury in an impeachment trial, the Senate's conviction on a particular article of impeachment reflects the Senate's judgment not only that the accused engaged in the misconduct underlying the article but also that the article stated an impeachable offense").

[27] For a more complete discussion of the Standards for Impeachment, please see *Submission by Counsel for President Clinton to the House Judiciary of the United States House of Representatives* at 24-43 (December 8, 1998); *Memorandum Regarding Standards of Impeachment* (October 2, 1998); and *Impeachment of William Jefferson, President of the United States*, Report of the Committee on the Judiciary to Accompany H. Res. 611, H. Rpt. 105-830, 105th Cong., 2d Sess. at 332-39 (citing Minority Report). References to pages 2-203 of the Committee Report will be cited hereinafter as "Committee Report." References to pages 329-406 of the Committee Report will be cited hereinafter as "Minority Report."

[28] "'It is known from its associates' . . . the meaning of a word is or may be known from the accompanying words." *Black's Law Dictionary* 1209 (4th ed. 1968).

Our Constitutional structure reaffirms that the standard must be a very high one. Ours is a Constitution of separated powers. In that Constitution, the President does not serve at the will of Congress, but as the directly elected,[29] solitary head of the Executive Branch. The Constitution reflects a judgment that a strong Executive, executing the law independently of legislative will, is a necessary protection for a free people.

These elementary facts of constitutional structure underscore the need for a very high standard for impeachment. The House Managers, in their Brief, suggest that the failure to remove the President would raise the standard for impeachment higher than the Framers intended. They say that if the Senate does not remove the President, "The bar will be so high that only a convicted felon or a traitor will need to be concerned." But that standard is just a modified version of the plain language of Article II, Section 4 of the Constitution, which says a President can only be impeached and removed for "Treason, Bribery, or other high Crimes and Misdemeanors." The Framers wanted a high bar. It was not the intention of the Framers that the President should be subject to the will of the dominant legislative party. As Alexander Hamilton said in a warning against the politicization of impeachment: "There will always be the greatest danger that the decision will be regulated more by comparative strength of parties than by the real demonstrations of innocence or guilt." Federalist 65. Our system of government does not permit Congress to unseat the President merely because it disagrees with his behavior or his policies. The Framers' decisive rejection of parliamentary government is one reason they caused the phrase "Treason, Bribery or other high Crimes and Misdemeanors" to appear in the

[29] Of course, that election takes place through the mediating activity of the Electoral College. *See* U.S. Const. Art. II, § 1, cl. 2-3 and Amend. XII.

Constitution itself. They chose to specify those categories of offenses subject to the impeachment power, rather than leave that judgment to the unfettered whim of the legislature.

Any just and proper impeachment process must be reasonably viewed by the public as arising from one of those rare cases when the Legislature is compelled to stand in for all the people and remove a President whose continuation in office threatens grave harm to the Republic. Indeed, it is not exaggeration to say -- as a group of more than 400 leading historians and constitutional scholars publicly stated -- that removal on these articles would "mangle the system of checks and balances that is our chief safeguard against abuses of public power."[30] Removal of the President on these grounds would defy the constitutional presumption that the removal power rests with the people in elections, and it would do incalculable damage to the institution of the Presidency. If "successful," removal here "will leave the Presidency permanently disfigured and diminished, at the mercy as never before of the caprices of any Congress."[31]

The Framers made the President the sole nationally elected public official (together with the Vice-President), responsible to all the people. Therefore, when articles of impeachment have been exhibited, the Senate confronts this inescapable question: is the alleged misconduct so profoundly serious, so malevolent to our Constitutional system, that it justifies undoing the people's decision? Is the wrong alleged of a sort that not only demands removal of the President before the ordinary electoral cycle can do its work, but also justifies the national

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[30] Statement of Historians in Defense of the Constitution (Oct. 28, 1998) ("*Statement of Historians*"); *see also* Schmitt, "Scholars and Historians Assail Clinton Impeachment Inquiry," *The New York Times* (Oct. 19, 1998) at A18.

[31] *Statement of Historians.*

trauma that accompanies the impeachment trial process itself? The wrongdoing alleged here does not remotely meet that standard.

b. The Framers Believed that Impeachment and Removal Were Appropriate Only for Offenses Against the System of Government

"[H]igh Crimes and Misdemeanors" refers to nothing short of Presidential actions that are "great and dangerous offenses" or "attempts to subvert the Constitution."[32] Impeachment was never intended to be a remedy for private wrongs. It was intended to be a method of removing a President whose continued presence in the Office would cause grave danger to the Nation and our Constitutional system of government.[33] Thus, "in all but the most extreme instances, impeachment should be limited to abuse of public office, not private misconduct unrelated to public office."[34]

Impeachment was designed to be a means of redressing *wrongful public conduct*. As scholar and Justice James Wilson wrote, "our President . . . is amenable to [the laws] in his private character as a citizen, and in his public character by impeachment."[35] As such,

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[32] George Mason, 2 Farrand, *The Records of the Federal Convention of 1787* 550 (Rev. ed. 1966).

[33] As the 1975 Watergate staff report concluded "Impeachment is the first step in a remedial process -- removal from office and possible disqualification from holding future office. The purpose of impeachment is not personal punishment; its function is primarily to maintain constitutional government. . . . In an impeachment proceeding a President is called to account for abusing powers that only a President possesses." *Constitutional Grounds for Presidential Impeachment, Report by the Staff of the Impeachment Inquiry*, House Comm. on Judiciary, 93d Cong., 2d Sess. at 24 (1974) ("*Nixon Impeachment Inquiry*").

[34] Minority Report at 337.

[35] *2 Elliot,* The Debate in the Several State Conventions on the Adoption of the Federal Constitution 480 (reprint of 2d ed.).

impeachment is limited to certain forms of wrongdoing. Alexander Hamilton described the subject of the Senate's impeachment jurisdiction 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 to the society itself.[36]

The Framers "intended that a president be removable from office for the commission of great offenses against the Constitution."[37] Impeachment therefore addresses public wrongdoing, whether denominated a "political crime[ ] against the state,"[38] or "an act of malfeasance or abuse of office,"[39] or a "great offense[ ] against the federal government."[40] Ordinary civil and criminal wrongs can be addressed through ordinary judicial processes. And ordinary political wrongs can be addressed at the ballot box and by public opinion. Impeachment is reserved for the most serious public misconduct, those aggravated abuses of executive power that, given the President's four-year term, might otherwise go unchecked.

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[36] *The Federalist No.* 65 at 331 (Gary Wills ed. 1982). As one of the most respected of the early commentators explained, the impeachment "power partakes of a political character, as it respects injuries to the society in its political character." Story, *Commentaries on the Constitution*, Sec. 744. (reprint of 1st ed. 1833).

[37] John Labovitz, *Presidential Impeachment* 94 (1978).

[38] Raoul Berger, *Impeachment* 61 (1973)

[39] Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 Ky. L.J. 707, 724 (1987/1988).

[40] Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 Tex. L. Rev. 1, 85 (1989).

3. Past Precedents Confirm that Allegations of Dishonesty Do Not Alone State Impeachable Offenses

Because impeachment of a President nullifies the popular will of the people, as evidenced by an election, it must be used with great circumspection. As applicable precedents establish, it should not be used to punish private misconduct.

a. The Fraudulent Tax Return Allegation Against President Nixon

Five articles of impeachment were proposed against then-President Nixon by the Judiciary Committee of the House of Representatives in 1974. Three were approved and two were not. The approved articles alleged official wrongdoing. Article I charged President Nixon with "using the powers of his high office [to] engage[ ] . . . in a course of conduct or plan designed to delay, impede and obstruct" the Watergate investigation.[41] Article II described the President as engaging in "repeated and continuing abuse of the powers of the Presidency in disregard of the fundamental principle of the rule of law in our system of government" thereby "us[ing] his power as President to violate the Constitution and the law of the land."[42] Article III charged the President with refusing to comply with Judiciary Committee subpoenas in frustration of a power necessary to "preserve the integrity of the impeachment process itself and the ability of Congress to act as the ultimate safeguard against improper Presidential conduct."[43]

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[41] *Impeachment of Richard M. Nixon, President of the United States*, Report of the Comm. on the Judiciary, 93rd Cong., 2d Sess., H. Rep. 93-1305 (Aug. 20, 1974) (hereinafter "*Nixon Report*") at 133.

[42] *Nixon Report* at 180.

[43] *Id*. at 212-13.

One article not approved by the House Judiciary Committee charged that President Nixon both "knowingly and fraudulently failed to report certain income and claimed deductions [for 1969-72] on his Federal income tax returns which were not authorized by law."[44] The President had signed his returns for those years under penalty of perjury,[45] and there was reason to believe that the underlying facts would have supported a criminal prosecution against President Nixon himself.[46]

Specifying the applicable standard for impeachment, the majority staff 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 the president office.[47]

And the minority views of many Republican members were in substantial agreement:

> 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 history, that the Framers of the United States Constitution intended that the President should be

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[44] *Id.* at 220. The President was alleged to have failed to report certain income, to have taken improper tax deductions, and to have manufactured (either personally or through his agents) false documents to support the deductions taken.

[45] Given the underlying facts, that act might have provided the basis for multiple criminal charges; conviction on, for example, the tax evasion charge, could have subjected President Nixon to a 5-year prison term.

[46] *See Nixon Report* at 344 ("the Committee was told by a criminal fraud tax expert that on the evidence presented to the Committee, if the President were an ordinary taxpayer, the government would seek to send him to jail") (Statement of Additional Views of Mr. Mezvinsky, *et al.*).

[47] *Nixon Impeachment Inquiry* at 26 (emphasis added).

> removable by the legislative branch only for serious misconduct dangerous to the system of government established by the Constitution.[48]

The legal principle that impeachable offenses required misconduct dangerous to our system of government provided one basis for the Committee's rejection of the fraudulent-tax-return charge. As Congressman Hogan (R-Md.) put the matter, the Constitution's phrase "high crime signified a crime against the system of government, not merely a serious crime."[49] As noted, the tax-fraud charge, involving an act which did not demonstrate public misconduct, was rejected by an overwhelming (and bipartisan) 26-12 margin.[50]

b. The Financial Misdealing Allegation Against Alexander Hamilton

In 1792, Congress investigated Secretary of Treasury Alexander Hamilton for alleged financial misdealings with a convicted swindler. Hamilton had made payments to the swindler and had urged his wife (Hamilton's paramour) to burn incriminating correspondence. Members of Congress investigated the matter and it came to the attention of President Washington and future Presidents Adams, Jefferson, Madison and Monroe.

This private matter was not deemed worthy of removing Mr. Hamilton as Secretary of the Treasury.[51] Even when it eventually became public, it was no barrier to

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[48] *Nixon Report* at 364-365 (Minority Views of Messrs. Hutchinson, Smith, Sandman, Wiggins, Dennis, Mayne, Lott, Moorhead, Maraziti and Latta).

[49] *Id.* (quoting with approval conclusion of *Nixon Impeachment Inquiry*).

[50] *Nixon Report* at 220.

[51] *See generally* Rosenfeld, "Founding Fathers Didn't Flinch," *The Los Angeles Times* (September 18, 1998).

Hamilton's appointment to high position in the United States Army. Although not insignificant, Hamilton's behavior was essentially private. It was certainly not regarded as impeachable.

4. The Views of Prominent Historians and Legal Scholars Confirm that Impeachable Offenses Are Not Present

a. No Impeachable Offense Has Been Stated Here

There is strong agreement among constitutional scholars and historians that the articles do not charge impeachable offenses. As Professor Michael Gerhardt summarized in his recent testimony before a subcommittee of the House of Representatives, there is "widespread recognition [of] a paradigmatic case for impeachment."[52] In such a case, "there must be a nexus between the misconduct of an impeachable official and the latter's official duties."[53]

There is no such nexus here. Indeed the allegations are so far removed from official wrongdoing that their assertion here threatens to weaken significantly the Presidency itself. As the more than 400 prominent historians and constitutional scholars warned in their public statement:

> [t]he theory of impeachment underlying these efforts is unprecedented in our history . . . [and is] are extremely ominous for the future of our political institutions. If carried forward, [the current processes] will leave the Presidency permanently disfigured and diminished, at the mercy as never before of the caprices of any Congress.[54]

Similarly, in a letter to the House of Representatives, an extraordinary group of 430 legal scholars argued together that these offenses, even if proven true, did not rise to the level of an

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[52] Statement of Professor Michael J. Gerhardt Before the House Subcommittee on the Constitution of the House Judiciary Committee Regarding the Background and History of Impeachment (November 9, 1998) at 13 ("*Subcommittee Hearings*").

[53] *Ibid*. (emphasis added).

[54] *Statement of Historians*.

impeachable offense.[55] The gist of these scholarly objections is that the alleged wrongdoing is insufficiently connected to the exercise of public office. Because the articles charge wrongdoing of an essentially private nature, any harm such behavior poses is too removed from our system of government to justify unseating the President. Numerous scholars, opining long before the current controversy. have emphasized the necessary connection of impeachable wrongs to threats against the state itself. They have found that impeachment should be reserved for:

- "offenses against the government";[56]
- "political crimes against the state";[57]
- "serious assaults on the integrity of the processes of government";[58]
- "wrongdoing convincingly established [and] so egregious that [the President's] continuation in office is intolerable";[59]
- "malfeasance or abuse of office,"[60] bearing a "functional relationship" to public office;[61]
- "great offense[s] against the federal government";[62]

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55 *See* Letter of 430 Law Professors to Messrs. Gingrich, Gephardt, Hyde and Conyers (released Nov. 6, 1998).

56 Labovitz, *Presidential Impeachment* at 26.

57 Berger, *Impeachment* at 61.

58 Charles L. Black, Jr., *Impeachment: A Handbook* 38-39 (1974).

59 Labovitz, *Presidential Impeachment* at 110.

60 Rotunda, 76 Ky. L.J. at 726.

61 *Ibid*.

62 Gerhardt, 68 Tex. L. Rev. at 85.

- "acts which, like treason and bribery, undermine the integrity of government."[63]

The articles contain nothing approximating that level of wrongdoing. Indeed the House Managers themselves acknowledge that "the President's [alleged] perjury and obstruction do not directly involve his official conduct."[64]

b. To Make Impeachable Offenses of These Allegations Would Forever Lower the Bar in a Way Inimical to the Presidency and to Our Government of Separated Powers

These articles allege (1) sexual misbehavior, (2) statements about sexual misbehavior and (3) attempts to conceal the fact of sexual misbehavior. These kinds of wrongs are simply not subjects fit for impeachment. To remove a President on this basis would lower the impeachment bar to an unprecedented level and create a devastating precedent. As Professor Arthur Schlesinger, Jr., addressing this problem, has testified:

> Lowering the bar for impeachment creates a novel, . . . revolutionary theory of impeachment, [and] . . . would send us on an adventure with ominous implications for the separation of powers that the Constitution established as the basis of our political order. It would permanently weaken the Presidency.[65]

The lowering of the bar that Professor Schlesinger described must stop here. Professor Jack Rakove made a similar point when he stated that "Impeachment [is] a remedy to be deployed only in . . . unequivocal cases where . . . the insult to the constitutional system is grave."[66]

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[63] Committee on Federal Legislation of the Bar Ass'n of the City of New York, *The Law of Presidential Impeachment* 18 (1974).

[64] House Br. at 109.

[65] *Subcommittee Hearings* (Written Statement of Arthur Schlesinger, Tr. at 2).

[66] *Subcommittee Hearings* (Written Statement of Professor Jack Rakove at 4).

Indeed, he said, there "would have to be a high degree of consensus on both sides of the aisle in Congress and in both Houses to proceed."[67]

Bipartisan consensus was, of course, utterly lacking in the House of Representatives. No civil officer -- no President, no judge, no cabinet member -- has ever been impeached by so narrow a margin as supported the articles exhibited here.[68] The closeness and partisan division of the vote reflect the constitutionally dubious nature of the charges.

When articles are based on sexual wrongdoing, and when they have passed only by the narrowest, partisan margin, the future of our constitutional politics is in the balance. The very stability of our Constitutional government may depend upon the Senate's response to these articles. Nothing about this case justifies removal of a twice-elected President, because no "high Crimes and Misdemeanors" are alleged.

5. Comparisons to Impeachment of Judges Are Wrong

The House Managers suggest that perjury *per se* is an impeachable offense because (1) several federal judges have been impeached and removed for perjury, and (2) those precedents control this case. *See* House Br. at 95-105. That notion is erroneous. It is blind both

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[67] *Subcommittee Hearings* (Oral Testimony of Professor Rakove).

[68] The present articles were approved by margins of 228-206 (Article I) and 221-212 (Article II). All prior resolutions were approved by substantially wider margins in the House of Representatives. *See* Impeachments of the following civil officers: Judge John Pickering (1803) (45-8); Justice Samuel Chase (1804) (73-32); Judge James Peck (1830) (143-49); Judge West Humphreys (1862) (no vote available, but resolution of impeachment voted "without division," *see* 3 Hinds Precedents of the House of Representatives § 2386); President Andrew Johnson (1868) (128-47); Judge James Belknap (1876) (unanimous); Judge Charles Swayne (1903) (unanimous); Judge Robert Archbald (1912) (223-1); Judge George English (1925) (306-62); Judge Harold Louderback (1932) (183-143); Judge Halsted Ritter (1933) (181-146); Judge Harry Claiborne (1986) (406-0); Judge Walter L. Nixon, Jr. (1988) (417-0); Judge Alcee L. Hastings (1988) (413-3). The impeachment resolution against Senator William Blount in 1797 was by voice vote and so no specific count was recorded.

to the qualitative differences among different allegations of perjury and the very basic differences between federal judges and the President.

First, the impeachment and removal of a Federal judge, while a very solemn task, implicates very different considerations than the impeachment of a President. Federal judges are appointed without public approval and enjoy life tenure without public accountability. Consequently, they hold their offices under our Constitution only "during good behavior." Under our system, impeachment is the only way to remove a Federal judge from office -- even a Federal judge sitting in jail.[69] By contrast, a President is elected by the Nation to a term, limited to a specified number of years, and he faces accountability in the form of elections.

Second, whether an allegedly perjurious statement rises to the level of an impeachable offense depends necessarily on the particulars of that statement, and the relation of those statements to the fulfillment of official responsibilities. In the impeachment of Judge

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[69] Former House Judiciary Committee Chairman Peter Rodino, during a recent judicial impeachment proceeding, cogently explained the unique position that Federal judges hold in our Constitutional system:

> The judges of our Federal courts occupy a unique position of trust and responsibility in our government: They are the only members of any branch that hold their office for life; they are purposely insulated from the immediate pressures and shifting currents of the body politic. But with the special prerogative of judicial independence comes the most exacting standard of public and private conduct. . . . The high standard of behavior for judges is inscribed in article III of the Constitution, which provides that judges "shall hold offices during good behavior. . . ."

132 Cong. Rec. H4712 (July 22, 1986) (impeachment of Judge Harry E. Claiborne) (emphasis added).

Harry Claiborne, the accused had been convicted of filing false income tax returns.[70] As a judge, Claiborne was charged with the responsibility of hearing tax-evasion cases. Once convicted, he simply could not perform his official functions because his personal probity had been impaired such that he could not longer be an arbiter of others' oaths. His wrongdoing bore a direct connection to the performance of his judicial tasks. The inquiry into President Nixon disclosed similar wrongdoing, but the House Judiciary Committee refused to approve an article of impeachment against the President on that basis. The case of Judge Walter Nixon is similar. He was convicted of making perjurious statements concerning his intervention in a judicial proceeding, which is to say, employing the power and prestige of his office to obtain advantage for a party.[71] Although the proceeding at issue was not in his court, his use of the judicial office for the private gain of a party to a judicial proceeding directly implicated his official functions. Finally, Judge Alcee Hastings was impeached and removed for making perjurious statements at his trial for conspiring to fix cases in his own court.[72] As with Judges Claiborne and Nixon, Judge Hastings' perjurious statements were immediately and incurably detrimental to the performance of his official duties. The allegations against the President, which (as the Managers acknowledge) "do not directly involve his official conduct," House Br. at 109, simply do not

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[70] Proceedings of the United States Senate in the Impeachment Trial of Harry E. Claiborne, 99th Cong., 2d Sess., S. Doc. 99-48 at 291-98 (1986) ("*Claiborne Proceedings*").

[71] Proceedings of the United States Senate in the Impeachment Trial of Walter L. Nixon, Jr., 101st Cong., 1st Sess., S. Doc. 101-22 at 430-440 (1989) ("*Judge Nixon Proceedings*").

[72] *See* Proceedings of the United States Senate in the Impeachment Trial of Alcee L. Hastings, 101st Cong., 1st Sess., S. Doc. 101-18 (1989).

involve wrongdoing of gravity sufficient to foreclose effective performance of the Presidential office.

Impeachment scholar John Labovitz, writing of the judicial impeachment cases predating Watergate, observed that:

> For both legal and practical reasons, th[e] [judicial impeachment] cases did not necessarily affect the grounds for impeachment of a president. The practical reason was that it seemed inappropriate to determine the fate of an elected chief executive on the basis of law developed in proceedings directed at petty misconduct by obscure judges. The legal reason was that the Constitution provides that judges serve during good behavior. . . . [T]he [good behavior] clause made a difference in judicial impeachments, confounding the application of these cases to presidential impeachment.[73]

Thus, the judicial precedents relied upon by the House Managers have only "limited force when applied to the impeachment of a President."[74]

The most telling rejoinder to the House's argument comes from President Ford. His definition of impeachable offenses, offered as a congressman in 1970 in connection with an effort to impeach Associate Justice William O. Douglas -- that it is, in essence, "whatever the majority of the House of Representatives considers it to be"-- has been cited. Almost never noted is the more important aspect of then-Congressman Ford's statement -- that, in contrast to the life-tenure of judges, because presidents can be removed by the electorate, "to remove them in midterm . . . would indeed require crimes of the magnitude of treason and bribery."[75]

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[73] Labovitz, *Presidential Impeachment* at 92-93 (emphasis added).

[74] Office of Senate Legal Counsel, *Memorandum on Impeachment Issues* at 26 (Oct. 7, 1988) (summarizing view of some commentators).

[75] 116 Cong. Rec. 11912, 11913 (1970).

B. The Standard of Proof

Beyond the question of what constitutes an impeachable offense, each Senator must confront the question of what standard the evidence must meet to justify a vote of "guilty." The Senate has, of course, addressed this issue before -- most recently in the trials of Judge Claiborne and Judge Hastings. We recognize that the Senate chose in the Claiborne proceedings, and reaffirmed in the Hastings trial, not to impose on itself any single standard of proof but, rather, to leave that judgment to the conscience of each senator. Many Senators here today were present for the debate on this issue and chose a standard by which to test the evidence. For many Senators, however, the issue is a new one. And none previously has had to face the issue in the special context of a Presidential impeachment.

We argued before the House Judiciary Committee that it must treat a vote to impeach as, in effect, a vote to remove the President from office and that a decision of such moment ought not to be based on anything less than "clear and convincing" evidence. That standard is higher than the "preponderance of the evidence" test applicable to the ordinary civil case but lower than the beyond a reasonable doubt test applicable to a criminal case. Nonetheless, we felt that the clear and convincing standard was consistent with the grave responsibility of triggering a process that might result in the removal of a president. In fact, it had been the standard agreed upon by both Watergate Committee majority and minority counsel (as well as counsel for President Nixon) twenty-four years ago.

Certainly no lesser standard should be applied in the Senate. Indeed, we submit that the gravity of the decision the Senate must reach should lead each Senator to go further and ask whether the House has established guilt beyond a reasonable doubt.

Both lawyers and laymen too often treat the standard of proof as meaningless legal jargon with no application to the real world of difficult decisions. But it is much more than that. In our system of justice, it is the guidepost that shows the way through the labyrinth of conflicting evidence. It tells the factfinder to look within and ask: "Would I make the most important decisions of my life based on the degree of certainty I have about these facts?" In the unique legal-political setting of an impeachment trial, it protects against partisan overreaching, and it assures the public that this grave decision has been made with care. In sum, it is a disciplining force to carry into the deliberations.

This point is given added weight by the language of the Constitution. Article I, section 3, clause 6 of the United States Constitution gives to the Senate "the Power to *try* all Impeachments. . . . and no Person shall be *convicted* without the Concurrence of two thirds of the Members present." (Emphasis added.) Use of the words "try" and "convicted" strongly suggests that an impeachment trial is akin to a criminal proceeding and that the beyond-a-reasonable-doubt standard of criminal proceedings should be used. This position was enunciated in the Minority Views contained in the Report of the House Judiciary Committee on the impeachment proceedings against President Nixon (H.Rep. 93-1305 at 377-381) and has been espoused as the correct standard by such Senators as Robert Taft, Jr., Sam Ervin, Strom Thurmond and John Stennis.[76]

Even if the clear and convincing standard nonetheless is appropriate for judicial impeachments, it does not follow that it should be applied where the Presidency itself is at stake. With judges, the Senate must balance its concern for the independence of the judiciary against

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[76] *Claiborne Proceedings* at 106-107.

the recognition that, because judges hold life-time tenure, impeachment is the only available means to protect the public against those who are corrupt. On the other hand, when a President is on trial, the balance to be struck is quite different. Here the Senate is asked, in effect, to overturn the results of an election held two years ago in which the American people selected the head of one of the three coordinate branches of government. It is asked to take this action in circumstances where there is no suggestion of corruption or misuse of office -- or any other conduct that places our system of government at risk in the two remaining years of the President's term, when once again the people will judge who they wish to lead them. In this setting, the evidence should be tested by the most stringent standard we know -- proof beyond a reasonable doubt. Only then can the American people be confident that this most serious of constitutional decisions has been given the careful consideration it deserves.

IV. THE PRESIDENT SHOULD BE ACQUITTED ON ARTICLE I

The evidence does not support the allegations of Article I.

A. Applicable Law

Article I alleges perjury, along with false and misleading statements, before a federal grand jury. Perjury is a statutory crime that is set forth in the United States Code at 18 U.S.C. § 1623.[77] Before an accused may be found guilty of perjury before a grand jury, a prosecutor must prove all elements of the offense.

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[77] Section 1623 provides in relevant part:

> (a) Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information . . . knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1623(a) (1994).

In the criminal law context, § 1623 requires proof beyond a reasonable doubt of the following elements: that an accused (1) while under oath (2) knowingly (3) made a false statement as to (4) material facts. The "materiality" element is fundamental: it means that testimony given to a grand jury may be found perjurious only if it had a tendency to influence, impede, or hamper the grand jury's investigation. *See, e.g.*, *United States v. Reilly*, 33 F.3d 1396, 1419 (3d Cir. 1994); *United States v. Barrett*, 111 F.3d 947, 953 (D.C. Cir. 1997). If an answer provided to a grand jury has no impact on the grand jury's investigation, or if it relates to a subject that the grand jury is not considering, it is incapable as a matter of law of being perjurious. Thus, alleged false testimony concerning details that a grand jury is not investigating cannot as a matter of law constitute perjury, since such testimony by definition is immaterial. *See, e.g.*, *United States v. Lasater*, 535 F.2d 1041, 1048 (8th Cir. 1976) (where defendant admitted signing letter and testified to its purpose, his denial of actually writing letter was not material to grand jury investigation and was incapable of supporting perjury charge); *United States v. Pyle*, 156 F.2d 852, 856 (D.C. Cir. 1946) (details such as whether defendant "paid the rent on her Washington apartment, as she testified that she did" were "not pertinent to the issue being tried;" therefore, "the false statement attributed to [defendant] was in no way material in the case in which she made it and did not constitute perjury within the meaning of the statute.") In other words, mere falsity -- even knowing falsity -- is not perjury if the statement at issue is not "material" to the matter under consideration.

An additional "element" of perjury prosecutions, at least as a matter of prosecutorial practice, is that a perjury conviction cannot rest solely on the testimony of one witness. In *United States v. Weiler*, 323 U.S. 606, 608-09 (1945), the Supreme Court observed

that the "special rule which bars conviction for perjury solely upon the evidence of a single witness is deeply rooted in past centuries." While § 1623 does not literally incorporate the so-called "two-witness" rule, the case law makes clear that perjury prosecutions under this statute require a high degree of proof, and that prosecutors should not, as a matter of reason and practicality, try to bring perjury prosecutions based solely on the testimony of a single witness. As the Supreme Court has cautioned, perjury cases should not rest merely upon "an oath against an oath." *Id.* at 609.

Indeed, that is exactly the point that experienced former federal prosecutors made to the House Judiciary Committee. A panel of former federal prosecutors, some Republican, testified that they would not charge perjury based upon the facts in this case. For example, Mr. Thomas Sullivan, a former United States Attorney for the Northern District of Illinois, told the Committee that "the evidence set out in the Starr report would not be prosecuted as a criminal case by a responsible federal prosecutor." *See* Transcript of "Prosecutorial Standards for Obstruction of Justice and Perjury" Hearing (Dec. 9, 1998); *see generally* Minority Report at 340-47. As Mr. Sullivan emphasized, "because perjury and obstruction charges often arise from private dealings with few observers, the courts have required either two witnesses who testified directly to the facts establishing the crime, or, if only one witness testifies to the facts constituting the alleged perjury, that there be substantial corroborating proof to establish guilt." *See* Transcript of "Prosecutorial Standards for Obstruction of Justice and Perjury" Hearing (Dec. 9, 1998). The other prosecutors on the panel agreed. Mr. Richard J. Davis, who served as an Assistant United States Attorney for the Southern District of New York and as a Task Force Leader for the Watergate Special Prosecution Force, testified that "it is virtually unheard of to

bring a perjury prosecution based solely on the conflicting testimony of two people." *Id.* A review of the perjury alleged here thus requires both careful scrutiny of the materiality of any alleged falsehood and vigilance against conviction merely on an "oath against an oath." *Weiler*, 323 U.S. at 609.

B. Structure of the Allegations

Article I charges that the President committed perjury when he testified before the grand jury on August 17, 1998. It alleges he "willfully provided perjurious, false and misleading testimony to the grand jury concerning "one or more of the following: (1) the nature and details of his relationship with a subordinate Government employee; (2) prior perjurious, false and misleading testimony he gave in a Federal civil rights action brought against him; (3) prior false and misleading statements he allowed his attorney to make to a Federal judge in that civil rights action; and (4) his corrupt efforts to influence the testimony of witnesses and to impede the discovery of evidence in that civil rights action." As noted above, the article does not provide guidance on the particular statements alleged to be perjurious, false and misleading. But by reference to the different views in the House Committee Report, the presentation of House Majority Counsel David Schippers, the OIC Referral, and the Trial Memorandum of the House Managers, we have attempted to identify certain statements from which members of the House might have chosen.

Subpart (1) alleges that the President committed perjury before the grand jury about the details of his relationship with Ms. Lewinsky -- including apparently such insignificant matters as mis-remembering the precise month on which certain inappropriate physical contact started, understating as "occasional" his infrequent inappropriate physical and telephone contacts

with Ms. Lewinsky over a period of many months, characterizing their relationship as starting as a friendship, and touching Ms. Lewinsky in certain ways and for certain purposes during their intimate encounters.

Subpart (2) of Article I alleges that the President made perjurious, false and misleading statements to the grand jury when he testified about certain responses he had given in the *Jones* civil deposition. The House Managers erroneously suggest that in the grand jury President Clinton was asked about and reaffirmed his entire deposition testimony, including his deposition testimony about whether he had been alone with Ms. Lewinsky. *See* House Br. at 2, 60. That is demonstrably false. Those statements that the President did in fact make in the grand jury, by way of explaining his deposition testimony, were truthful. Moreover, to the extent this subpart repeats allegations of Article II of the original proposed articles of impeachment, the full House of Representatives has explicitly considered and specifically rejected those charges, and their consideration would violate the impeachment procedures mandated by the Constitution.

Subparts (3) and (4) allege that the President lied in the grand jury when he testified about certain activities in late 1997 and early 1998. They are based on statements about conduct that the House Managers claim constitutes obstruction of justice under Article II and in many respects track Article II. *Compare* Article I (3) (perjury in the grand jury concerning alleged "prior false and misleading statements he allowed his attorney to make to a Federal judge") *with* Article II (5) (obstructing justice by "allow[ing] his attorney to make false and misleading statements to a Federal judge) and *compare* Article I (4) (perjury in the grand jury concerning alleged "corrupt efforts to influence testimony of witnesses and to impede the discovery of evidence") *with* Article II (3), (6), (7) (obstructing justice when he (3) "engaged in, encouraged,

or supported a scheme to conceal evidence," *i.e.*, gifts; (6) "corruptly influence[d] the testimony" of Betty Currie; (7) "made false and misleading statements to potential witnesses in a Federal grand jury proceeding in order to corruptly influence the testimony of those witnesses"). These perjury allegations are without merit both because the obstruction charges upon which they are based are wrong and because the statements that President Clinton made in the grand jury about these charges are true. Because of the close parallel, and for sake of brevity in this submission, we have dealt comprehensively with these overlapping allegations in the next section addressing Article II (obstruction of justice), and address them only briefly in this section.

C. Response to the Particular Allegations in Article I

The President testified truthfully before the grand jury. There must be no mistake about what the President said. He admitted to the grand jury that he had engaged in an inappropriate intimate relationship with Ms. Lewinsky over a period of many months. He admitted to the grand jury that he had been alone with Ms. Lewinsky. He admitted to the grand jury that he had misled his family, his friends and staff, and the entire Nation about the nature of that relationship. No one who heard the President's August 17 speech or watched the President's videotaped grand jury testimony had any doubt that he had admitted to an ongoing physical relationship with Ms. Lewinsky.

The article makes general allegations about this testimony but does not specify alleged false statements, so direct rebuttal is impossible. In light of this uncertainty, we set forth below responses to the allegations that have been made by the House Managers, the House Committee, and the OIC, even though they were not adopted in the article, in an effort to try to respond comprehensively to the charges.

1. The President denies that he made materially false or misleading statements to the grand jury about "the nature and details of his relationship" with Monica Lewinsky

a) Early in his grand jury testimony, the President specifically acknowledged that he had had a relationship with Ms. Lewinsky that involved "improper intimate contact." App. at 461. He described how the relationship began and how it ended early in 1997 -- long before any public attention or scrutiny.

In response to the first question about Ms. Lewinsky, the President read the following statement:

> When I was alone with Ms. Lewinsky on certain occasions in early 1996 and once in early 1997, I engaged in conduct that was wrong. These encounters did not consist of sexual intercourse. They did not constitute sexual relations as I understood that term to be defined at my January 17th, 1998 deposition. But they did involve inappropriate intimate contact.
>
> These inappropriate encounters ended, at my insistence, in early 1997. I also had occasional telephone conversations with Ms. Lewinsky that included inappropriate sexual banter.
>
> I regret that what began as a friendship came to include this conduct, and I take full responsibility for my actions.
>
> While I will provide the grand jury whatever other information I can, because of privacy considerations affecting my family, myself, and others, and in an effort to preserve the dignity of the office I hold, this is all I will say about the specifics of these particular matters.
>
> I will try to answer, to the best of my ability, other questions including questions about my relationship with Ms. Lewinsky; questions about my understanding of the term "sexual relations," as I understood it to be defined at my January 17th, 1998 deposition; and questions concerning alleged subornation of perjury, obstruction of justice, and intimidation of witnesses.

App. at 460-62. The President occasionally referred back to this statement -- but only when asked very specific questions about his physical relationship with Ms. Lewinsky -- and he

otherwise responded fully to four hours of interrogation about his relationship with Ms. Lewinsky, his answers in the civil deposition, and his conduct surrounding the *Jones* deposition.

The articles are silent on precisely what statements the President made about his relationship with Ms. Lewinsky that were allegedly perjurious. But between the House Brief and the Committee Report, both drafted by the Managers, it appears there are three aspects of this prepared statement that are alleged to be false and misleading because Ms. Lewinsky's recollection differs -- albeit with respect to certain very specific, utterly immaterial matters: first, when the President admitted that inappropriate conduct occurred "on certain occasions in early 1996 and once in 1997," he allegedly committed perjury because in the Managers' view, the first instance of inappropriate conduct apparently occurred a few months prior to "early 1996," *see* House Br. at 53; second, when the President admitted to inappropriate conduct "on certain occasions in early 1996 and once in 1997," he allegedly committed perjury because, according to the House Committee, there were eleven total sexual encounters and the term "on certain occasions" implied something other than eleven, *see* Committee Report at 34; and third, when the President admitted that he "had occasional telephone conversations with Ms. Lewinsky that included sexual banter," he allegedly committed perjury because, according to the House Committee (although not Ms. Lewinsky), seventeen conversations may have included sexually explicit conversation, *ibid.* Apart from the fact that the record itself refutes some of the allegations (for example, seven of the seventeen calls were only "possible," according even to

the OIC, App. at 116-26, and Ms. Lewinsky recalled fewer than seventeen, App. at 744), simply to state them is to reveal their utter immateriality.[78]

The President categorically denies that his prepared statement was perjurious, false and misleading in any respect. He offered his written statement to focus the questioning in a manner that would allow the OIC to obtain the information it needed without unduly dwelling on the salacious details of his relationship. It preceded almost four hours of follow-up questions about the relationship. It is utterly remarkable that the Managers now find fault even with the President's very painful public admission of inappropriate conduct.

In any event, the charges are totally without merit. The Committee Report takes issue with the terms "on certain occasions" and "occasional," but neither phrase implies a definite or maximum number. "On certain occasions" -- the phrase introducing discussion of the physical contacts -- has virtually no meaning other than "it sometimes happened." It is unfathomable what objective interpretation the Majority gives to this phrase to suggest that it could be false. An attack on the phrase "occasional" -- the phrase introducing discussion of the inappropriate telephone contacts -- is little different. Dictionaries define "occasional" to mean "occurring at irregular or infrequent intervals" or "now and then."[79] It is a measure of the Committee Report's extraordinary overreaching to suggest that the eleven occasions of intimate

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[78] Even the OIC Referral did not allege perjury based on these latter two theories and mentioned the first only briefly.

[79] *Webster's Collegiate Dictionary* (10th ed. 1997) p. 803; *see also Webster's II New Riverside Dictionary* (1988) p. 812 ("occurring from time to time; infrequent"); *Chambers English Dictionary* (1988 ed.) p. 992 ("occurring infrequently, irregularly, now and then"); *The American Heritage Dictionary* (2d Coll. ed.) ("occurring from time to time"); *Webster's New World Dictionary* (3d Coll. ed.) p. 937 ("of irregular occurrence; happening now and then; infrequent").

contact alleged by the House Majority over well more than a year did not occur, by any objective reading, "on certain occasions." And since even the OIC Referral acknowledges that the inappropriate telephone contact occurred not "at least 17 times" (as the Committee Report and the Managers suggest, Committee Report at 8; House Br. at 11) but between 10 and 15 times over a 23-month period,[80] "occasional" would surely seem not just a reasonable description but the correct one.

Finally, these squabbles are utterly immaterial. Even if the President and Ms. Lewinsky disagreed as to the precise number of such encounters, it is of no consequence whatsoever to anything, given his admission of their relationship. This is precisely the kind of disagreement that the law does not intend to capture as perjury.

The date of the first intimate encounter is also totally immaterial. Having acknowledged the relationship, the President had no conceivable motive to misstate the date on which it began. The Managers assert that the President committed perjury when he testified about when the relationship began, but they offer no rationale for why he would have done so.[81] The President had already made a painful admission. Any misstatement about when the intimate

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[80] The OIC chart of contacts between Ms. Lewinsky and the President identifies ten phone conversations "including phone sex" and seven phone conversations "possibly" including phone sex. App. at 116-26.

[81] The Committee Report did not adopt the baseless surmise of the OIC Referral, *i.e.*, that the President lied about the starting date of his relationship because Ms. Lewinsky was still an intern at the time, whereas she later became a paid employee. For good reason. The only support offered by the Referral for this conjecture is a comment Ms. Lewinsky attributes to the President in which he purportedly said that her pink "intern pass" "might be a problem." Referral at 149-50. But even Ms. Lewinsky indicated that the President was not referring to her intern status, but rather was noting that, as an intern with a pink "intern pass," she had only limited access to the West Wing of the White House. App. at 1567 (Lewinsky FBI 302 8/24/98).

relationship began (if there was a misstatement) cannot justify a charge of perjury, let alone the removal of the President from office. As Chairman Hyde himself stated in reference to this latter allegation, "It doesn't strike me as a terribly serious count." Remarks of Chairman Hyde at Perjury Hearing of December 1, 1998.

b) The Managers also assert that the President lied when, after admitting that he had an inappropriate sexual relationship with Ms. Lewinsky, he maintained that he did not touch Ms. Lewinsky in a manner that met the definition used in the *Jones* deposition. *See* House Br. at 54. The President admits that he engaged in inappropriate physical contact with Ms. Lewinsky, but has testified that he did not engage in activity that met the convoluted and truncated definition he was presented in the *Jones* deposition.[82]

Moreover, Ms. Lewinsky had in fact become an employee by late 1995, so even under the OIC theory the President could have acknowledged such intimate contact in 1995.

[82] At the deposition, the Jones attorneys presented a broad, three-part definition of the term "sexual relations" to be used by them in the questioning. Judge Wright ruled that two parts of the definition were "too broad" and eliminated them. Dep. at 22. The President, therefore, was presented with the following definition (as he understood it to have been amended by the Court):

> Definition of Sexual Relations
>
> For the purposes of this deposition, a person engages in "sexual relations" when the person knowingly engages in or causes -
>
> (1) contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to arouse or gratify the sexual desire of any person;
>
> ~~(2) contact between any part of the person's body or an object and the genitals and anus of another person; or~~
>
> ~~(3) contact between the genitals or anus of the person and any part of another person's body.~~
>
> ~~"Contact" means intentional touching, either directly or through clothing.~~

It is important to note that this *Jones* definition was not of the President's making. It was one provided to him by the Jones' lawyers for their questioning of him. Under that definition, oral sex performed by Ms. Lewinsky on the President would not constitute sexual relations, while touching certain areas of Ms. Lewinsky's body with the intent to arouse her would meet the definition. The President testified in the grand jury that believed that oral sex performed on him fell outside the *Jones* definition. App. at 544.[83] As strange as this may sound, a totally reasonable reading of the definition supports that conclusion, as many commentators have agreed.[84]

This claim comes down to an oath against an oath about immaterial details concerning an acknowledged wrongful relationship.

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[83] The Managers erroneously suggest that the President's explanation of his understanding of the *Jones* deposition definition of "sexual relations" is a recent fabrication rather than an accurate account of his view at the time of the deposition. House Br. at 54-55. To support this contention, the Managers, among other meritless arguments, point to a document produced by the White House entitled "January 24, 1998 Talking Points," stating that oral sex would constitute a sexual relationship for the President. *Id.* at 55. This document, however, was not created, reviewed or approved by the President and did not represent his views. It is irrelevant to the issue at hand for the additional reason that it does not speak by its own terms to the meaning of the contorted definition of "sexual relations" used in the *Jones* deposition.

[84] *See, e.g.*, Perjury Hearing of December 1, 1998 (Statement of Professor Stephen A. Saltzburg at 2) ("That definition defined certain forms of sexual contact as sexual relations but, for reasons known only to the Jones lawyers, limited the definition to contact with any person for the purpose of gratification."); MSNBC Internight, August 12, 1998 (Cynthia Alksne) ("[W]hen the definition finally was put before the president, it did not include the receipt of oral sex"); "DeLay Urges a Wait For Starr's Report," *The Washington Times* (August 31, 1998) ("The definition of sexual relations, used by lawyers for Paula Jones when they questioned the president, was loosely worded and may not have included oral sex"); "Legally Accurate," *The National Law Journal* (August 31, 1998) ("Given the narrowness of the court-approved definition in [the *Jones*] case, Mr. Clinton indeed may not have perjured himself back then if, say, he received oral sex but did not reciprocate sexually").

2. The President denies that he made perjurious, false and misleading statements to the grand jury about testimony he gave in the *Jones* case

First, it is important to understand that the allegation of Article I that the President "willfully provided false and misleading testimony to the grand jury concerning … prior perjurious, false and misleading testimony he gave in" the *Jones* deposition is premised on a misunderstanding of the President's grand jury testimony. The President was not asked to, and he did not, reaffirm his entire *Jones* deposition testimony during his grand jury appearance. For example, contrary to popular myth and the undocumented assertion of the House Managers, House Br. at 2, the President was never even asked in the grand jury about his answer to the deposition question whether he and Ms. Lewinsky had been "together alone in the Oval Office," Dep. at 52-53,[85] and he therefore neither reaffirmed it nor even addressed it. In fact, in the grand jury he was asked only about a small handful of his answers in the deposition. As is demonstrated below, his explanations of these answers were not reaffirmations or in any respect evasive or misleading -- they were completely truthful, and they do not support a perjury allegation.

The extent to which this allegation of the House Majority misses the mark is dramatically apparent when it is compared with the OIC's Referral. The OIC did not charge that the President's statements about his prior deposition testimony were perjurious (apart from the charge discussed above concerning the nature and details of his relationship with Ms. Lewinsky).

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[85] The only questions the OIC asked the President about being alone with Ms. Lewinsky did not reference the deposition at all. Instead, the OIC asked the President to elaborate on his acknowledgement in his prepared statement before the grand jury that he had been alone with Ms. Lewinsky, App. at 481, and to explain why he made a statement, "I was never alone with her" to Ms. Currie on January 18th. *See, e.g.,* App. at 583.

See OIC Ref. at 145.[86] It would be remarkable to contemplate charges beyond those brought by the OIC, particularly in the context of a perjury claim where the OIC chose what to ask the President and itself conducted the grand jury session.

The House Managers point to a single statement made by President Clinton in the grand jury to justify their contention that every statement from his civil deposition is now fair game. House Br. at 60. Specifically, the House Managers rely on President Clinton's explanation in the grand jury of his state of mind during the *Jones* deposition: "My goal in this deposition was to be truthful, but not particularly helpful … I was determined to walk through the mine field of this deposition without violating the law, and I believe I did." App. at 532. In addition to being a true statement of his belief as to his legal position, this single remark plainly was not intended as and was not a broad reaffirmation of the accuracy of all the statements the President made during the *Jones* deposition. Indeed, given that he told the grand jury that he had an intimate relationship with Ms. Lewinsky during which he was alone with her, no one who heard the grand jury testimony could have understood it to be the unequivocal reaffirmation that is alleged.

The Managers charge that the President did not really mean it when he told the grand jury how he was trying to be literally truthful in the *Jones* deposition without providing information about his relationship with Ms. Lewinsky. The President had endeavored to navigate the deposition without having to make embarrassing admissions about his inappropriate,

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[86] Specifically, the Referral alleges that the President lied when he testified (1) that "he believed that oral sex was not covered by any of the terms and definitions for sexual activity used at the *Jones* deposition;" (2) that their physical contact was more limited than Ms. Lewinsky's testimony suggests; and (3) that their intimate relationship began in early 1996 and not late 1995. *Id.* at 148-49.

albeit consensual, relationship with Ms. Lewinsky. And to do this, the President walked as close to the line between (a) truthful but evasive or non-responsive testimony and (b) false testimony as he could without crossing it. He sought, as he explained to the grand jury, to give answers that were literally accurate, even if, as a result, they were evasive and thus misleading. We repeat: what is at issue here is not the underlying statements made by the President in the deposition, but the President's explanations in the grand jury of his effort to walk a fine line. Anyone who reads or watches that deposition knows the President was in fact trying to do precisely what he has admitted -- to give the lawyers grudging, unresponsive or even misleading answers without actually lying. However successful or unsuccessful he might have been, there is no evidence that controverts the fact that this was indeed the President's intention.

An examination of the statements that the President actually did make in the grand jury about his deposition testimony further demonstrates the lack of merit in this article. In the grand jury, the President only was asked about three areas of his deposition testimony that were covered in the failed impeachment article alleging perjury in the civil deposition.[87] The first topic was the nature of any intimate contact with Ms. Lewinsky and has already been addressed above.

The second topic was the President's testimony about his knowledge of gifts he exchanged with Ms. Lewinsky. In his grand jury testimony, the President had the following exchange with the OIC:

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[87] The proposed article of impeachment alleging perjury in the civil deposition, like the two that are before the Senate, did not identify any specific instances of false testimony, but we have made our comparison with the Committee Report's elaboration of the deposition perjury article as it undoubtedly represents the largest universe of alleged perjurious statements.

> Q: When you testified in the Paula Jones case, this was only two and a half weeks after you had given her these six gifts, you were asked, at page 75 in your deposition, lines 2 through 5, "Well, have you ever given any gifts to Monica Lewinsky?" And you answer, "I don't recall."
>
> And you were correct. You pointed out that you actually asked them, for prompting, "Do you know what they were?"
>
> A: I think what I meant there was I don't recall what they were, not that I don't recall whether I had given them. And then if you see, they did give me these specifics, and I gave them quite a good explanation here. I remembered very clearly what the facts were about The Black Dog. …

App. at 502-03. The President's explanation that he could not recall the exact gifts that he had given Ms. Lewinsky and that he affirmatively sought prompting from the *Jones* lawyers is entirely consistent with his deposition testimony. This record plainly does not support a charge of perjury.

The third and last topic was the President's deposition testimony that Ms. Lewinsky's affidavit statement denying have a sexual relationship with the President was correct:

> Q: And you indicated that it [Ms. Lewinsky's affidavit statement that she had no sexual relationship with him] was absolutely correct.
>
> A: I did. … I believe at the time that she filled out this affidavit, if she believed that the definition of sexual relationship was two people having intercourse, then this is accurate. And I believe that this is the definition that most ordinary Americans would give it. …

App. at 473. The President's grand jury testimony was truthful. As Ms. Lewinsky and Ms. Tripp discussed long before any of this matter was public, this was in fact Ms. Lewinsky's definition of "sex" and apparently the President's as well. *See* Supp. at 2664 (10/3/97 Tape); *see also* App. at 1558 (Lewinsky FBI 302 8/19/98). There is no evidence whatever that the President did not believe this definition of sexual relations, and his belief finds support in dictionary

definitions, the courts and commentators.[88] Moreover, the record establishes that Ms. Lewinsky shared this view.[89] Since the President's grand jury testimony about his understanding is corroborated both by dictionaries and by his prior statements to Ms. Lewinsky, it simply cannot be labeled "wrong" or, more seriously, "perjurious."

The President did not testify falsely and perjuriously in the grand jury about his civil deposition testimony.

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[88] As one court has stated, "[i]n common parlance the terms 'sexual intercourse' and 'sexual relations' are often used interchangeably." *J.Y. v. D.A*, 381 N.E.2d 1270, 1273 (Ind. App. 1978). Dictionary definitions make the same point:

- Webster's Third New International Dictionary (1st ed. 1981) at 2082, defines "sexual relations" as "coitus;"
- Random House Webster's College Dictionary (1st ed. 1996) at 1229, defines "sexual relations" as "sexual intercourse; coitus;"
- Merriam-Webster's Collegiate Dictionary (10th ed. 1997) at 1074, defines "sexual relations" as "coitus;"
- Black's Law Dictionary (Abridged 6th ed. 1991) at 560, defines "intercourse" as "sexual relations;" and
- Random House Compact Unabridged Dictionary (2d ed. 1996) at 1755, defines "sexual relations" as "sexual intercourse; coitus."

[89] Ms. Lewinsky took the position early on that her contact with the President did not constitute "sex" and reaffirmed that position even after she had received immunity and began cooperating with the OIC. For example, in one of the conversations surreptitiously taped by Ms. Tripp, Ms. Lewinsky explained to Ms. Tripp that she "didn't have sex" with the President because "[h]aving sex is having intercourse." Supp. at 2664; *see also* Supp. at 1066 (grand jury testimony of Ms. Neysa Erbland stating that Ms. Lewinsky had said that the President and she "didn't have sex"). Ms. Lewinsky reaffirmed this position even after receiving immunity, stating in an FBI interview that "her use of the term 'having sex' means having intercourse. . . ." App. at 1558 (Lewinsky FBI 302 8/19/98). Likewise, in her original proffer to the OIC, she wrote, "Ms. L[ewinsky] was comfortable signing the affidavit with regard to the 'sexual relationship' because she could justify to herself that she and the Pres[ident] did not have sexual intercourse." App. at 718 (2/1/98 Proffer).

3. The President denies that he made perjurious, false and misleading statements to the grand jury about the statements of his attorney to Judge Wright during the *Jones* deposition.

It is remarkable that Article I contains allegations such as this one that even the OIC, which conducted the President's grand jury appearance, chose not to include in the Referral (presumably because there was no "substantial and credible information" to support the claim). Subpart (3) appears to allege that the President lied in his grand jury testimony when he characterized his state of mind in his civil deposition as his lawyer described the Lewinsky affidavit as meaning "there is no sex of any kind in any manner, shape or form." Dep. at 53-54. Specifically, the House Managers appear to base their perjury claim on President Clinton's grand jury statement that "I'm not even sure I paid attention to what he [Mr. Bennett] was saying." House Br. at 62.

The House Brief takes issue with President Clinton's statement that he was "not paying a great deal of attention to this exchange" because, it alleges, the "videotape [of the deposition] shows the President looking directly at Mr. Bennett, paying close attention to his argument to Judge Wright." *Ibid.* While it is true that the videotape shows the President staring in what is presumably Mr. Bennett's direction, there is no evidence whatsoever that he was indeed "paying close attention" to the lengthy exchange. Notably absent from the videotape is any action on the part of the President that could be read as affirming Mr. Bennett's statement, such as a nod of the head, or any other activity that could be used to distinguish between a fixed stare and true attention to the complicated sparring of counsel. The President was a witness in a difficult and complex deposition and, as he testified, he was "focussing on [his] answers to the

questions." App. at 477. It is a safe bet that the common law has never seen a perjury charge based on so little.[90]

4. The President denies that he made perjurious, false and misleading statements to the grand jury when he denied attempting "to influence the testimony of witnesses and to impede the discovery of evidence" in the *Jones* case

The general language of the final proviso of Article I, according to the House Managers, is meant to signify a wide range of allegations, *see* House Br. at 60-69, although none were thought sufficiently credible to be included in the OIC Referral. These allegations were not even included in the summary of the Starr evidence presented to the Committee on October 5, 1998, by House Majority Counsel Schippers. They are nothing more than an effort to inflate the perjury allegations by converting every statement that the President made about the subject matter of Article II into a new count for perjury. As the discussion of Article II establishes, the President did not attempt to obstruct justice. Thus, his explanations of his statements in the grand jury were truthful.

The House Brief asserts that the President committed perjury with respect to three areas of his grand jury testimony about the obstruction allegations. These claims are addressed thoroughly in the next section along with the corresponding Article II obstruction claims, and they are addressed in a short form here. The first claim is that the President committed perjury "when he testified before the grand jury that he recalled telling Ms. Lewinsky that if Ms. Jones' lawyers requested the gifts exchanged between Ms. Lewinsky and the President, she should provide them." House Br. at 63. The House

[90] This allegation is nearly identical to the allegation of Article II (5), and, for the sake of brevity, it is addressed at greater length in the response to Article II, below.

Managers contest the truthfulness of this statement by asserting that the President was responsible for Ms. Lewinsky's transfer of gifts to Ms. Currie in late December. In other words, if the obstruction claim is true, they allege, this statement is not true. As is laid out in greater detail in the next section, the House Manager's view of this matter ignores a wealth of evidence establishing that the idea to conceal some of the gifts she had received originated with, and was executed by, Ms. Lewinsky. *See, e.g.*, Supp. at 557 (Currie GJ 1/27/98); Supp. at 531 (Currie FBI 302 1/24/98); Supp. at 582 (Currie GJ 5/6/98); App. at 1122 (Lewinsky GJ 8/20/98); *see also* App. at 1481 ("LEWINSKY . . . suggested to the President that Betty Currie hold the gifts.") (Lewinsky FBI 302 8/1/98).

Second, the House Managers contend that the President provided perjurious testimony when he explained to the grand jury that he was trying to "refresh" his recollection when he spoke with Betty Currie on January 18, 1998 about his relationship with Ms. Lewinsky. House Br. at 65. The House Managers completely ignore the numerous statements that Ms. Currie makes in her testimony that support the President's assertion that he was merely trying to gather information. For example, Ms. Currie stated in her first interview with the OIC that "Clinton then mentioned some of the questions he was asked at his deposition. Currie advised the way Clinton phrased the queries, they were both statements and questions at the same time." Supp. at 534 (Currie FBI 302 1/24/98). Ms. Currie's final grand jury testimony on this issue also supports the President' explanation of his questioning:

> 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 that 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.

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.

Supp. at 668 (Currie GJ 7/22/98) (emphasis added).

Ms. Currie's testimony supports the President's assertion that he was looking for information as a result of his deposition. There is no basis to doubt the President's explanation that his expectation of a media onslaught prompted the conversation. *See* App. at 583. Indeed, neither the testimony of Ms. Currie nor that of the President -- the only two participants in this conversation -- conceivably supports the inference that he had any other intent. The House Managers' contention that the President's explanation to the grand jury was perjurious totally disregards the testimony of the only two witnesses with first-hand knowledge and has no basis in fact or in the evidence.

Finally, the House Managers contend that President Clinton "lied about his attempts to influence the testimony of some of his top aides." House Br. at 68. The basis for this charge appears to be the President's testimony that, although he said misleading things to his

aides about his relationship with Ms. Lewinsky, he tried to say things that were true. *Id.* at 69. Once again, the record does not even approach a case for perjury. The President acknowledged that he misled; he tried, however, not to lie. It is a mystery how the Managers could try to disprove this simple statement of intent.

V. THE PRESIDENT SHOULD BE ACQUITTED ON ARTICLE II

The evidence does not support the allegations of Article II.

A. Applicable Law

Article II alleges obstruction of justice, a statutory crime that is set forth in 18 U.S.C. § 1503, the "Omnibus Obstruction Provision." In the criminal law context, § 1503 requires proof of the following elements: (1) that there existed a pending judicial proceeding; (2) that the accused knew of the proceeding; and (3) that the defendant acted "corruptly" with the specific intent to obstruct or interfere with the proceeding or due administration of justice. *See, e.g., United States v. Bucey*, 876 F.2d 1297, 1314 (7th Cir. 1989). False statements alone cannot sustain a conviction under § 1503. *See United States v. Thomas*, 916 F.2d 647, 652 (11th Cir. 1990).[91]

[91] 18 U.S.C. § 1512 covers witness tampering. It is clear that the allegations in Article II could not satisfy the elements of § 1512. That provision requires proof that a defendant knowingly engaged in intimidation, physical force, threats, misleading conduct, or corrupt persuasion with intent to influence, delay, or prevent testimony or cause any person to withhold objects or documents from an official proceeding. It is clear from the case law that "misleading conduct" as contemplated by § 1512 does not cover scenarios where an accused urged a witness to give false testimony without resorting to coercive or deceptive conduct. *See, e.g., United States v. Kulczyk*, 931 F.2d 542, 547 (9th Cir. 1991) (reversing conviction under § 1512 because "there is simply no support for the argument that [defendant] did anything other than ask the witnesses to lie"); *United States v. King*, 762 F.2d 232, 237 (2d Cir. 1985) ("Since the only allegation in the indictment as to the means by which [defendant] induced [a witness] to withhold testimony was that [the defendant] misled [the witness], and since the evidence failed totally to support any inference that [the witness] was, or even could have been, misled, the

B. Structure of the Allegations

Article II exhibited by the House of Representatives alleges that the President "has prevented, obstructed, and impeded the administration of justice, and has to that end engaged 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" in the *Jones* case. The Article alleges that the President did so by engaging in "one or more of the following acts": the President (1) corruptly encouraged Ms. Lewinsky "to execute a sworn affidavit … that he knew to be perjurious, false and misleading"; (2) "corruptly encouraged Ms. Lewinsky to give perjurious, false, and misleading testimony if and when called to testify personally" in the *Jones* case; (3) "corruptly engaged in, encouraged, or supported a scheme to conceal evidence that had been subpoenaed" in the *Jones* case, namely gifts given by him to Ms. Lewinsky; (4) "intensified and succeeded in an effort to secure job assistance" for Ms. Lewinsky between December 7, 1997 and January 14, 1998, "in order to corruptly prevent [her] truthful testimony" in the *Jones* case; (5) "corruptly allowed his attorney to make false and misleading statements" to Judge Susan Webber Wright at the *Jones* deposition; (6) "related a false and misleading account of events" involving Ms. Lewinsky to Betty Currie, a "potential witness" in the *Jones* case, "in order to corruptly influence" her testimony; and (7) made false and misleading statements to certain members of his staff who were "potential" grand jury witnesses, in order to corruptly influence their testimony.

As noted above, this article essentially duplicates some of the perjury allegations of Article I (4): Article II alleges particular acts of obstruction while Article I (4) alleges that the

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conduct proven by the government was not within the terms of § 1512."). Deceit is thus the

President lied in the grand jury when he discussed those allegations.[92] Both sets of allegations are unsupported. Our discussion here of the details of these charges will, as well, serve in part as our response to the allegations in Article I (4).

C. Response to the Particular Allegations in Article II

1. The President denies that on or about December 17, 1997, he "corruptly encouraged" Monica Lewinsky "to execute a sworn affidavit in that proceeding that he knew to be perjurious, false and misleading"

Article II (1) alleges that the President "corruptly encouraged" Monica Lewinsky "to execute a sworn affidavit in that proceeding that he knew to be perjurious, false and misleading." The House Managers allege that during a December 17 phone conversation, Ms. Lewinsky asked the President what she could do if she were subpoenaed in the *Jones* case and that the President responded, "Well, maybe you can sign an affidavit." House Br. at 22. This admitted statement by the President of totally lawful conduct is the Managers' entire factual basis for the allegation in Article II (1).

The Managers do not allege that the President ever suggested to Ms. Lewinsky she should file a false affidavit or otherwise told her what to say in the affidavit. Indeed they could not, because Ms. Lewinsky has repeatedly and forcefully denied any such suggestions:

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gravamen of an obstruction of justice charge that is predicated on witness tampering.

[92] *Compare* Article I (4) (perjury in the grand jury concerning alleged "corrupt efforts to influence testimony of witnesses and to impede the discovery of evidence") with Article II (1)-(3), (6) (obstructing justice when he (1) "encouraged a witness . . . to execute a [false] sworn affidavit"; (2) "encouraged a witness . . . to give perjurious, false and misleading testimony"; (3) "engaged in, encouraged, or supported a scheme to conceal evidence"; (6) "corruptly influence[d] the testimony" of Betty Currie). *Compare also* Article I (3) (perjury in the grand jury concerning alleged "prior false and misleading statements he allowed his attorney to make to a Federal judge") with Article II (5) (obstructing justice by "allow[ing] his attorney to make false and misleading statements to a Federal judge).

- "Neither the Pres[ident] nor Mr. Jordan (or anyone on their behalf) asked or encouraged Ms. L[ewinsky] to lie." App. at 718 (2/1/98 Proffer).

- "[N]o one ever asked me to lie and I was never promised a job for my silence." App. at 1161 (Lewinsky GJ 8/20/98).

- "Neither the President nor Jordan ever told Lewinsky that she had to lie." App. at 1398 (Lewinsky FBI 302 7/27/98).

- "Neither the President nor anyone ever directed Lewinsky to say anything or to lie. . . ." App. at 1400 (Lewinsky FBI 302 7/27/98).

- "I think I told [Linda Tripp] that -- you know at various times the President and Mr. Jordan had told me I have to lie. That wasn't true." App. at 942 (Lewinsky GJ 8/6/98).

In an attempt to compensate for the total lack of evidence supporting their theory,[93] the Managers offer their view that "both parties knew the affidavit would have to be false and misleading in order to accomplish the desired result." House Br. at 22; *see also* Committee Report at 65 (the President "knew [the affidavit] would have to be false for Ms. Lewinsky to avoid testifying"). But there is no evidence to support such bald conjecture, and in fact the opposite is true. Both Ms. Lewinsky and the President testified that, given the particular claims in the *Jones* case, they thought a truthful, limited affidavit might establish that Ms. Lewinsky had nothing relevant to offer. The President explained to the grand jury why he

[93] The myth that the President told Ms. Lewinsky to lie in her affidavit springs not from the evidence but from the surreptitiously recorded Tripp tapes. But as Ms. Lewinsky explained to the grand jury, many of the statements she made to Ms. Tripp -- including on this subject -- were not true: "I think I told [Linda Tripp] that -- you know at various times the President and Mr. Jordan had told me I have to lie. That wasn't true." App. at 942 (Lewinsky GJ 8/6/98).

believed that Ms. Lewinsky could execute a truthful but limited affidavit that would have established that she was not relevant to the *Jones* case:[94]

- "But I'm just telling you that it's certainly true what she says here, that we didn't have -- there was no employment, no benefit in exchange, there was nothing having to do with sexual harassment. And if she defined sexual relationship in the way I think most Americans do, meaning intercourse, then she told the truth." App. at 474.

- "You know, I believed then, I believe now, that Monica Lewinsky could have sworn out an honest affidavit, that under reasonable circumstances, and without the benefit of what Linda Tripp did to her, would have given her a chance not to be a witness in this case." App. at 521.

- "I believed then, I believe today, that she could execute an affidavit which, under reasonable circumstances with fair-minded, nonpolitically-oriented people, would result in her being relieved of the burden to be put through the kind of testimony that, thanks to Linda Tripp's work with you and with the Jones lawyers, she would have been put through. I don't think that's dishonest. I don't think that's illegal." App. at 529.

- "But I also will tell you that I felt quite comfortable that she could have executed a truthful affidavit, which would not have disclosed the embarrassing details of the relationship that we had had, which had been over for many, many months by the time this incident occurred." App. at 568-69.

- "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 of testifying on an affidavit? Absolutely. Did I want her to execute a false affidavit? No, I did not." App. at 571.

The *Jones* case involved allegations of a nonconsensual sexual solicitation. Ms. Lewinsky's relationship with the President was consensual, and she knew nothing about the factual allegations of the *Jones* case.

Ms. Lewinsky similarly recognized that an affidavit need not be false in order to

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[94] Indeed, the Committee Report alleges without support that the President lied to the grand jury when he indicated his *belief* that Ms. Lewinsky could indeed have filed a truthful but limited affidavit that might have gotten her out of testifying in the *Jones* case. Article I (4). This claim fails for the reasons discussed in the text.

accomplish the purpose of avoiding a deposition:

- LEWINSKY told TRIPP that the purpose of the affidavit was to avoid being deposed. LEWINSKY advised that one does this by giving a portion of the whole story, so the attorneys do not think you have anything of relevance to their case. App. at 1420 (Lewinsky FBI 302 7/29/98) (emphasis added).

- LEWINSKY advised the goal of an affidavit is to be as benign as possible, so as to avoid being deposed. App. at 1421 (Lewinsky FBI 302 7/29/98) (emphasis added).

- 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 a relationship. App. at 842 (Lewinsky GJ 8/6/98) (emphasis added).

The Committee Report argued that Ms. Lewinsky must have known that the President wanted her to lie because he never told her to fully detail their relationship in her affidavit and because an affidavit fully detailing the "true nature" of their relationship would have been damaging to him in the *Jones* case. Committee Report at 65. The Managers wisely appear to have abandoned this argument.[95] Ms. Lewinsky plainly was under no obligation to volunteer to the Jones lawyers every last detail about her relationship with the President -- and the failure of the President to instruct her to do so is neither wrong nor an obstruction of justice. A limited, truthful affidavit might have established that Ms. Lewinsky was not relevant to the

[95] The Committee Report argued that Ms. Lewinsky "contextually understood that the President wanted her to lie" because he never told her to file an affidavit fully detailing the "true nature" of their relationship. Committee Report at 65. The only support cited for this "contextual understanding" obstruction theory advanced by the Committee Report was a reference back to the OIC Referral. The OIC Referral, in turn, advanced the same theory, citing only the testimony of Ms. Lewinsky that, while the President never encouraged her to lie, he remained silent about what she should do or say, and by such silence, "I knew what that meant." App. at 954 (Lewinsky GJ 8/6/98) (cited in Referral at 174). It is extraordinary that the President of the United States could face removal from office not because he told Ms. Lewinsky to lie, or said anything of the sort, but instead because he stayed silent -- and Ms. Lewinsky thought she "knew what that meant."

Jones case. The suggestion that perhaps Ms. Lewinsky could submit an affidavit in lieu of a deposition, as the President knew other potential deponents in the *Jones* case had attempted to do, in order to avoid the expense, burden, and humiliation of testifying in the *Jones* case was entirely proper. The notion that the President of the United States could face removal from office not because he told Monica Lewinsky to lie, or encouraged her to do so, but because he did not affirmatively instruct her to disclose every detail of their relationship to the *Jones* lawyers is simply not supportable.

Moreover, there is significant evidence in the record that, at the time she executed the affidavit, Ms. Lewinsky honestly believed that her denial of a sexual relationship was accurate given what she believed to be the definition of a "sexual relationship":

- "I never even came close to sleeping with [the President] . . . We didn't have sex . . . Having sex is having intercourse. That's how most people would --" Supp. at 2664 (Lewinsky-Tripp tape 10/3/97).[96]

- "Ms. L[ewinsky] was comfortable signing the affidavit with regard to the sexual relationship because she could justify to herself that she and the Pres[ident] did not have sexual intercourse." App. at 718 (2/1/98 Proffer).

- "Lewinsky said that her use of the term 'having sex' means having intercourse. . . ." App. at 1558 (Lewinsky FBI 302 8/19/98).

The allegation contained in Article II (1) is totally unsupported by evidence. It is the product of a baseless hypothesis, and it should be rejected.

2. The President denies that on or about December 17, 1997, he "corruptly encouraged" Monica Lewinsky "to give perjurious, false

[96] A friend of Ms. Lewinsky's also testified that, based on her close relationship with her, she believed that Ms. Lewinsky did not lie in her affidavit based on her understanding that when Ms. Lewinsky referred to "sex" she meant intercourse. Supp. at 4597 (6/23/98 grand jury testimony of Ms. Dale Young). *See also* Supp. at 1066 (grand jury testimony of Ms. Neysa Erbland stating that Ms. Lewinsky had said that the President and she "didn't have sex").

and misleading testimony if and when called to testify personally" in the Jones litigation

Article II (2) alleges that the President encouraged Ms. Lewinsky to give false testimony if and when she was called to testify personally in the *Jones* litigation. Again, Ms. Lewinsky repeatedly denied that anyone told her or encouraged her to lie:

- "Neither the Pres[ident] nor Mr. Jordan (or anyone on their behalf) asked or encouraged Ms. L[ewinsky] to lie." App. at 718 (2/1/98 Proffer).
- "[N]o one ever asked me to lie and I was never promised a job for my silence." App. at 1161 (Lewinsky GJ 8/20/98).
- "Neither the President nor Jordan ever told Lewinsky that she had to lie." App. at 1398 (Lewinsky FBI 302 7/27/98).
- "Neither the President nor anyone ever directed Lewinsky to say anything or to lie. . . ." App. at 1400 (Lewinsky FBI 302 7/27/98).
- "I think I told [Linda Tripp] that -- you know at various times the President and Mr. Jordan had told me I have to lie. That wasn't true." App. at 942 (Lewinsky GJ 8/6/98) (emphasis added).

The Managers allege that the President called Ms. Lewinsky on December 17 to inform her that she had been listed as a potential witness in the *Jones* case, and that during this conversation, he "sort of said, 'You know, you can always say you were coming to see Betty or that you were bringing me letters.'" House Br. at 22; App. at 843 (Lewinsky GJ 8/6/98). Other than the fact that Ms. Lewinsky recalls this statement being made in the same conversation in which she learned that her name was on the *Jones* witness list, the Managers cite no evidence whatsoever that supports their claim that the President encouraged her to make such statements "if and when called to testify personally in the *Jones* case." They claim simply that Ms. Lewinsky had discussed such explanations for her visits with the President in the past.

Unremarkably, the President and Ms. Lewinsky had been concerned about concealing their improper relationship from others while it was ongoing.

Ms. Lewinsky's own testimony and proffered statements undercut their case:

- When asked what should be said if anyone questioned Ms. Lewinsky about her being with the President, he said she should say she was bringing him letters (when she worked in Legislative Affairs) or visiting Betty Currie (after she left the WH). There is truth to both of these statements…. [This] occurred prior to the subpoena in the Paula Jones case. App. at 709 and 718 (2/1/98 Proffer) (emphasis added).

- After Ms. Lewinsky was informed, by the Pres[ident], that she was identified as a possible witness in the Jones case, the Pres[ident] and Ms. L[ewinsky] discussed what she should do. The President told her he was not sure she would be subpoenaed, but in the event that she was, she should contact Ms. Currie. When asked what to do if she was subpoenaed, the Pres[ident] suggested she could sign an affidavit to try to satisfy their inquiry and not be deposed. In general, Ms. L[ewinsky] should say she visited the WH to see Ms. Currie and, on occasion when working at the WH, she brought him letters when no one else was around. Neither of those statements untrue. App. at 712 (2/1/98 Proffer) (emphasis added).

- To the best of Ms. L[ewinsky]'s memory, she does not believe they discussed the content of any deposition that Ms. L[ewinsky] might be involved in at a later date. App. at 712 (2/1/98 Proffer) (emphasis added).

- LEWINSKY advised, though they did not discuss the issue in specific relation to the JONES matter, she and CLINTON had discussed what to say when asked about LEWINSKY's visits to the White House. App. at 1466 (Lewinsky FBI 302 7/31/98) (emphasis added).

Ms. Lewinsky's statements indicate that she asked the President what to say if "anyone" asked about her visits, that the President said "in general" she could give such an explanation, and that they "did not discuss the issue in specific relation to the *Jones* matter."

This is consistent with the President's testimony that he and Ms. Lewinsky "might have talked about what to do in a non-legal context at some point in the past," although he had no specific memory of that conversation. App. at 569. The President also stated in his grand

jury testimony that he did not recall saying anything like that in connection with Ms. Lewinsky's testimony in the *Jones* case:

> Q. And in that conversation, or in any conversation in which you informed her she was on the witness list, did you tell her, you know, you can always say that you were coming to see Betty or bringing me letters? Did you tell her anything like that?
> A. I don't remember. She was coming to see Betty. I can tell you this. I absolutely never asked her to lie.

App. at 568. Ms. Lewinsky does not testify that this discussion was had in reference to testimony she may or may not have been called to give personally, and the Managers' implication is directly contradicted by Ms. Lewinsky's statement that she and the President did not discuss her deposition testimony in that conversation. *See* App. at 712 (2/1/98 Proffer) ("To the best of Ms. L[ewinsky's] memory, she does not believe they discussed [in the December 17 conversation] the content of any deposition that Ms. L[ewinsky] might be involved in at a later date.").

In support of this allegation, the Managers also cite Ms. Lewinsky's testimony that she told the President she would deny the relationship and that the President made some encouraging comment. House Br. at 23. Ms. Lewinsky never stated that she told the President any such thing on December 17, or at any other time after she had been identified as a witness. Indeed, Ms. Lewinsky testified that that discussion did not take place after she learned she was a witness in the *Jones* case:

> Q: 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 -- it

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.

App. at 1119-20 (Lewinsky GJ 8/20/98) (emphasis added).

Moreover, Ms. Lewinsky has stated several times that neither of these so-called "cover stories" was untrue. In her handwritten proffer, Ms. Lewinsky stated that she asked that the President what to say if anyone asked her about her visits to the Oval Office and he said that she could say "she was bringing him letters (when she worked in Legislative Affairs) or visiting Betty Currie (after she left the White House)." App. at 709 (Lewinsky 2/1/98 Proffer). Ms. Lewinsky expressly stated: "There is truth to both of these statements." *Id.* (emphasis added); *see also* App. at 712 (2/1/98 Proffer) ("[n]either of those statements [was] untrue.") (emphasis added). Indeed, Ms. Lewinsky testified to the grand jury that she did in fact bring papers to the President and that on some occasions, she visited the Oval Office only to see Ms. Currie:

Q: Did you actually bring [the President] papers at all?

A: Yes.

Q: All right. Tell us a little about that.

A: It varied. Sometimes it was just actual copies of letters. . . .

App. at 774-75 (Lewinsky GJ 8/6/98).

> I saw Betty on every time that I was there ... most of the time my purpose was to see the President, but there were some times when I did just go see Betty but the President wasn't in the office.

App. at 775 (Lewinsky GJ 8/6/98). The Managers assert that these stories were misleading. House Br. at 23; *see also* Committee Report at 66 (delivering documents to the President was a "ruse that had no legitimate business purpose."). In other words, while the so-called "cover stories" were literally true, such explanations might have been misleading. But literal truth is a

critical issue in perjury and obstruction cases, as is Ms. Lewinsky's belief that the statements were, in fact, literally true.

The allegation contained in Article II (2) is unsupported by the evidence and should be rejected.

3. The President denies that he "corruptly engaged in, encouraged, or supported a scheme to conceal evidence" -- gifts he had given to Monica Lewinsky -- in the Jones case

This allegation charges that the President participated in a scheme to conceal certain gifts he had given to Monica Lewinsky. It apparently centers on two events allegedly occurring in December 1997: (a) a conversation between the President and Ms. Lewinsky in which the two allegedly discussed the gifts the President had given Ms. Lewinsky, and (b) Ms. Currie's receipt of a box of gifts from Ms. Lewinsky and storage of them under her bed. The evidence does not support the charge.

a. Ms. Lewinsky's December 28 Meeting with the President

Monica Lewinsky met with the President on December 28, 1997, sometime shortly after 8:00 a.m. to pick up Christmas presents. App. at 868 (Lewinsky GJ 8/6/98). According to Ms. Lewinsky, she raised the subject of gifts she had received from the President in relation to the *Jones* subpoena, and this was the first and only time that this subject arose. App. at 1130 (Lewinsky GJ 8/20/98); App. at 1338 (Lewinsky Depo. 8/26/98).

The House Trial Brief and the Committee Report quote one version of Ms. Lewinsky's description of that December 28 conversation:

> "[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." App. at 872 (Lewinsky GJ 8/6/98).

In fairness, the Senate should be aware that Ms. Lewinsky has addressed this crucial exchange with prosecutors on at least ten different occasions, which we lay out in the margin for review.[97] The accounts varied -- in some Ms. Lewinsky essentially recalled that the

[97] Those statements, from earliest to latest in time:

1. Proffer (2/1/98): " Ms. L then asked if she should put away (outside her home) the gifts he had given her or, maybe, give them to someone else." App. at 715.

2. FBI 302 (7/27/98): "LEWINSKY expressed her concern about the gifts that the President had given LEWINSKY and specifically the hat pin that had been subpoenaed by PAULA JONES. The President seemed to know what the JONES subpoena called for in advance and did not seem surprised about the hat pin. The President asked LEWINSKY if she had told anyone about the hat pin and LEWINSKY denied that she had, but may have said that she gave some of the gifts to FRANK CARTER. ...LEWINSKY asked the President if she should give the gifts to someone and the President replied 'I don't know.'" App. at 1395.

3. FBI 302 (8/1/98): "LEWINSKY said that she was concerned about the gifts that the President had given her and suggested to the President that BETTY CURRIE hold the gifts. The President said something like, 'I don't know,' or 'I'll think about it.' The President did not tell LEWINSKY what to do with the gifts at that time." App. at 1481.

4. Grand Jury (8/6/98): "[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." App. at 872.

5. FBI 302 (8/13/97): "During their December 28, 1997 meeting, CLINTON did not specifically mention which gifts to get rid of." App. at 1549.

6. Grand Jury (8/20/98): "It was December 28th and I was there to get my Christmas gifts from him... And we spent maybe about five minutes or so, not very long, talking about the case. And I said to him, 'Well, do you think'... And at one point, I said, 'Well do you think I should--' I don't think I said 'get rid of,' I said, 'But do you think I should put away or maybe give to Betty or give someone the gifts?' 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." App. at 1121-22.

7. Grand Jury (8/20/98): "A JUROR: Now, did you bring up Betty's name [at the December 28 meeting during which gifts were supposedly discussed] or did the President bring up Betty's name? THE WITNESS: I think I brought it up. The President wouldn't have brought up Betty's name because he really didn't -- he really didn't discuss it..." App. at 1122.

President gave no response, but the House Managers, like the Committee Report and the OIC Referral, cite only the account most favorable to their case, failing even to take note of the other inconsistent recollections. But the important fact about Ms. Lewinsky's various descriptions of this conversation is that, at the very most, the President stated "I don't know" or "Let me think about it" when Ms. Lewinsky raised the issue of the gifts. Even by the account most unfavorable to the President, the record is clear and unambiguous that the President never initiated any discussion about the gifts nor did he tell or even suggest to Ms. Lewinsky that she should conceal the gifts.

Indeed, on several occasions, Ms. Lewinsky's accounts of the President's reaction depict the President as not even acknowledging her suggestion. Among those versions, ignored by the Committee Report and the Managers, are the following:

- "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." App. at 1122 (Lewinsky GJ 8/20/98) (emphasis added).

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8. Grand Jury (8/20/98): "A JUROR: You had said that the President had called you initially to come get your Christmas gift, you had gone there, you had a talk, et cetera, and there was no -- you expressed concern, the President really didn't say anything." App. at 1126.

9. FBI 302 (8/24/98): "LEWINSKY advised that CLINTON was sitting in the rocking chair in the Study. LEWINSKY asked CLINTON what she should do with the gifts CLINTON had given her and he either did not respond or responded 'I don't know.' LEWINSKY is not sure exactly what was said, but she is certain that whatever CLINTON said, she did not have a clear image in her mind of what to do next." App. at 1566.

10. FBI 302 (9/3/98): "On December 28, 1997, in a conversation between LEWINSKY and the President, the hat pin given to Lewinsky by the President was specifically discussed. They also discussed the general subject of the gifts the President had given Lewinsky. However, they did not discuss other specific gifts called for by the PAULA JONES subpoena. LEWINSKY got the impression that the President knew what was on the subpoena." App. at 1590.

- "[The President] either did not respond or responded 'I don't know.' LEWINSKY is not sure exactly what was said, but she is certain that whatever CLINTON said, she did not have a clear image in her mind of what to do next." App. at 1566 (Lewinsky FBI 302 8/24/98) (emphasis added).

- "The President wouldn't have brought up Betty's name, because he really didn't -- he really didn't discuss it . . ." App. at 1122 (Lewinsky GJ 8/20/98) (emphasis added).

- "A JUROR: You had said that the President had called you initially to come get your Christmas gift, you had gone there, you had a talk, et cetera, and there was no -- you expressed concern, the President didn't really say anything." App. at 1126 (Lewinsky GJ 8/20/98) (emphasis added).[98]

Thus, the evidence establishes that there was essentially no discussion of gifts. That December 28 meeting provides no evidence of any "scheme . . . designed to . . . conceal the existence" of any gifts.

b. Ms. Currie's Supposed Involvement in Concealing Gifts

Because the record is devoid of any evidence of obstruction by the President at his December 28 meeting with Monica Lewinsky, Article II (3) necessarily depends on the added assumption that, after the December 28 meeting, the President must have instructed his secretary, Ms. Betty Currie, to retrieve the gifts from Ms. Lewinsky, thereby consummating the obstruction of justice. As the following discussion will demonstrate, the record is devoid of any direct evidence that the President discussed this subject with Ms. Currie. At most, it conflicted on the question of whether Ms. Currie or Ms. Lewinsky initiated the gift retrieval.

We begin with what is certain. The record is undisputed that Ms. Currie picked up a box containing gifts from Ms. Lewinsky and placed them under her bed at home. The primary factual dispute, therefore, is which of the two initiated the pick-up. According to the

[98] Here a grand juror is restating Ms. Lewinsky's earlier testimony, with which Ms. Lewinsky appeared to agree (she did not dispute the accuracy of the grand juror's recapitulation).

logic of the Committee Report, if Ms. Currie initiated the retrieval, she must have been so instructed by the President. Committee Report at 69 ("there is no reason for her to do so unless instructed by the President").

But the facts are otherwise. Both Ms. Currie and the President have denied ever having any such conversation wherein the President instructed Ms. Currie to retrieve the gifts from Ms. Lewinsky. App. at 502 (President Clinton GJ 8/17/98); Supp. at 581 (Currie GJ 5/6/98). In other words, the only two parties who could have direct knowledge of such an instruction by the President have denied it took place.

In the face of this direct evidence that the President did not ask Ms. Currie to pick up these gifts, the Committee Report's obstruction theory hinges on the inference that Ms. Currie called Ms. Lewinsky and must have done so at the direction of the President. To be sure, Ms. Lewinsky has stated on several occasions that Ms. Currie initiated a call to her to inquire about retrieving something. 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.

App. at 874 (Lewinsky GJ 8/6/98). *See also* App. at 715 (2/1/98 Proffer) ("Ms. Currie called Ms. L later that afternoon and said that the Pres. had told her Ms. L wanted her to hold onto to something for her.").

However, Ms. Lewinsky acknowledged that it was she who first raised the prospect of Ms. Currie's involvement in holding the gifts:

> A JUROR: Now, did you bring up Betty's name or did the President bring up Betty's name?
>
> [MS. LEWINSKY]: I think I brought it up. The President wouldn't have brought up Betty's name because he really didn't -- he really didn't discuss it.

App. at 1122 (Lewinsky GJ 8/20/98). And contrary to the Committee Report's suggestion that Lewinsky's memory of these events has been "consistent and unequivocal" and she has "recited the same facts in February, July, and August," Committee Report at 69, Ms. Lewinsky herself acknowledged at her last grand jury appearance that her memory of the crucial conversation is less than crystal clear:

> A JUROR: . . . Do you remember Betty Currie saying that the President had told her to call?
>
> [MS. LEWINSKY]: Right now. I don't. I don't remember. . . .

App. at 1141 (Lewinsky GJ 8/20/98).

Moreover, Ms. Currie has repeatedly and unvaryingly stated that it was Ms. Lewinsky who contacted Ms. Currie about the gifts, not the other way around. A few examples include:

- "LEWINSKY called CURRIE and advised she had to return all gifts CLINTON had given LEWINSKY as there was talk going around about the gifts." Supp. at 531 (Currie FBI 302 1/24/98);
- "Monica said she was getting concerned, and she wanted to give me the stuff the President had given her -- or give me a box of stuff. It was a box of stuff." Supp. at 557 (Currie GJ 1/27/98);
- Q: . . . Just tell us for a moment how this issue first arose and what you did about it and what Ms. Lewinsky told you.

A: The best I remember it first arose with a conversation. I don't know if it was over the telephone or in person. I don't know. She asked me if I would pick up a box. She said Isikoff had been inquiring about gifts." Supp. at 582 (Currie GJ 5/6/98);

- "The best I remember she said that she wanted me to hold these gifts -- hold this -- she may have said gifts, I'm sure she said gifts, box of gifts -- I don't remember --because people were asking questions. And I said, 'Fine.'" Supp. at 581 (Currie GJ 5/6/98).

- "The best I remember is Monica calls me and asks me if she can give me some gifts, if I'd pick up some gifts for her." Supp. at 706 (Currie GJ 7/22/98).

The Committee Report attempts to portray Ms. Currie's memory as faulty on the key issue of whether Ms. Lewinsky initiated the gift retrieval by unfairly referencing Ms. Currie's answer to a completely different question. Ms. Currie was asked whether she had discussed with the President Ms. Lewinsky's "turning over to [her]" the gifts he had given her. Ms. Currie indicated that she could remember no such occasion. "If Monica said [Ms. Currie] talked to the President about it," she was then asked, "would that not be true?" Then, only on the limited question of whether Ms. Currie ever talked to the President about the gifts -- wholly separate from the issue of who made the initial contact -- did Ms. Currie courteously defer, "Then she may remember better than I. I don't remember." Supp. at 584 (Currie GJ 5/6/98). Ironically, it is the substance of this very allegation -- regarding conversations between Ms. Currie and the President -- that Ms. Lewinsky told the grand jury she could not recall. (In later testimony, referring to a conversation she had with the President on January 21, Ms. Currie testified that she was "sure" that she did not discuss the fact that she had a box of Ms. Lewinsky's belongings under her bed. Supp. at 705 (Currie GJ 7/22/98).)

To support its theory that Ms. Currie initiated a call to Ms. Lewinsky, the House Managers place great reliance on a cell phone record of Ms. Currie, calling it "key evidence that Ms. Currie's fuzzy recollection is wrong" and which "conclusively proves" that "the President

directed Ms. Currie to pick up the gifts." House Br. at 33. There is record of a one-minute call on December 28, 1998 from Ms. Currie's cell phone to Ms. Lewinsky's home at 3:32 p.m. Even assuming Ms. Lewinsky is correct that Ms. Currie picked up the gifts on December 28, her own testimony refutes the possibility that the Managers' mysterious 3:32 p.m. telephone call could have been the initial contact by Ms. Currie to retrieve the gifts. To the contrary, the timing and duration of the call strongly suggest just the opposite. It is undisputed that Ms. Lewinsky entered the White House on the morning of December 28 at 8:16 a.m. App. at 111 (White House entry records). While no exit time for Ms. Lewinsky was recorded because she inadvertently left her visitor badge in the White House, she has testified that the visit lasted around an hour. App. at 870-72 (Lewinsky GJ 8/6/98). Consistent with this timing, records also indicate that the President left the Oval Office at 9:52 a.m., thus placing Ms. Lewinsky's exit around 9:30 to 9:45 a.m. App. at 111. Ms. Lewinsky has indicated on several occasions that her discussion with Betty Currie occurred just "several hours" after she left. App. at 875 (Lewinsky GJ 8/6/98); App. at 1395 (Lewinsky FBI 302 7/27/98). Ms. Lewinsky three times placed the timing of the actual gift exchange with Ms. Currie "at about 2:00 p.m." App at 1127 (Lewinsky GJ 8/20/98); App. at 1396 (Lewinsky FBI 302 7/27/98); App. at 1482 (Lewinsky FBI 302 8/1/98). Thus, in light of undisputed documentary evidence and Ms. Lewinsky's own testimony, it becomes clear that the 3:32 p.m. telephone record relied upon by the Committee Report in fact is unlikely to reflect a call placed to initiate the pick-up.

Apart from this conspicuous timing defect, there is another, independent reason to conclude that the 3:32 p.m. telephone call could not have been the conversation Ms. Lewinsky describes. The 3:32 p.m. call is documented to have lasted no longer than one minute, and

because such calls are rounded up to the nearest minute, it quite conceivably could have been much shorter in duration. It is difficult to imagine that the conversation reflected in Ms. Lewinsky's statements could have taken place in less than one minute. Both Ms. Currie and Ms. Lewinsky have described the various matters that were discussed in their initial conversation: not only was this the first time the topic of returning gifts was discussed, which quite likely generated some discussion between the two, but they also had to discuss and arrange a convenient plan for Ms. Currie to make the pick-up.[99]

What, then, to make of this call so heavily relied upon by the House Managers? The record is replete with references that Ms. Currie and Ms. Lewinsky communicated very frequently, especially during this December 1997-January 1998 time period. *See, e.g.,* Supp. at 554 (Currie GJ 1/27/98) (many calls around Christmas-time). They often called or paged each other to discuss a host of topics, including Ms. Lewinsky's pending job search, Ms. Currie's mother's illness, and her contacts with Mr. Jordan. There is simply no reason to believe this call was anything other than one of the many calls and exchanges of pages that these two shared during the period.

c. The Obstruction-by-Gift-Concealment Charge Is at Odds With the President's Actions

Ultimately, and irrespective of the absence of evidence implicating the President in Ms. Lewinsky's gift concealment, the charge fails because it is inconsistent with other events

[99] The OIC Referral, which took great pains to point out every allegedly incriminating piece of evidence, made no reference to this telephone record, perhaps because the OIC knew it tended not to corroborate Ms. Lewinsky's time line. In its place, the Referral rested its corroboration hopes in the following bizarre analysis: "More generally, the person making the extra effort (in this case, Ms. Currie) is ordinarily the person requesting the favor." Referral at 170. Wisely, the House Managers chose not to pursue this groundless speculation.

of the very same day. There is absolutely no dispute that the President gave Ms. Lewinsky numerous additional gifts during their December 28 meeting. It must therefore be assumed that on the very day the President and Ms. Lewinsky were conspiring to hide the gifts he had already given to her, the President added to the pile. No stretch of logic will support such an outlandish theory.

From the beginning, this inherent contradiction has puzzled investigators. If there were a plot to conceal these gifts, why did the President give Ms. Lewinsky several more gifts at the very moment the concealment plan was allegedly hatched? The House Managers OIC prosecutors, grand jurors, and even Ms. Lewinsky hopelessly searched for an answer to that essential question:

> Q: Although, Ms. Lewinsky, I think what is sort of -- it seems a little odd and, I guess really the grand jurors wanted your impression of it, was on the same day that you're discussing basically getting the gifts to Betty to conceal them, he's giving you a new set of gifts.
>
> A: You know, I have come recently to look at that as sort of a strange situation, I think, in the course of the past few weeks. . . .

App. at 887-88 (Lewinsky GJ 8/6/98) (emphasis added). See House Br. at 34.

The Committee Report fails to resolve this significant flaw in its theory.[100] The report admits that Ms. Lewinsky "can't answer" why the President would in one breath give her

[100] Incredibly, not only does the Committee Report fail to offer a sensible answer to this perplexity, but without any factual or logical support it accuses the President of lying to the grand jury when he testified that he was not particularly concerned about the gifts he had given Ms. Lewinsky and thus had no compunction about giving her additional gifts on December 28. Article I (4). For whatever reason, neither the Committee Report nor the OIC Referral acknowledges the most reasonable explanation for these events: as the President has testified repeatedly, he was not concerned about the gifts he had given Ms. Lewinsky:

- "I was never hung up about this gift issue. Maybe it's because I have a different

gifts and in the next hatch a plan to take them back. But it cites only to Ms. Lewinsky's understanding of the relationship's pattern of concealment and how she contemplated it must apply to the gifts. It creates the erroneous impression that the President gave Ms. Lewinsky instructions to conceal the gifts in the December 28 meeting by quoting her testimony that "from everything he said to me" she would conceal the gifts. But we know that Ms. Lewinsky has repeatedly testified that no such discussion ever occurred. Her reliance on "everything he said to me" must, therefore, reflect her own plan to implement discussions the two had had about concealing the relationship long before her role in the *Jones* litigation.

What this passage confirms is that Ms. Lewinsky had very much in her mind that she would do what she could to conceal the relationship -- a *modus operandi* she herself acknowledged well pre-dated the *Jones* litigation. That she took such steps does not mean that the President knew of or participated in them. Indeed, it appears that the entire gift-concealment plan arose not from any plan suggested by the President -- which the Committee Report so

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experience. But, you know, the President gets hundreds of gifts a year, maybe more. I have always given a lot of gifts to people, especially if they give me gifts. And this was no big deal to me." App. at 495.

- "this gift business . . . didn't bother me." App. at 496.
- "I wasn't troubled by this gift issue." App. at 497.
- "I have always given a lot of people gifts. I have always been given gifts. I do not think there is anything improper about a man giving a woman a gift, or a woman giving a man a gift, that necessarily connotes an improper relationship. So, it didn't bother me." App. at 498.

desperately struggles to maintain -- but rather more innocently from the actions of a young woman taking steps she thought were best.[101]

In any event, the record evidence is abundantly clear that the President has not obstructed justice by any plan or scheme to conceal gifts he had given to Ms. Lewinsky, and logic and reason fully undercut any such theory.

4. The President denies that he obstructed justice in connection with Monica Lewinsky's efforts to obtain a job in New York in an effort to "corruptly prevent" her "truthful testimony" in the *Jones* case

Again, in the absence of specifics in Article II itself, we look to the Committee Report for guidance on the actual charges. The Committee Report would like to portray this claim in as sinister a light as possible, and it alleges that the President of the United States employed his close friend Vernon Jordan to get Monica Lewinsky a job in New York to influence her testimony or perhaps get her away from the *Jones* lawyers. To reach this conclusion, and without the benefit of a single piece of direct evidence to support the charge, it ignores the direct testimony of several witnesses, assigns diabolical purposes to a series of innocuous events, and then claims that "[i]t is logical to infer from this chain of events" that the job efforts "were motivated to influence the testimony of" Ms. Lewinsky. Committee Report at 71. Again, the evidence contradicts the inferences the Committee Report strives to draw. Ms. Lewinsky's New York job search began on her own initiative long before her involvement in the *Jones* case. By her own forceful testimony, her job search had no connection to the *Jones* case.

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[101] As the President has stated about this potentiality, "I didn't then, I don't now see this [the gifts] as a problem. And if she thought it was a problem, I think it -- it must have been from a, really, a misapprehension of the circumstances. I certainly never encouraged her not to, to comply lawfully with a subpoena." App. at 497-98 (emphasis added.)

Mr. Jordan agreed to help Ms. Lewinsky not at the direction of the President but upon the request of Betty Currie, Mr. Jordan's long-time friend. And bizarrely, the idea to involve Mr. Jordan (which arose well before Ms. Lewinsky became a possible *Jones* witness) came not from the President but apparently emanated from Ms. Tripp. In short, the facts directly frustrate the House Majority's theory.[102]

a. The Complete Absence of Direct Evidence Supporting This Charge

It is hard to overstate the importance of the fact that -- by the House Managers', the Committee Report's and the OIC's own admission -- there is not one single piece of direct evidence to support this charge. Not one. Indeed, just the contrary is true. Both Ms. Lewinsky and Mr. Jordan have repeatedly testified that there was never an explicit or implicit agreement, suggestion, or implication that Ms. Lewinsky would be rewarded with a job for her silence or false testimony. One need look no further than their own testimony :

Lewinsky: "[N]o one ever asked me to lie and I was never promised a job for my silence." App. at 1161 (Lewinsky GJ 8/20/98);

> "There was no agreement with the President, JORDAN, or anyone else that LEWINSKY had to sign the Jones affidavit before getting a job in New York. LEWINSKY never demanded a job from Jordan in exchange for a favorable

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[102] This allegation has gone through several iterations. As initially referred to the House of Representatives, the charge was that the President "help[ed] Ms. Lewinsky obtain a job in New York at a time when she would have been a witness against him" in the *Jones* case. OIC Referral at 181. Faced with the significant evidence that Ms. Lewinsky's job efforts had originated long before she became involved in the *Jones* case and were in fact entirely unrelated to the *Jones* case, the Judiciary Committee Majority was forced to recraft this claim. Instead of implying a complete connection between the job search and the *Jones* litigation, the article now oddly charges that the President "intensified and succeeded in an effort to secure job assistance" for Ms. Lewinsky "at a time when the truthful testimony of [Ms. Lewinsky] would have been harmful to him," Article II (5) (emphasis added) -- thereby admitting that the initial effort was motivated by appropriate concerns.

affidavit. Neither the President nor JORDAN ever told LEWINSKY that she had to lie." App. at 1398 (Lewinsky FBI 302 7/27/98).

Jordan: "As far as I was concerned, [the job and the affidavit] were two very separate matters." Supp. at 1737 (Jordan GJ 3/5/98).

"Unequivocally, indubitably, no." -- in response to the question whether the job search and the affidavit were in any way connected. Supp. at 1827 (Jordan GJ 5/5/98). [103]

This is the direct evidence. The House Managers' circumstantial "chain of events" case, House Br. at 39-41, cannot overcome the hurdle the direct evidence presents.

b. Background of Ms. Lewinsky's New York Job Search

By its terms, Article II (4) would have the Senate evaluate Ms. Lewinsky's job search by considering only the circumstances "[b]eginning on or about December 7, 1997." Article II (4). Although barely mentioned in the Committee Report's "explanation" of Article II (4), the significant events occurring before December 7, 1997 cannot simply be ignored because they are inconsistent with the Majority's theory. Without reciting every detail, the undisputed record establishes that the following facts occurred long before Ms. Lewinsky was involved in the *Jones* case:

First, Ms. Lewinsky had contemplated looking for a job in New York as early as July 1997. App. at 1414 (Lewinsky FBI 302 7/29/98) (July 3 letter "first time [Lewinsky] mentioned the possibility of moving to New York"); App. at 787-88 (on July 4, 1997, Ms.

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[103] The only person who suggested any such *quid pro quo* was Ms. Tripp, who repeatedly urged Ms. Lewinsky to demand such linkage. App. at 1493 (Lewinsky FBI 302 8/2/98) ("TRIPP told LEWINSKY not to sign the affidavit until LEWINSKY had a job."). To appease Linda Tripp's repeated demands on this point, Ms. Lewinsky ultimately told Ms. Tripp that she had told Mr. Jordan she wouldn't sign the affidavit until she had a job. But as she later emphasized to the grand jury, "That was definitely a lie, based on something Linda had made me promise her on January 9th." App. at 1134 (Lewinsky GJ 8/20/98).

Lewinsky wrote the President a letter describing her interest in a job "in New York at the United Nations"); Committee Report at 10 ("Ms. Lewinsky had been searching for a highly paid job in New York since the previous July.") She conveyed that prospect to a friend on September 2, 1997. App. at 2811 (Lewinsky e-mail).

Second, in early October, at the request of Ms. Currie, then-Deputy Chief of Staff John Podesta asked U.N. Ambassador Bill Richardson to consider Ms. Lewinsky for a position at the U.N. Supp. at 3404 (Richardson GJ 4/3/98). Ms. Currie testified that she was acting on her own in this effort. Supp. at 592 (Currie GJ 5/6/98).

Third, around October 6, Ms. Tripp told Ms. Lewinsky that an acquaintance in the White House reported that it was unlikely Ms. Lewinsky would ever be re-employed at the White House. After this disclosure, Ms. Lewinsky "was mostly resolved to look for a job in the private sector in New York." App. at 1543-44 (Lewinsky FBI 302) 8/13/98; *see also* App. at 1460 (Lewinsky FBI 302 7/31/98) (remarks by the Linda Tripp acquaintance were the "straw that broke the camel's back").

Fourth, sometime prior to October 9, 1997, Ms. Tripp and Ms. Lewinsky discussed the prospect of enlisting Mr. Vernon Jordan to assist Ms. Lewinsky in obtaining a private sector job in New York. App. at 822-24 (Lewinsky GJ 8/6/98); *see also* App. at 1079 (Lewinsky GJ 8/20/98) ("I don't remember . . . if [enlisting Jordan] was my idea or Linda's idea. And I know that that came up in discussions with her, I believe, before I discussed it with the President"). On either October 9 or 11, Ms. Lewinsky conveyed to the President this idea of asking Mr. Jordan for assistance. *Id.*

Fifth, in mid-October, 1997, Ms. Lewinsky purchased a book on jobs in New York. App. at l462 (Lewinsky FBI 302 7/31/98). Ms. Lewinsky completed and sent to Betty Currie at the White House a packet of jobs-related materials on October 15 or 16. Supp. at 735 (Lewinsky Tripp tape of 10/15/97 conversation).

Sixth, on October 31, 1997, Ms. Lewinsky interviewed for a position with Ambassador Bill Richardson at the United Nations in New York. Ambassador Richardson was "impressed" with Ms. Lewinsky and, on November 3, offered her a position, which she ultimately rejected. Supp. at 3411 (Richardson GJ 4/30/98); Supp. at 3731 (Sutphen GJ 5/27/98). Ms. Currie informed the President that Ms. Lewinsky had received a job offer at the U.N. Supp. at 592 (Currie GJ 5/6/98). Ambassador Richardson never spoke to the President or Mr. Jordan about Ms. Lewinsky, and he testified emphatically and repeatedly that no one pressured him to hire her. Supp. at 3422-23 (Richardson GJ 4/30/98); Supp. at 3418 (same); Supp. at 3429 (same).

Seventh, as of late October or November, Ms. Lewinsky had told Mr. Kenneth Bacon, her boss at the Pentagon, that she wanted to leave the Pentagon and move to New York. In a series of conversations, she enlisted his assistance in obtaining a private sector job in New York. Supp. at 11 (Kenneth Bacon FBI 302 2/26/98). In response, Mr. Bacon contacted Howard Paster, CEO of the public relations firm Hill & Knowlton about Ms. Lewinsky. *Id.*

Eighth, in November, Ms. Lewinsky gave notice to the Pentagon that she would be leaving her Pentagon job at year's end. Supp. at 116 (Clifford Bernath GJ 5/21/98).

Ninth, Ms. Lewinsky apparently had a preliminary meeting with Mr. Jordan on November 5, 1997 to discuss her job search. During this twenty-minute meeting, Ms. Lewinsky

and Mr. Jordan discussed a list of potential employers she had compiled. App. at 1464-65 (Lewinsky FBI 302 7/31/98). In that meeting, Ms. Lewinsky never informed Mr. Jordan of any time constraints on her need for job assistance. Supp. at 2647 (Lewinsky-Tripp Tape of 11/8/97 conversation). Mr. Jordan had to leave town the next day. App. at 1465 (Lewinsky FBI 302 Form 7/31/98). Ms. Lewinsky had a follow-up telephone conversation with Mr. Jordan around Thanksgiving wherein he advised her that he was "working on her job search" and instructed her to call him again "around the first week of December." App. at 1465 (Lewinsky FBI 302 7/31/98); *see also* App. at 825 (Lewinsky GJ 8/6/98) ("And so Betty arranged for me to speak with [Jordan] again and I spoke with him when I was in Los Angeles before -- right before Thanksgiving.") [104] Inexplicably, the Committee Report, the presentation by its chief counsel, and the Starr Referral all choose to ignore this key piece of testimony -- that contact resumed in early December because Ms. Lewinsky and Mr. Jordan agreed (in November) that it would. *See* Committee Report at 10 ("Ms. Lewinsky had no further contacts with Mr. Jordan at that time [early November to mid December]."); Schippers Dec. 10, 1998 Presentation at 38 ("Vernon Jordan, who, by the way, had done nothing from early November to mid-December."); Referral at 182 ("Ms. Lewinsky had no contact with . . . Mr. Jordan for another month [after November 5].").

In sum, the record is clear that Ms. Lewinsky decided on her own to seek a job in New York many months before her involvement in the *Jones* case. She had asked her Pentagon boss to help, as well as Ms. Currie, who arranged indirectly for Ms. Lewinsky to interview with Ambassador Richardson at the United Nations. Mr. Jordan became involved in the job search at

[104] Mr. Jordan was then out of the country from the day after Thanksgiving until December 4. Supp. at 1804 (Jordan GJ 5/5/98).

the request of Ms. Currie (apparently at the suggestion of Ms. Tripp) and, notwithstanding his travels in November, Supp. at 1811 (Jordan GJ 5/5/98), kept in contact with Ms. Lewinsky with plans to reconvene early in December.

c. The Committee Report's Circumstantial Case

Article II ignores this background and merely alleges that efforts to aid Ms. Lewinsky's job search "intensified and succeeded" in December 1997. While not adopted in the article, the House Brief, the Committee Report, and the accompanying final presentation by Majority Counsel Schippers offer some guidance as to the meaning of the actual charge. They cite three events -- Mr. Jordan's December 11 meeting with Ms. Lewinsky to discuss job prospects in New York, Ms. Lewinsky's execution of her *Jones* affidavit, and her receipt of a job -- in an effort to portray Ms. Lewinsky's job search as sinister. But the full record easily dispels any suggestion that there were any obstructive or improper acts.

1) Monica Lewinsky's December 11 meeting with Vernon Jordan

The House Managers and the Committee Report suggest that Mr. Jordan took action on Ms. Lewinsky's job search request only after, and because, Ms. Lewinsky's name appeared on the witness list on December 5 and only after, and because, Judge Wright ordered the President to answer certain questions about "other women" on December 11. *See* House Br. at 21. Consider the Committee Report portrayal:

> "[T]he effort to obtain a job for Monica Lewinsky in New York intensified after the President learned, on December 6, 1997, that Monica Lewinsky was listed on the witness list for the case Jones v. Clinton.[105]

[105] Committee Report at 70. That portrayal flatly contradicts the Committee Report's earlier statement that on December 6 "there was still no urgency to help Lewinsky." Committee Report at 10-11.

> On December 7, 1997, President Clinton met with Vernon Jordan at the White House. Ms. Lewinsky met with Mr. Jordan on December 11 to discuss specific job contacts in New York. Mr. Jordan then made calls to certain New York companies on Ms. Lewinsky's behalf. Jordan telephoned President Clinton to keep him informed of the efforts to get Ms. Lewinsky a job." Committee Report at 70.
>
> "Something happened that changed the priority assigned to the job search. On the morning of December 11, 1997, Judge Susan Webber Wright ordered President Clinton to provide information regarding any state or federal employee with whom he had, proposed, or sought sexual relations. To keep Ms. Lewinsky satisfied was now of critical importance." Committee Report at 11.

The unmistakable intention of this narrative is to suggest that, after the President learned Ms. Lewinsky's name was on the witness list on December 6, he (1) contacted Mr. Jordan on December 7 to engage his assistance for Ms. Lewinsky, and only then did Mr. Jordan agree to meet with Ms. Lewinsky, and further, that (2) Mr. Jordan met with Ms. Lewinsky on December 11 and took concrete steps to help Ms. Lewinsky only after and as a result of Judge Wright's December 11 order. Both suggestions are demonstrably false.

The President had nothing to do with arranging the December 11 meeting between Mr. Jordan and Ms. Lewinsky. As the record indicates, after receiving a request from Ms. Currie on December 5 that he meet with Ms. Lewinsky, and telling Ms. Currie to have Ms. Lewinsky call him, Ms. Lewinsky called Mr. Jordan on December 8. Supp. at 1705 (Jordan GJ 3/3/98). As noted above, that call had been presaged by a conversation between Mr. Jordan and Ms. Lewinsky around Thanksgiving in which Jordan told her "he was working on her job search" and asked her to contact him again "around the first week of December." App. at 1465 (Lewinsky FBI 302 7/31/98). In the December 8 call, the two arranged for Ms. Lewinsky to come to Mr. Jordan's office on December 11; on the same day, Ms. Lewinsky sent Mr. Jordan

via courier a copy of her resume. Supp. at 1705 (Jordan GJ 3/3/98). At the time of that contact, Mr. Jordan did not even know that Ms. Lewinsky knew President Clinton. *Id*.

In the intervening period before Ms. Lewinsky's December 11 meeting with Mr. Jordan, the President met with Mr. Jordan on December 7. As the Committee Report acknowledges, that meeting had nothing to do with Ms. Lewinsky. Committee Report at 11. Yet the House Managers' Brief, like the Committee Report before it, states that "the sudden interest [in helping Ms. Lewinsky obtain a job] was inspired by a court order entered on December 11, 1997" in the *Jones* case.[106] House Br. at 21. No evidence supports that supposition. The December 11 meeting had been scheduled on December 8. Neither the OIC Referral nor the Committee Report nor the Managers' Brief cites <u>any</u> evidence that the President or Mr. Jordan had any knowledge of the contents of that Order at the time of the December 11 meeting.

Mr. Jordan met with Ms. Lewinsky shortly after 1:00 p.m. on December 11. Supp. at 1863 (Akin Gump visitor log); Supp. at 1809 (Jordan GJ 5/5/98). In anticipation of that meeting, Mr. Jordan had made several calls to prospective employers about Ms. Lewinsky. Supp. at 1807-09 (Jordan GJ 5/5/98). Mr. Jordan spoke about Ms. Lewinsky with Mr. Peter Georgescu of Young & Rubicam at 9:45 a.m. that morning, and with Mr. Richard Halperin of Revlon around 1:00 p.m., immediately before meeting with Ms. Lewinsky. Supp. at 1807-09 (Jordan GJ 5/5/98). Again, there is no evidence that any of this occurred after Mr. Jordan learned of Judge Wright's order.

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[106] That Order authorized Paula Jones' attorneys to obtain discovery relating to certain government employees "with whom the President had sexual relations, proposed sexual relations, or sought to have sexual relations." House Br. at 21.

Although the Committee Report claims that a heightened sense of urgency attached in December which "intensified" the job search efforts, it ignores the sworn testimony of Mr. Jordan denying any such intensification: "Oh no. I do not recall any heightened sense of urgency [in December]. What I do recall is that I dealt with it when I had time to do it." Supp. at 1811 (Jordan GJ 5/5/98).[107]

The "heightened urgency" theory also is undermined by the simple fact that Mr. Jordan indisputably placed no pressure on any company to give Ms. Lewinsky a job and suggested no date by which Ms. Lewinsky had to be hired. The first person Mr. Jordan contacted, Mr. Georgescu of Young & Rubicam/Burson-Marsteller, told investigators that Mr. Jordan did not engage in a "sales pitch" for Lewinsky. Supp. at 1222 (Georgescu FBI 302 3/25/98). Mr. Georgescu told Mr. Jordan that the company "would take a look at [Ms. Lewinsky] in the usual way," Supp. at 1219 (Georgescu FBI 302 1/29/98), and that once the initial interview was set up, Ms. Lewinsky would be "on [her] own from that point." Supp. at 1222 (Georgescu FBI 302 3/25/98). The executive who interviewed Ms. Lewinsky at Burson-Marsteller stated that Ms. Lewinsky's recruitment process went 'by the book" and, "while somewhat accelerated," the process "went through the normal steps." Supp. at 111 (Berk FBI 302 3/31/98).

At American Express, Mr. Jordan contacted Ms. Ursula Fairbairn, who stated that Mr. Jordan exerted "no . . . pressure" to hire Lewinsky. Supp. at 1087 (Fairbairn FBI 302 2/4/98). Indeed, she considered it "not unusual for board members" like Mr. Jordan to recommend talented people for employment and noted that Mr. Jordan had recently

[107] Mr. Jordan explained that not much activity occurred in November because "I was traveling." Supp. at 1811 (Jordan GJ 9/5/98).

recommended another person just a few months earlier. *Id.* The person who interviewed Ms. Lewinsky stated that he felt "absolutely no pressure" to hire her and indeed told her she did not have the qualifications necessary for the position. Supp. at 3521 (Schick FBI 302 1/29/98).

Perhaps most telling of the absence of pressure applied by Mr. Jordan is the fact that neither Young & Rubicam/Burson-Marsteller or American Express offered Ms. Lewinsky a job.

Similarly, at MacAndrews & Forbes/Revlon, where Ms. Lewinsky ultimately was offered a job (see below), Mr. Jordan initially contacted Mr. Halperin, who has stated that is was not unusual for Mr. Jordan to make an employment recommendation. Supp. at 1281 (Halperin FBI 302 1/26/98). Moreover, he emphasized that Mr. Jordan did not "ask [him] to work on any particular timetable," Supp. at 1294 (Halperin GJ 4/23/98), and that "there was no implied time constraint or requirement for fast action." Supp. at 1286 (Halperin FBI 3/27/98.)

2) The January job interviews and the Revlon employment offer

The Committee Report attempts to conflate separate and unrelated acts -- the signing of the affidavit and the Revlon job offer -- to sustain its otherwise unsustainable obstruction theory. The Committee Report's description of these events is deftly misleading:

> "The next day, January 7, Monica Lewinsky signed the false affidavit. She showed the executed copy to Mr. Jordan that same day. She did this so that Mr. Jordan could report to President Clinton that it had been signed and another mission had been accomplished.
>
> On January 8, Ms. Lewinsky had an interview arranged by Mr. Jordan with MacAndrews & Forbes in New York. The interview went poorly. Afterwards, Ms. Lewinsky called Mr. Jordan and informed him. Mr. Jordan, who had done nothing from early November to mid-December, then called the chief executive officer of MacAndrews & Forbes, Ron Perelman, to "make things happen, if they could happen." Mr. Jordan called Ms. Lewinsky back and told her not to worry. That evening,

> MacAndrews & Forbes called Ms. Lewinsky and told her that she would be given more interviews the next morning.
>
> The next morning, Ms. Lewinsky received her reward for signing the false affidavit. After a series of interviews with MacAndrews & Forbes personnel, she was informally offered a job. Committee Report at 18 (citations omitted).

By this portrayal, the Committee Report suggests two conclusions: first, that Ms. Lewinsky was "reward[ed]" with a job for her signing of the affidavit; second, that the only reason Ms. Lewinsky was given a second interview and ultimately hired at Revlon was Mr. Jordan's intervention with Mr. Perelman. Once again, both conclusions are demonstrably false.

Mr. Jordan and Ms. Lewinsky have testified under oath that there was no causal connection between the job search and the affidavit. The only person to draw (or, actually, recommend) any such linkage was Ms. Tripp. The factual record easily debunks the second insinuation -- that Ms. Lewinsky was hired as a direct result of Mr. Jordan's call to Mr. Perelman. One fact is virtually dispositive: the Revlon executive who scheduled Ms. Lewinsky's January 9 interview and decided to hire her that same day never even knew about Mr. Jordan's call to Mr. Perelman, or any interest Mr. Perelman might have in Ms. Lewinsky, and thus could not have been acting in furtherance of such a plan.

Ms. Lewinsky initially interviewed with Mr. Halperin of MacAndrews & Forbes (Revlon's parent company) on December 18, 1997. (Mr. Jordan had spoken with Mr. Halperin on December 11.) Prior to interviewing Ms. Lewinsky, Mr. Halperin forwarded a copy of her resume to Mr. Jaymie Durnan, also of MacAndrews & Forbes, for his consideration. Supp. at 1286-87 (Halperin FBI 302 3/27/98). Following his interview of Ms. Lewinsky, Mr. Halperin thought that she would likely be "shipped to Revlon" for consideration. *Id.*

Mr. Durnan received Ms. Lewinsky's resume from Mr. Halperin in mid-December and, after reviewing it, decided to interview Ms. Lewinsky after the first of the year. (He was going on vacation the last two weeks of December). Supp. at 1053 (Durnan FBI 302 3/27/98). When he returned from vacation, his assistant scheduled an interview with Ms. Lewinsky for January 7, 1998, but, because of scheduling problems, he rescheduled the interview for the next day, January 8, 1998. Supp. at 1049 (Durnan FBI 302 1/26/98). Mr. Durnan's decision to interview Ms. Lewinsky was made independently of the decision by Mr. Halperin to interview her. Indeed, only when Mr. Durnan interviewed Ms. Lewinsky in January did he discover that she had had a December interview with Mr. Halperin. *Id.*

It was this interview with Mr. Durnan that Ms. Lewinsky later described as having gone poorly in her view. App. at 926 (Lewinsky GJ 8/6/98). The House Managers ("[t]he interview went poorly," House Br. at 38), the Committee Report ("The interview went poorly", *id.* at 21), and the OIC Referral ("The interview went poorly," *id.* at 184) all emphasize only Ms. Lewinsky's impression of the job interview -- for obvious reasons: it tends to heighten the supposed relevance of the Jordan call to Mr. Perelman. In other words, under this theory, Ms. Lewinsky had no prospect of a job at MacAndrews & Forbes/Revlon until Mr. Jordan resurrected her chances with Mr. Perelman.

Unfortunately, like so much other "evidence" in the obstruction case, the facts do not bear out this sinister theory. Mr. Durnan had no similar impression that his interview with Ms. Lewinsky had gone "poorly." In fact, just the opposite was true: he was "impressed" with Ms. Lewinsky and thought that she would "fit in" with MacAndrews & Forbes but "there was nothing available at that time which suited her interests." Supp. at 1054 (Durnan FBI 302

3/27/98). Mr. Durnan therefore decided to forward Ms. Lewinsky's resume to Ms. Allyn Seidman of Revlon. After the interview, he called Ms. Seidman and left her a voicemail message about his interview with Ms. Lewinsky and explained that, while there was no current opening at MacAndrews & Forbes, "perhaps there was something available at Revlon." *Id.*

In the meantime, Mr. Jordan had called Mr. Perelman about Ms. Lewinsky. Mr. Perelman described this conversation as "very low key and casual." Supp. at 3273 (Perelman FBI 302 1/26/98). Mr. Jordan "made no specific requests and did not request" him "to intervene"; nonetheless, Mr. Perelman agreed to "look into it." *Id.* Later that day, Mr. Durnan spoke to Mr. Perelman, who mentioned that he had received a call from Mr. Jordan about a job candidate. Mr. Perelman told Mr. Durnan "let's see what we can do," Supp. at 3276 (Perelman FBI 302 3/27/98), but Mr. Durnan never concluded that hiring Ms. Lewinsky was "mandatory." Supp. at 1055 (Durnan FBI 302 3/27/98). Mr. Perelman later called Mr. Jordan and said they would do what they could; Mr. Jordan expressed no urgency to Mr. Perelman. Supp. at 3276 (Perelman FBI 302 3/27/98).

By the time Mr. Durnan had discussed Ms. Lewinsky with Mr. Perelman, he had already forwarded her resume to Ms. Seidman at Revlon. Supp. at 1049-50 (Durnan FBI 302 1/26/98). After speaking with Mr. Perelman, Mr. Durnan spoke with Ms. Seidman, following up on the voicemail message he had left earlier that day. Supp. at 1055 (Durnan FBI 302 3/27/98). Upon speaking to Ms. Seidman about Ms. Lewinsky, however, Mr. Durnan did not tell Ms. Seidman that CEO Perelman has expressed any interest in Ms. Lewinsky. *Id.* Rather, he simply said that if she liked Ms. Lewinsky, she should hire her. Supp. at 1050 (Durnan FBI 302 1/26/98).

For her part, Ms. Seidman has testified that she had no idea that Mr. Perelman had expressed interest in Ms. Lewinsky:

> Q: Did [Mr. Durnan] indicate to you that he had spoken to anyone else within MacAndrews or Revlon about Monica Lewinsky?
>
> A: Not that I recall, no.
>
> Q: Do you have any knowledge as to whether or not Mr. Perelman spoke with anyone either on the MacAndrews & Forbes side or the Revlon side about Monica Lewinsky?
>
> A: No.

Supp. at 3642 (Seidman Depo. 4/23/98). Rather, Ms. Seidman's consideration of Ms. Lewinsky proceeded on the merits. Indeed, as a result of the interview, Ms. Seidman concluded that Ms. Lewinsky was "bright, articulate and polished," Supp. at 3635 (Seidman FBI 302 1/26/98), and "a talented, enthusiastic, bright young woman" who would be a "good fit in [her] department." Supp. at 3643 (Seidman Depo. 4/23/98). She decided after the interview to hire Ms. Lewinsky, and thereafter called Mr. Durnan "and told him I thought she was great." *Id.*

In sum, Ms. Seidman made the decision to grant an interview and hire Ms. Lewinsky on the merits. She did not even know that Mr. Perelman had expressed any interest in Ms. Lewinsky or that Mr. Jordan had spoken to Mr. Perelman the day before. As amply demonstrated, the House Managers' Jordan-Perelman intervention theory just doesn't hold water.

d. Conclusion

From the preceding discussion of the factual record, two conclusions are inescapable. First, there is simply no direct evidence to support the job-for-silence obstruction theory. From her initial proffer to the last minutes of her grand jury appearance, the testimony of Ms. Lewinsky has been clear and consistent: she was never asked or encouraged to lie or

promised a job for her silence or for a favorable affidavit. Mr. Jordan has been equally unequivocal on this point. Second, the "chain of events" circumstantial case upon which this obstruction allegation must rest falls apart after inspection of the full evidentiary record. Ms. Lewinsky's job search began on her own volition and long before she was ever a witness in the *Jones* case. Mr. Jordan's assistance originated with a request from Ms. Currie, which had no connection to events in the *Jones* litigation. No pressure was applied to anyone at any time. And Ms. Lewinsky's ultimate hiring had absolutely no connection to her signing of the affidavit in the *Jones* case. Viewed on this unambiguous record, the job-search allegations are plainly unsupportable.

5. The President denies that he "corruptly allowed his attorney to make false and misleading statements to a Federal judge" concerning Monica Lewinsky's affidavit

Article II (5) charges that the President engaged in an obstruction of justice because he "did not say anything" during his *Jones* deposition when his attorney cited the Lewinsky affidavit to Judge Wright and stated that "there is no sex of any kind in any manner, shape, or form." Committee Report at 72. The rationale underlying this charge of obstruction of justice hinges on an odd combination of a bizarrely heightened legal obligation, a disregard of the actual record testimony, and a good dose of amateur psychology. This claim is factually and legally baseless.

The law, of course, imposes no obligation on a client to monitor every statement and representation made by his or her lawyer. Particularly in the confines of an ongoing civil deposition, where clients are routinely counseled to focus on the questions posed of them and their responses and ignore all distractions, it is totally inappropriate to try to remove a President

from office because of a statement by his attorney. Indeed, the President forcefully explained to the grand jury that he was not focusing on the exchange between the lawyers but instead concentrating on his own 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." App. at 476;
- "I was not paying a great deal of attention to this exchange. I was focusing on my own testimony." App. at 510;
- "I'm quite sure that I didn't follow all the interchanges between the lawyers all that carefully." App. at 510;
- "I am not even sure that when Mr. Bennett made that statement that I was concentrating on the exact words he used." App. at 511;
- "When I was in there, I didn't think about my lawyers. I was, frankly, thinking about myself and my testimony and trying to answer the questions." App. at 512;
- "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." App. at 513.

The Committee Report ignores the President's repeated and consistent description of his state of mind during the deposition exchange. Instead, the Committee Report and majority counsel's final presentation undertake a novel exercise in video psychology, claiming that by studying the President's facial expressions and by noting that he was "looking in Mr. Bennett's direction" during the exchange, it necessarily follows that the President was in fact listening to and concentrating on every single word uttered by his attorney[108] and knowingly made a decision not to correct his attorney.

[108] It is upon this same fanciful methodology that the Committee Report premises the allegation of Article I (3) that the President lied to the grand jury in providing these responses. Citing the President's oft-criticized response about Mr. Bennett's use of the present tense in his

The futility of such an exercise is manifest. It is especially unsettling when set against the President's adamant denials that he harbored any contemporaneous or meaningful realization of his attorney's colloquy with the Judge. The theory is factually flimsy, legally unfounded, and should be rejected.

6. The President denies that he obstructed justice by relating "false and misleading statements" to "a potential witness," Betty Currie, "in order to corruptly influence [her] testimony"

There is no dispute that the President met with his secretary, Ms. Currie, on the day after his *Jones* deposition and discussed questions he had been asked about Ms. Lewinsky. The Managers cast this conversation in the most sinister light possible and alleges that the President attempted to influence the testimony of a "witness" by pressuring Ms. Currie to agree with an inaccurate version of facts about Ms. Lewinsky. The Managers claim that "the President essentially admitted to making these statements when he knew they were not true." House Br. at 47. That is totally false. The President admitted nothing of the sort and the Managers cite nothing in support. The President has adamantly denied that he had any intention to influence Ms. Currie's recollection of events or her testimony in any manner. The absence of any such intention is further fortified by the undisputed factual record establishing that to the President's knowledge, Ms. Currie was neither an actual nor contemplated witness in the *Jones* litigation at

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statement "there is no sex of any kind" ("It depends on what the meaning of the word 'is' is." App. at 510), the Committee Report claims that such parsing contradicts the President's claim that he was not paying close attention to the exchange. But contrary to the Committee Report's suggestion, the President's response to this question did not purport to describe the President's contemporaneous thinking at the deposition, but rather only in retrospect whether he agreed with the questioner that it was "an utterly false statement." *Id*. The President later emphasized that he "wasn't trying to give . . . a cute answer" in his earlier explanation, but rather only that the average person thinking in the present tense would likely consider that Mr. Bennett's statement was accurate since the relationship had ended long ago. App. at 513..

the time of the conversation. And critically, Ms. Currie testified that, during the conversation, she did not perceive any pressure "whatsoever" to agree with any statement made by the President.

The President's actions could not as a matter of law support this allegation. To obstruct a proceeding or tamper with a witness, there must be both a known proceeding and a known witness. In the proceeding that the President certainly knew about -- the *Jones* case -- Ms. Currie was neither an actual nor prospective witness. As for the only proceeding in which Ms. Currie ultimately became a witness -- the OIC investigation -- no one asserts the President could have known it existed at that time.

At the time of the January 18 conversation,[109] Ms. Currie was not a witness in the *Jones* case, as even Mr. Starr acknowledged: "The evidence is not that she was on the witness list, and we have never said that she was." Transcript of November 19, 1998 Testimony at 192.

Nor was there any reason to suspect Ms. Currie would play any role in the *Jones* case. The discovery period was, at the time of this conversation, in its final days, and a deposition of Ms. Currie scheduled and completed within that deadline would have been highly unlikely.

Just as the President could not have intended to influence the testimony of "witness" Betty Currie because she was neither an actual nor a prospective witness, so too is it equally clear that the President never pressured Ms. Currie to alter her recollection. Such lack of real or perceived pressure also fatally undercuts this charge. Despite the prosecutor's best efforts

[109] Ms. Currie remembers a second conversation similar in substance a few days after the January 18 discussion, but still in advance of the public disclosure of this matter on January 21, 1998. Supp. at 561 (Currie GJ 1/27/98).

to coax Ms. Currie into saying she was pressured to agree with the President's statements, Ms. Currie adamantly denied any such pressure. As she testified:

> 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.
>
> * * *
>
> 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.

Supp. at 668 (Currie GJ 7/22/98). Ms. Currie explained that she felt no pressure because she basically agreed with the President's statements:

> Q: You testified with respect to the statements as the President made them, and, in particular, the four statements that we've already discussed. You felt at the time that they were technically accurate? Is that a fair assessment of your testimony?
>
> A: That's a fair assessment.

Q: But you suggested that at the time. Have you changed your opinion about it in retrospect?

A: I have not changed my opinion, no.

Supp. at 667 (Currie GJ 7/22/98); *see also* Supp. at 534 (Currie FBI 302 1/24/98) ("Currie advised that she responded "right" to each of the statements because as far as she knew, the statements were basically right."); Supp. at 665 (Currie GJ 7/22/98) ("I said 'Right' to him because I thought they were correct, 'Right, you were never really alone with Monica, right'").

What, then, to make of this conversation if there was no effort to influence Ms. Currie's testimony? Well, to understand fully the dynamic, one must remove the memory of all that has transpired since January 21 and place oneself in the President's position after the *Jones* deposition. The President had just faced unexpectedly detailed questions about Ms. Lewinsky. The questions addressed, at times, minute details and at other times contained bizarre inaccuracies about the relationship. As the President candidly admitted in his grand jury testimony, he had long thought the day would come when his relationship with Ms. Lewinsky would become public:

> "I formed an opinion early in 1996, once I got into this unfortunate and wrong conduct, that when it stopped, which I knew I'd have to do and which I should have done long before I did, <u>that she would talk about it</u>. Not because Monica Lewinsky is a bad person. She's basically a good girl. She's a good young woman with a good heart and a good mind. . . . But I knew that the minute there was no longer any contact, <u>she would talk about this</u>. She would have to. She couldn't help it. It was, it was part of her psyche.

App. at 575-76 (emphasis added). Now, with the questioning about Ms. Lewinsky in the *Jones* case and the publication of the first internet report article about Ms. Lewinsky, the President knew that a media storm was about to erupt. And erupt it did.

So it was hardly surprising that the President reached out to Ms. Currie at this time. He was trying to gather all available information and assess the political and personal consequences that this revelation would soon have. Though he did not confide fully in Ms. Currie, he knew Ms. Currie was Ms. Lewinsky's main contact and thus could have additional relevant information to help him assess and respond to the impending media scrutiny. As the President 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.

App. at 593. And further, "[W]hat I was trying to determine was whether my recollection was right and that she was always in the office complex when Monica was there. . . . I thought what would happen is that it would break in the press, and I was trying to get the facts down." App. at 507-08 (emphasis added). As the President concluded: "I was not trying to get Betty Currie to say something that was untruthful. I was trying to get as much information as quickly as I could." App. at 508.

Ms. Currie's grand jury testimony confirms the President's "agitated" state of mind and information-gathering purpose for the discussion. She testified that the President appeared, in her words, to be "shocked or surprised that this was an issue, and he was just talking." Supp. at 668 (Currie GJ 7/22/98). She described the President's remarks as "both statements and questions at the same time." Supp. at 534 (Currie FBI 302 1/24/98).

Finally, the inference that the President intended to influence Ms. Currie's testimony before she ever became a witness is firmly undercut by the advice the President gave to her when she ultimately did become a witness in the OIC investigation:

> And then I remember when I knew she was going to have to testify to the grand jury, and I, I felt terrible because she had been through this loss of her sister, this horrible accident Christmas that killed her brother, and her mother was in the hospital. I was trying to do -- to make her understand that I didn't want her to, to be untruthful to the grand jury. And if her memory was different than mine, it was fine, just go in there and tell them what she thought. So, that's all I remember.

App. at 593; *see also* App. at 508 ("I think Ms. Currie would also testify that I explicitly told her, once I realized you were involved in the Jones case -- you, the Office of Independent Counsel -- and that she might have to be called as a witness, that she should just go in there and tell the truth, tell what she knew, and be perfectly truthful.").[110]

In sum, neither the testimony of Ms. Currie nor that of the President -- the only two participants in this conversation -- supports the inference that the conversation had an insidious purpose. The undisputed evidence shows that Ms. Currie was neither an actual nor contemplated witness in the *Jones* case. And when Ms. Currie did ultimately become a witness in the Starr investigation, the President told her to tell the truth, which she did.

7. The President denies that he obstructed justice when he relayed allegedly "false and misleading statements" to his aides

This final allegation of Article II should be rejected out of hand. The President has admitted misleading his family, his staff, and the Nation about his relationship with Ms. Lewinsky, and he has expressed his profound regret for such conduct. But this Article asserts that the President should be impeached and removed from office because he failed to be candid with his friends and aides about the nature of his relationship with Ms. Lewinsky. These

[110] Only groundless speculation and unfounded inferences support the Committee Report's mirror allegation of Article I (4) that the President lied to the grand jury when he described his motivation in discussing these matters with Ms. Currie. That allegation should be rejected for the same reasons discussed more fully in the text of this section.

allegedly impeachable denials took place in the immediate aftermath of the Lewinsky publicity -- at the very time the President was denying any improper relationship with Ms. Lewinsky in nearly identical terms on national television. Having made this announcement to the whole country on television, it is simply absurd to believe that he was somehow attempting corruptly to influence the testimony of aides when he told them virtually the same thing at the same time.[111] Rather, the evidence demonstrates that the President spoke with these individuals regarding the allegations because of the longstanding professional and personal relationships he shared with them and the corresponding responsibility he felt to address their concerns once the allegations were aired. The Managers point to no evidence -- for there is none -- that the President spoke to these individuals for any other reason, and certainly not that he spoke with them intending to obstruct any proceeding.[112] They simply assert that since he knew there was an investigation, his intent had to be that they relate his remarks to the investigators and grand jurors. House Br. at 80.

However, there is no allegation that the President attempted to influence these aides' testimony about their own personal knowledge or observations. Nor is there any evidence that the President knew any of these aides would ultimately be witnesses in the grand jury when he spoke with them. None was under subpoena at the time the denials took place and none had any independent knowledge of any sexual activity between the President and Ms. Lewinsky.

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[111] As the Supreme Court has held, to constitute obstruction of justice such actions must be taken "with an intent to influence judicial or grand jury proceedings." *United States v. Aguilar*, 515 U.S. 592, 599 (1995).

[112] The Committee Report's allegation under Article I (4) that the President committed perjury before the grand jury when, in the course of admitting that he misled his close

Indeed, the only evidence these witnesses could offer on this score was the hearsay repetition of the same public denials that the members of the grand jury likely heard on their home television sets. Under the strained theory of this article, every person who heard the President's public denial could have been called to the grand jury to create still additional obstructions of justice.

To bolster this otherwise unsupportable charge, the Managers point to an excerpt of the President's testimony wherein he acknowledged that, to the extent he shared with anyone any details of the facts of his relationship with Ms. Lewinsky, they could conceivably be called before the grand jury -- which for the sake of his friends the President wanted to avoid:

> "I think I was quite careful what I said after [January 21]. I may have said something to all of these people to that effect [denying an improper relationship], but I'll also -- whenever anybody asked me any details, I said, look, I don't want you to be a witness or I turn you into a witness or give you information that could get you in trouble. I just wouldn't talk. I, by and large, didn't talk to people about this."

App. at 647. The point was not that the President believed these people would be witnesses and so decided to mislead them, but rather that he decided to provide as little information as possible (consistent with his perceived obligation to address their legitimate concerns) in order to keep them from becoming witnesses solely because of what he told them.

In conclusion, this Article fails as a matter of law and as a matter of common sense. It should be soundly rejected.

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aides, he stated that he endeavored to say to his aides "things that were true," App. at 557-60, without disclosing the full nature of the relationship is simply bizarre.

VI. THE STRUCTURAL DEFICIENCIES OF THE ARTICLES PRECLUDE A CONSTITUTIONALLY SOUND VOTE

The Constitution prescribes a strict and exacting standard for the removal of a popularly elected President. Because each of the two articles charges multiple unspecified wrongs, each is unconstitutionally flawed in two independent respects.

First, by charging multiple wrongs in one article, the House of Representatives has made it impossible for the Senate to comply with the Constitutional mandate that any conviction be by the concurrence of two-thirds of the members. Since Senate Rules require that an entire article be voted as a unit, sixty-seven Senators could conceivably vote to convict while in wide disagreement as to the alleged wrong committed -- for example, they could completely disagree on what statement they believe is false -- in direct violation of the Constitutional requirements of "Concurrence" and due process.

Second, by charging perjury without identifying a single allegedly perjurious statement, and charging obstruction of justice without identifying a single allegedly obstructive action by the President, the House of Representatives has failed to inform the Senate either of the statements it agreed were perjurious (if it agreed), or of the actual conduct by the President that it agreed constituted obstruction of justice (again, if it agreed). The result is that the President does not have the most basic notice of the charges against him required by due process and fundamental fairness. He is not in a position to defend against anything other than a moving target. The guesswork involved even in identifying the charges to be addressed in this Trial Memorandum highlights just how flawed the articles are.[113]

[113] The House Managers cannot constitutionally unbundle the charges in the articles or provide the missing specifics. This is because the Constitution provides that only the House

of Representatives can amend articles of impeachment, and judicial precedent demonstrates that unduly vague indictments cannot be cured by a prosecutor providing a bill of particulars. Only the charging body -- here, the House -- can particularize an impermissibly vague charge.

Indeed, Senate precedent confirms that the entire House must grant particulars when articles of impeachment are not sufficiently specific for a fair trial. During the 1933 impeachment trial of Judge Harold Louderback, counsel for the Judge filed a motion to make the original Article V, the omnibus or "catchall" article, more definite. 77 Cong. Rec. 1852, 1854 (1933). The House Managers unanimously consented to the motion, which they considered to be akin to a motion for a bill of particulars, and the full House amended Article V to provide the requested specifics. *Id*. Thereafter, the Clerk of the House informed the Senate that the House had adopted an amendment to Article V. *Id*. Judge Louderback was then tried on the amended article. Judge Louderback was subsequently acquitted on all five articles. Impeachment of Richard M. Nixon, President of the United States, Report by Staff of the Impeachment Inquiry, House Comm. on the Judiciary, 93d Cong., 2d Sess., Appendix B at 55 (Feb. 1974).

The power to define and approve articles of impeachment is vested by the Constitution exclusively in the House of Representatives. U.S. Const. Art I, § 2, cl. 5. It follows that any alteration of an Article of Impeachment can be performed only by the House. The House cannot delegate (and has not delegated) to the Managers the authority to amend or alter the Articles, and Senate precedent demonstrates that only the House (not the Managers unilaterally) can effect an amendment to articles of impeachment.

Case law is consistent with this precedent. When indictments are unconstitutionally vague, they cannot be cured by a prosecutor's provision of a bill of particulars, because only the charging body can elaborate upon vague charges. As the Supreme Court noted in *Russell v. United States*, 369 U.S. 749, 771 (1962):

> It is argued that any deficiency in the indictments in these cases could have been cured by bills of particulars. But it is a settled rule that a bill of particulars cannot save an invalid indictment . . . To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. This underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury . . . .

See also Stirone v. United States, 361 U.S. 212, 216 (1960) quoting *Ex Parte Bain*, 121 U.S. 1 (1887) ("If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the

The result is a pair of articles whose structure does not permit a constitutionally sound vote to convict. If they were counts in an indictment, these articles would not survive a motion to dismiss. Under the unique circumstances of an impeachment trial, they should fail.

A. The Articles Are Both Unfairly Complex and Lacking in Specificity

A cursory review of the articles demonstrates that they each allege multiple and unspecified acts of wrongdoing.

1. The Structure of Article I

Article I accuses the President of numerous different wrongful actions. The introductory paragraph charges the President with (i) violating his constitutional oath faithfully to execute his office and defend the Constitution; (ii) violating his constitutional duty to take care that the laws be faithfully executed; (iii) willfully corrupting and manipulating the judicial process; and (iv) impeding the administration of justice.

The second paragraph charges the President with (a) perjurious, (b) false, and (c) misleading testimony to the grand jury concerning "one or more" of four different subject areas:

> (1) the nature and details of his relationship with a subordinate government employee;
>
> (2) prior perjurious, false and misleading testimony he gave in a Federal civil rights action brought against him;
>
> (3) prior false and misleading statements he allowed his attorney to make to a federal judge in that action;
>
> (4) his corrupt efforts to influence the testimony of witnesses and to impede the discovery of evidence in that civil rights action.

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common law attaches to an indictment by a grand jury . . . may be frittered away until its value is almost destroyed.").

The third paragraph alleges that, as a consequence of the foregoing, the President has, to the manifest injury of the people of the United States:

- undermined the integrity of his office;
- brought disrepute on the Presidency;
- betrayed his trust as President; and
- acted in a manner subversive of the rule of law and justice.

It is imperative to note that although Article I alleges "perjurious, false and misleading" testimony concerning "one or more" of four general subject areas, it does not identify the particular sworn statements by the President that were allegedly "perjurious," (and therefore potentially illegal), or "false" or "misleading" (and therefore not unlawful). In fact, contrary to the most basic rules of fairness and due process, Article I does not identify a single specific statement that is at issue.

In sum, Article I appears to charge the President with four general forms of wrongdoing (violations of two oaths, manipulation of legal process, impeding justice), involving three (perjurious, false, misleading) distinct types of statements, concerning different subjects (relationship to Ms. Lewinsky, prior deposition testimony, prior statements of his attorney, obstruction of justice),[114] resulting in four species of harms either to the Presidency (undermining its integrity, bringing it into disrepute) or to the people (acting in a manner subversive of the rule of law and to the manifest injury of the people). And it alleges all of this without identifying a single, specific perjurious, false or misleading statement.

[114] It appears that each of these topic areas includes various, unspecified allegedly perjurious, false and misleading statements.

Absent a clear statement of which statements are alleged to have been perjurious, and which specific acts are alleged to have been undertaken with the purpose of obstructing the administration of justice, it is impossible to prepare a defense. It is a fundamental tenet of our jurisprudence that an accused must be afforded notice of the specific charges against which he must defend. Neither the Referral of the Office of the Independent Counsel, nor the Committee Report of the Judiciary Committee, nor the House Managers' Trial Memorandum was adopted by the House, and none of them can provide the necessary particulars. It is impossible to know whether the different statements and acts charged in the Referral, or the Report, or the Trial Memorandum, or all, or none, are what the House had in mind when it passed the Articles.

2. The Structure of Article II

Article II accuses the President of a variety of wrongful acts. The introductory paragraph charges the President with (i) violating his constitutional oath faithfully to execute his office and defend the Constitution and (ii) violating his constitutional duty to take care that the laws be faithfully executed by (iii) preventing, obstructing and impeding the administration of justice by engaging (personally and through subordinates and agents) in a scheme designed to delay impede, cover up, and conceal the existence of evidence and testimony related to a Federal civil rights action.

The second paragraph specifies the various ways in which the violations in the first paragraph are said to have occurred. It states that the harm was effectuated by "means" that are not expressly defined or delimited, but rather are said to include "one or more" of seven "acts" attributed to the President:

(1) corruptly encouraging a witness to execute a perjurious, false and misleading affidavit;

(2) corruptly encouraging a witness to give perjurious, false and misleading testimony if called to testify;

(3) corruptly engaging in, encouraging or supporting a scheme to conceal evidence;

(4) intensifying and succeeding in an effort to secure job assistance to a witness in order to corruptly prevent the truthful testimony of that witness at a time when that witness's truthful testimony would have been harmful;

(5) allowing his attorney to make false and misleading statements to a federal judge in order to prevent relevant questioning;

(6) relating a false and misleading account of events to a potential witness in a civil rights action in order to corruptly influence the testimony of that person;

(7) making false and misleading statements to potential witnesses in a Federal grand jury proceeding in order to corruptly influence their testimony and causing the grand jury to receive false and misleading information.

The third paragraph alleges that, as a result of the foregoing, the President has, to the manifest injury of the people of the United States:

- undermined the integrity of his office;
- brought disrepute on the Presidency;
- betrayed his trust as President; and
- acted in a manner subversive of the rule of law and justice.

As with the first article, Article II does not set forth a single specific act alleged to have been performed by the President. Instead, it alleges general "encourage[ment]" to execute a false affidavit, provide misleading testimony, and conceal subpoenaed evidence. This Article also includes general allegations that the President undertook to "corruptly influence" and/or "corruptly prevent" the testimony of potential witnesses and that he "engaged in . . . or supported" a scheme to conceal evidence. Again, the Senate and the President have been left to guess at the charges (if any) actually agreed upon by the House.

B. Conviction on These Articles Would Violate the Constitutional Requirement That Two-Thirds of the Senate Reach Agreement that Specific Wrongdoing Has Been Proven

1. The Articles Bundle Together Disparate Allegations in Violation of the Constitution's Requirements of Concurrence and Due Process

a. The Articles Violate the Constitution's Two-Thirds Concurrence Requirement

Article I, section 3 of the Constitution provides that "no person shall be convicted [on articles of impeachment] without the Concurrence of two thirds of the Members present." U.S. Const. Art. I, § 3, cl. 6. The Constitution's requirement is plain. There must be "Concurrence," which is to say genuine, reliably manifested, agreement, among those voting to convict. Both the committing of this task to the Senate and the two-thirds requirement are important constitutional safeguards reflecting the Framers' intent that conviction not come easily. Conviction demands real and objectively verifiable agreement among a substantial supermajority.

Indeed, the two-thirds supermajority requirement is a crucial constitutional safeguard. Supermajority provisions are constitutional exceptions[115] to the presumption that decisions by legislative bodies shall be made by majority rule.[116] These exceptions serve exceptional ends. The two-thirds concurrence rule serves the indispensable purpose of protecting the people who chose the President by election. By giving a "veto" to a minority of

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[115] *See, e.g.*, U.S. Const. Art. I, § 7, cl. 2 (two thirds vote required to override Presidential veto); U.S. Const. Art. II, § 2, cl. 2 (two thirds required for ratification of treaties); U.S. Const. Art. V (two thirds required to propose constitutional amendments); U.S. Const. Art. I, § 5, cl. 2 (two thirds required to expel members of Congress).

[116] Madison referred to majority voting as "the fundamental principal of free government." *Federalist No. 58* at 248 (G. Wills ed. 1982).

Senators, the Framers sought to ensure the rights of an electoral majority -- and to safeguard the people in their choice of Executive. Only the Senate and only the requirement of a two-thirds concurrence could provide that assurance.

The "Concurrence" required is agreement that the charges stated in specific articles have in fact been proved, and the language of those articles is therefore critical. Since the House of Representatives is vested with the "sole Power of Impeachment," U.S. Const. Art. I, § 2, cl. 5, the form of those articles cannot be altered by the Senate. And Rule XXIII of The Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials ("Senate Rules") provides that "[a]n article of impeachment shall not be divisible for the purpose of voting thereon at any time during the trial."

It follows that each Senator may vote on an article only in its totality. By the express terms of Article I, a Senator may vote for impeachment if he or she finds that there was perjurious, false and misleading testimony in any "one or more" of four topic areas. But that prospect creates the very real possibility that "conviction" could occur even though fewer than two-thirds of the Senators actually agree that any particular false statement was made.[117] Put differently, the article's structure presents the possibility that the President could be convicted on Article I even though he would have been acquitted if separate votes were taken on individual allegedly perjurious statements. To illustrate the point, consider that it would be possible for conviction to result even with as few as seventeen Senators agreeing that any single statement was perjurious, because seventeen votes for one statement in each of four categories would yield

[117] There remains the additional problem that the articles allege not specific perjurious statements, but perjury within a topic area. Perjury as to a category (rather than as to specific statements) is an incomprehensible notion.

68 votes, one more than necessary to convict. The problem is even worse if Senators agree that there is a single perjurious statement but completely disagree as to which statement within the 176 pages of transcript they believe is perjurious. Such an outcome would plainly violate the Constitution's requirement that there be conviction only when a two-thirds majority agrees.

The very same flaw renders Article II unconstitutional as well. That Article alleges a scheme of wrongdoing effected through "means" including "one or more" of seven factually and logically discrete "acts." That compound structure is fraught with the potential to confuse. For example, the Article alleges both concealment of gifts on December 28, 1997, and false statements to aides in late January 1998. These two allegations involve completely different types of behavior. They are alleged to have occurred in different months. They involved different persons. And they are alleged to have obstructed justice in different legal proceedings. In light of Senate Rule XXIII's prohibition on dividing articles, the combination of such patently different types of alleged wrongdoing in a single article creates the manifest possibility that votes for conviction on this article would not reflect any two-thirds agreement whatsoever.

The extraordinary problem posed by such compound articles is well-recognized and was illustrated by the proceedings in the impeachment of Judge Walter Nixon. Article III of the Nixon proceedings, like the articles here, was phrased in the disjunctive and charged multiple false statements as grounds for impeachment. Judge Nixon moved to dismiss Article III on a number of grounds, including on the basis of its compound structure.[118] Although that motion

[118] *See* Report of the Senate Impeachment Trial Committee on the Articles of Impeachment Against Judge Walter L. Nixon, Jr., Hearings Before the Senate Impeachment Trial Committee, 101st Cong., 1st Sess. at 257, 281-84 (1989).

was defeated in the full Senate by a vote of 34-63,[119] the 34 Senators who voted to dismiss were a sufficient number to block conviction on Article III.

Judge Nixon (although convicted on the first two articles) was ultimately acquitted on Article III by a vote of 57 (guilty) to 40 (not guilty).[120] Senator Biden, who voted not guilty on the article, stated that the structure of the article made it "possible . . . for Judge Nixon to be convicted under article III even though two-thirds of the members present did not agree that he made any one of the false statements."[121] Senator Murkowski concurred: "I don't appreciate the omnibus nature of article III, and I agree with the argument that the article could easily be used to convict Judge Nixon by less than the super majority vote required by the Constitution." *Id.* at 464.[122] And Senator Dole stated that "Article III is redundant, complex and unnecessarily confusing. . . . It alleges that Judge Nixon committed five different offenses in connection with each of fourteen separate events, a total of seventy charges. . . .[I]t was virtually impossible for Judge Nixon and his attorneys to prepare an adequate defense."[123]

In his written statement filed after the voting was completed, Senator Kohl pointed out the dangers posed by combining multiple accusations in a single article:

> Article III is phrased in the disjunctive. It says that Judge Nixon concealed his conversations through "one or more" of 14 false statements.

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[119] *Judge Nixon Proceedings* at 430-32.

[120] *Id.* at 435-36.

[121] Statement of Senator Joseph R. Biden, Jr., *id.* at 459.

[122] *See also* Statement of Senator Bailey, Impeachment of Judge Harold Louderback, 77 Cong. Rec. 4238 (May 26, 1933) (respondent should be tried on individual articles and not on all of them assembled into one article).

[123] Statement of Senator Robert Dole, *Judge Nixon Proceedings* at 457.

> This wording presents a variety of problems. First of all, it means that Judge Nixon can be convicted even if two thirds of the Senate does not agree on which of his particular statements were false . . . . .
>
> The House is telling us that it's OK to convict Judge Nixon on Article III even if we have different visions of what he did wrong. But that's not fair to Judge Nixon, to the Senate, or to the American people. Let's say we do convict on Article III. The American people -- to say nothing of history -- would never know exactly which of Judge Nixon's statements we regarded as untrue. They'd have to guess. What's more, this ambiguity would prevent us from being totally accountable to the voters for our decision.[124]

As noted, the Senate acquitted Judge Nixon on the omnibus article -- very possibly because of the constitutional and related due process and fairness concerns articulated by Senator Kohl and others.[125]

The constitutional problems identified by those Senators are significant when a single federal judge (one of roughly 1000) is impeached. But when the Chief Executive and sole head of one entire branch of our government stands accused, those infirmities are momentous. Fairness and the appearance of fairness require that the basis for any action this body might take be clear and specific. The Constitution clearly forbids conviction unless two thirds of the Senate concurs in a judgment. Any such judgment would be meaningless in the absence of a finding that specific, identifiable, wrongful conduct has in fact occurred. No such conclusion is possible under either article as drafted.

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[124] Statement of Senator Herbert H. Kohl, *id.* at 449 (emphasis added). Senator Kohl did not believe that the constitutional question concerning two-thirds concurrence had to be answered in the Judge Nixon proceedings because he believed that the bundling problem created an unfairness (in effect, a due process violation) that precluded conviction. *Id.*

[125] *See also* Constitutional Grounds for Presidential Impeachment: Modern Precedents, Report by the Staff of the Impeachment Inquiry, Comm. on Judiciary, 105th Cong., 2d Sess. at 12 (1998) (discussing Sen. Kohl's position).

b. Conviction on the Articles Would Violate Due Process Protections that Forbid Compound Charges in a Single Accusation

Even apart from the Constitution's clear requirement of "Concurrence" in Article I, section 3, the fundamental principles of fairness and due process that underlie our Constitution and permeate our procedural and substantive law compel the same outcome. In particular, the requirement that there be genuine agreement by the deciding body before an accused is denied life, liberty or property is a cornerstone of our jurisprudence.[126]

While in the federal criminal context due process requires that there be genuine agreement among the entire jury, *see United States v. Fawley*, 137 F.3d 458, 470 (7th Cir. 1998),

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[126] Judicial precedent is persuasive here on these due process and fairness questions. Indeed, in prior impeachment trials, the Senate has been guided by decisions of the courts, because they reflect cumulative wisdom concerning fairness and the search for justice. During the impeachment trial of Judge Alcee L. Hastings, Senator Specter stated:

> [T]he impeachment process [] relies in significant measure on decisions of the court and the opinion of judges . . . [T]he decisions and interpretations of the courts should be highly instructive to us. In our system of Government, it has been the courts that through the years have been called upon to construe, define and apply the provisions of our Constitution. Their decisions reflect our values and our evolving notions of justice . . . Although we are a branch of Government coequal with the judiciary, and by the Constitution vested with the "sole" power to try impeachments, I believe that the words and reasoning of judges who have struggled with the meaning and application of the Constitution and its provisions ought to be given great heed because that jurisprudence embodies the values of fairness and justice that ought to be the polestar of our own determinations.

S. Doc. 101-18, 101st Cong., 1st Sess. at 740-41. As Senator Specter observed, judicial rules have been developed and refined over the years to assure that court proceedings are fair, and that an accused is assured the necessary tools to prepare a proper defense, including proper notice.

Schad v. Arizona, 501 U.S. 624 (1991) (plurality), in the impeachment context, that requirement of genuine agreement must be expressed by a two-thirds supermajority. But the underlying due process principle is the same in both settings. This basic principle is bottomed on two fundamental notions: (1) that there be genuine agreement -- mutuality of understanding -- among those voting to convict, and (2) that the unanimous verdict be understood (by the accused and by the public) to have been the product of genuine agreement.

This principle is given shape in the criminal law in the well-recognized prohibition on "duplicitous" charges. "Duplicity is the joining in a single count of two or more distinct and separate offenses." *United States v. UCO Oil*, 546 F.2d 833, 835 (9th Cir. 1976). In the law of criminal pleading, a single count that charges two or more separate offenses is duplicitous. *See United States v. Parker*, 991 F.2d 1493, 1497-98 (9th Cir. 1993); *United States v. Hawkes*, 753 F.2d 355, 357 (4th Cir. 1985).[127] A duplicitous charge in an indictment violates the due process principle that "the requisite specificity of the charge may not be compromised by the joining of separate offenses." *Schad v. Arizona*, 501 U.S. 624, 633 (1991) (plurality).

More specifically, a duplicitous charge poses the acute danger of conviction by a less-than-unanimous jury; some jurors may find the defendant guilty of one charge but not guilty of a second, while other jurors find him guilty of a second charge but not the first. *See United States v. Saleh*, 875 F.2d 535, 537 (6th Cir. 1989); *United States v. Stanley*, 597 F.2d 866, 871

[127] *See also* Federal Rules of Criminal Procedure, Rule 8(a): "Two or more offenses may be charge in the same indictment or information in a separate count for each offense if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." (emphasis added).

(4th Cir. 1979); *Bins v. United States*, 331 F.2d 390, 393 (5th Cir. 1964).[128] Our federal system of justice simply does not permit conviction by less than unanimous agreement concerning a single, identified charge. *See United States v. Fawley*, 137 F.3d 471 (7th Cir. 1998) (conviction requires unanimous agreement as to particular statements); *United States v. Holley*, 942 F.2d 916, 929 (5th Cir. 1991) (reversal required where no instruction was given to ensure that all jurors concur in conclusion that at least one particular statement was false); *see also United States v. Gipson*, 553 F.2d 453, 458-59 (5th Cir. 1977) (right to unanimous verdict violated by instruction authorizing conviction if jury found defendant committed any one of six acts proscribed by statute).[129] The protection against conviction by less than full agreement by the factfinders is enshrined in Rule 31(a) of the Federal Rules of Criminal Procedure which dictates that "[t]he verdict shall be unanimous."[130]

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[128] Each of the four categories charged here actually comprises multiple allegedly perjurious statements. Thus, the dangers of duplicitousness are increased exponentially.

[129] The Supreme Court has stated that "[u]nanimity in jury verdicts is required where the Sixth and Seventh Amendments apply." *Andres v. United States*, 333 U.S. 740, 748 (1948); *Apodaca v. Oregon*, 406 U.S. 404 (1972) (same).

[130] That rule gives expression to a criminal defendant's due process right to a unanimous verdict. *See United States v. Fawley*, 137 F.2d 458, 4771 (7th Cir. 1988). Because the Constitution does not tolerate the risk of a less than unanimous verdict in the criminal setting, "where the complexity of a case or other factors create the potential for confusion as to the legal theory or factual basis which sustains a defendant's conviction, a specific unanimity instruction is required." *United States v. Jackson*, 879 F.2d 85, 88 (3d Cir. 1989) (citing *United States v. Beros*, 833 F.2d 455, 460 (3d Cir. 1987)). Such instructions are required where the government charges several criminal acts, any of which alone could have supported the offense charged, because of the need to provide sufficient guidance to assure that all members of the jury were unanimous on the same act or acts of illegality. *Id.* at 88. As the Seventh Circuit recently concluded in a case alleging multiple false statements, "the jury should have been advised that in order to have convicted [the defendant], they had to unanimously agree that a particular statement contained in the indictment was falsely made." *Fawley*, 137 F.2d at 470.

Thus, where the charging instrument alleges multiple types of wrongdoing, the unanimity requirement "means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principal factual elements underlying a specified offense." *United States v. Ferris*, 719 F.2d 1405, 1407 (9th Cir. 1983) (emphasis added). Accordingly, although there need not be unanimity as to every bit of underlying evidence, due process "does require unanimous agreement as to the nature of the defendant's violation, not simply that a violation has occurred." *McKoy v. North Carolina*, 494 U.S. 433, 449 n.5 (1990) (Blackmun, J., concurring). Such agreement is necessary to fulfill the demands of fairness and rationality that inform the requirement of due process. *See Schad*, 501 U.S. at 637.[131]

Where multiple accusations are combined in a single charge, neither the accused nor the factfinder can know precisely what that charge means. When the factfinding body cannot agree upon the meaning of the charge, it cannot reach genuine agreement that conviction is warranted. These structural deficiencies preclude a constitutionally sound vote on the articles.

[131] In our federal criminal process, a duplicitous pleading problem may sometimes be cured by instructions to the jury requiring unanimous agreement on a single statement, *see Fawley, supra*, but that option is not present here. Not only do the Senate Rules not provide for the equivalent of jury instructions, they expressly rule out the prospect of subdividing an article of impeachment for purposes of voting. *See* Senate Impeachment Rule XXIII. Nor is the duplicitousness problem presented here cured by any specific enumeration of elements necessary to be found by the factfinder. *See, e.g., Santarpio v. United States*, 560 F.2d 448 (1st Cir. 1977) (duplicitous charge harmless because indictments adequately set out the elements of the federal crime; appellants were not misled or prejudiced). Article I does not enumerate specific elements to be found by the factfinder. To the contrary, the Article combines multiple types of wrong, allegedly performed by different types of statements, the different types occurring in multiple subject matter areas, and all having a range of allegedly harmful effects.

C. Conviction on These Articles Would Violate Due Process Protections Prohibiting Vague and Nonspecific Accusations

1. The Law of Due Process Forbids Vague and Nonspecific Charges

Impermissibly vague indictments must be dismissed, because they "fail[] to sufficiently apprise the defendant 'of what he must be prepared to meet.'" *United States v. Russell*, 369 U.S. 749, 764 (1962) (internal quotation omitted). In *Russell*, the indictment at issue failed to specify the subject matter about which the defendant had allegedly refused to answer questions before a Congressional subcommittee. Instead, the indictment stated only that the questions to which the answers were refused "were pertinent to the question then under inquiry" by the Subcommittee. *Id*. at 752. The Court held that because the indictment did not provide sufficient specificity, it was unduly vague and therefore had to be dismissed. *Id*. at 773. The Supreme Court explained that dismissal is the only appropriate remedy for an unduly vague indictment, because only the charging body can elaborate upon vague charges:

> To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him. This underlying principle is reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury . . .

Id. at 771. *See also Stirone v. United States*, 361 U.S. 212, 216 (1960); *see also United States v. Lattimore*, 215 F.2d 847 (D.C. Cir. 1954) (perjury count too vague to be valid cannot be cured even by bill of particulars); *United States v. Tonelli*, 577 F.2d 194, 200 (3d Cir. 1978) (vacating perjury conviction where "the indictment . . . did not 'set forth the precise falsehood[s] alleged").

Under the relevant case law, the two exhibited Articles present paradigmatic examples of charges drafted too vaguely to enable the accused to meet the accusations fairly. More than a century ago, the Supreme Court stated that "[i]t is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species -- it must descend to particulars." *United States v. Cruikshank*, 92 U.S. 542, 558 (1875). The Court has more recently emphasized the fundamental "vice" of nonspecific indictments: that they "fail[] to sufficiently apprise the defendant 'of what he must be prepared to meet.'" *Russell*, 369 U.S. at 764.

The Supreme Court emphasized in *Russell* that specificity is important not only for the defendant, who needs particulars to prepare a defense, but also for the decision-maker, "so it may decide whether [the facts] are sufficient in law to support a conviction, if one should be had." *Id*. at 768 (internal citation and quotation marks omitted). An unspecific indictment creates a "moving target" for the defendant exposing the defendant to a risk of surprise through a change in the prosecutor's theory. "It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise and conjecture." *Russell*, 369 U.S. at 766. Ultimately, an unspecific indictment creates a risk that "a defendant could . . . be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." *Id*. at 770.

2. The Allegations of Both Articles Are Unconstitutionally Vague

Article I alleges that in his August 17, 1998 grand jury testimony, President Clinton provided "perjurious, false and misleading" testimony to the grand jury concerning "one or more" of four subject areas. Article I does not, however, set forth a single specific statement by the President upon which its various allegations are predicated. The Article haphazardly intermingles alleged criminal conduct with totally lawful conduct, and its abstract generalizations provide no guidance as to actual alleged perjurious statements.

Article I thus violates the most fundamental requirement of perjury indictments. It is fatally vague in three distinct respects: (1) it does not identify <u>any</u> statements that form the basis of its allegations,[132] (2) it therefore does not specify which of the President's statements to the grand jury were allegedly "perjurious," which were allegedly "false," and which were allegedly "misleading," and (3) it does not even specify the <u>subject</u> <u>matter</u> of any alleged perjurious statement.

The first defect is fatal, because it is axiomatic that if the precise perjurious statements are not identified in the indictment, a defendant cannot possibly prepare his defense properly. *See, e.g.*, *Slawik*, 548 F.2d 75, 83-84 (3d Cir. 1977). Indeed, in past impeachment trials in the Senate where articles of impeachment alleged the making of false statements, the false statements were specified in the Articles. For example, in the impeachment trial of Alcee

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[132] One of the cardinal rules of perjury cases is that "[a] conviction under 18 U.S.C. § 1623 may not stand where the indictment fails to set forth the precise falsehood alleged and the factual basis of its falsity with sufficient clarity to permit a jury to determine its verity and to allow meaningful judicial review of the materiality of those falsehoods." *United States v. Slawik*, 548 F.2d 75, 83-84 (3d Cir. 1977). Courts have vacated convictions for perjury in instances where "the indictment . . . did not 'set forth the precise falsehood(s) alleged." *Tonelli*, 577 F.2d at 200.

L. Hastings, Articles of Impeachment II-XIV specified the exact statements that formed the bases of the false statement allegations against Judge Hastings.[133] Similarly, in the impeachment trial of Walter L. Nixon, Jr., Articles of Impeachment I-III specified the exact statements that formed the bases of their false statement allegations.[134] In this case, Article I falls far short of specificity standards provided in previous impeachment trials in the Senate.

As to the second vagueness defect, there is a significant legal difference between, on the one hand, statements under oath which are "perjurious," and those, on the other hand, which are simply "false" or "misleading." Only the former could form the basis of a criminal charge. The Supreme Court has emphatically held that "misleading" statements alone cannot form the basis of a perjury charge. In *Bronston v. United States*, 409 U.S. 352 (1973), the Court held that literally true statements are by definition non-perjurious, and "it is no answer to say that here the jury found that [the defendant] intended to mislead his examiner," since "[a] jury should not be permitted to engage in conjecture whether an unresponsive answer . . . was intended to mislead or divert the examiner." *Id.* at 358-60 (emphasis added). The Court emphasized that "the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner so long as the witness speaks the literal truth." *Id*. Thus, specification of the exact statements alleged to be perjurious is required, because "to hold

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[133] Proceedings of the United States Senate in the Impeachment Trial Alcee L. Hastings, 101st Cong., 1st. Sess., S. Doc. 101-18 at 4-7 (1989). *See, e.g., Id*. at 2 (Article II alleging that the false statement was "that Judge Hastings and William Borders, of Washington, D.C., never made any agreement to solicit a bribe from defendants in *United States v. Romano*, a case tried before Judge Hastings").

[134] Proceedings of the United States Senate in the Impeachment Trial of Walter L. Nixon, Jr., 101st Cong., 1st Sess., S. Doc. 101-22 at 430-32 (1989). *See, e.g., Id*. at 432 (Article

otherwise would permit the trial jury to inject its inferences into the grand jury's indictment, and would allow defendants to be convicted for immaterial falsehoods or for 'intent to mislead' or 'perjury by implication,' which Bronston specifically prohibited." *Slawik*, 538 F.2d at 83-84 (emphasis added). Thus, if the House meant that certain statements were misleading but literally truthful, they might be subject to a motion to dismiss on the ground that the offense was not impeachable.

The same is true for allegedly "false" answers, because it is clear that mere "false" answers given under oath, without more, are not criminal. 18 U.S.C. § 1623, the statute proscribing perjury before a federal grand jury, requires additional elements beyond falsity, including the defendant's specific intent to testify falsely and the statement's materiality to the proceeding. A defense to a perjury charge is therefore tied directly to the specific statement alleged to have been perjurious. Did the defendant know the particular answer was false? Was it material?[135]

I alleging that the false statement was "Forrest County District Attorney Paul Holmes never discussed the Drew Fairchild case with Judge Nixon.").

[135] Not surprisingly, courts have specifically held that because of these additional elements (the lack of which may undermine a perjury prosecution), a defendant must know exactly which statements are alleged to form the basis of a perjury indictment to test whether the requisite elements are present. *See, e.g., United States v. Lattimore*, 215 F.2d 847, 850 (D.C. Cir. 1954) ("The accused is entitled under the Constitution to be advised as to every element in respect to which it is necessary for him to prepare a defense"). For example, because of the intent requirement, one potential defense to a perjury prosecution is that the question to which the allegedly perjurious statement was addressed was fundamentally ambiguous, as courts have held that fundamentally ambiguous questions cannot as a matter of law produce perjurious answers. *See, e.g., Tonelli*, 577 F.2d at 199; *United States v. Wall*, 371 F.2d 398 (6th Cir. 1967). A separate defense to a perjury prosecution is that the statement alleged to have been perjurious was not material to the proceeding. Thus, "false" statements alone are not perjurious if they were not material to the proceeding. By not specifying which statements are alleged to be "false" or "misleading,'" Article I precludes the President from preparing a

Article I's third vagueness defect is that it does not specify the subject matter of the alleged perjurious statements. Instead, it simply alleges that the unspecified statements by the President to the grand jury were concerning "one or more" of four enumerated areas. The "one or more" language underscores the reality that the President -- and, critically, the Senate -- cannot possibly know what the House majority had in mind, since it may have failed even to agree on the subject matter of the alleged perjury. The paramount importance of this issue may be seen by reference to court decisions holding that a jury has to "unanimously agree that a particular statement contained in the indictment was falsely made." *United States v. Fawley*, 137 F.3d 458, 471 (7th Cir. 1998) (emphasis added); *see also* discussion of unanimity requirement in Section VI.B, *supra*.

Article II is also unconstitutionally vague. It alleges that the President "obstructed and impeded the administration of justice . . . in a course of conduct or scheme designed to delay, impede, cover up and conceal" unspecified evidence and testimony in the *Jones* case. It sets forth seven instances in which the President allegedly "encouraged" false testimony or the concealment of evidence, or "corruptly influenced" or "corruptly prevented"

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materiality defense, and it also fails to distinguish allegedly criminal conduct from purely lawful conduct. As one court explained,

> It is to be observed that . . . it is not sufficient to constitute the offense that the oath shall be merely false, but that it must be false in some 'material matter.' Applying that definition to the facts stated in either count of this indictment, and it would seem that there is an entire lack in any essential sense to disclose that the particulars as to which the oath is alleged to have been false were material in the essential sense required for purposes of an indictment for this offense.

United States v. Cameron, 282 F. 684, 692 (D. Ariz. 1922).

various other testimony, also unspecified. In fact, not only does Article II fail to identify a single specific act performed by the President in this alleged scheme to obstruct justice, it does not even identify the "potential witnesses" whose testimony the President allegedly sought to "corruptly influence."

The President cannot properly defend against Article II without knowing, at a minimum, which specific acts of obstruction and/or concealment he is alleged to have performed, and which "potential witnesses" he is alleged to have attempted to influence. For example, it is clear that, in order to violate the federal omnibus obstruction of justice statute, 18 U.S.C. § 1503, an accuser must prove that there was a pending judicial proceeding, that the defendant knew of the proceeding, and that the defendant acted "corruptly" with the specific intent to obstruct or interfere with the proceeding or due administration of justice. *See, e.g.*, *United States v. Bucey*, 876 F.2d 1297, 1314 (7th Cir. 1989); *United States v. Smith*, 729 F. Supp. 1380, 1383-84 (D.D.C. 1990). Without knowing which "potential witnesses" he is alleged to have attempted to influence, and the precise manner in which he is alleged to have attempted to obstruct justice, the President cannot prepare a defense that would address the elements of the offense with which he has been charged -- that he had no intent to obstruct, that there was no pending proceeding, or that the person involved was not a potential witness.

It follows that the requisite vote of two-thirds of the Senate required by the Constitution cannot possibly be obtained if there are no specific statements <u>whatsoever</u> alleged to be perjurious, false or misleading in Article I or no specific acts of obstruction alleged in Article II. Different Senators might decide that different statements or different acts were unlawful without any concurrence by two-thirds of the Senate as to any particular statement or act. Such a

scenario is antithetical to the Constitution's due process guarantee of notice of specific and definite charges and it threatens conviction upon vague and uncertain grounds. As currently framed, neither Article I nor Article II provides a sufficient basis for the President to prepare a defense to the unspecified charges upon which the Senate may vote, or an adequate basis for actual adjudication.

D. The Senate's Judgment Will Be Final and That Judgment Must Speak Clearly and Intelligibly.

An American impeachment trial is not a parliamentary inquiry into fitness for office. It is not a vote of no confidence. It is not a mechanism whereby a legislative majority may oust a President from a rival party on political grounds. To the contrary, because the President has a limited term of office and can be turned out in the course of ordinary electoral processes, a Presidential impeachment trial is a constitutional measure of last resort designed to protect the Republic.

This Senate is therefore vested with an extremely grave Constitutional task: a decision whether to remove the President for the protection of the people themselves. In the Senate's hands there rests not only the fate of one man, but the integrity of our Constitution and our democratic process.

Fidelity to the Constitution and fidelity to the electorate must converge in the impeachment trial vote. If the Senate is to give meaning to the Constitution's command, any vote on removal must be a vote on one or more specifically and separately identified "high Crimes and Misdemeanors," as set forth in properly drafted impeachment articles approved by the House. If the people are to have their twice-elected President removed by an act of the Senate, that act must be intelligible. It must be explainable and justifiable to the people who first chose

the President and then chose him again. The Senate must ensure that it has satisfied the Constitution's requirement of a genuine two-thirds concurrence that specific, identified wrongdoing has been proven. The Senate must also assure the people, through the sole collective act the Senate is required to take, that its decision has a readily discernible and unequivocal meaning.

As matters stand, the Senate will vote on two highly complex Articles of Impeachment. Its vote will not be shaped by narrowing instructions. Its rules preclude a vote on divisible parts of the articles. There will be no judicial review, no correction of error, and no possibility of retrial. The Senate's decision will be as conclusive as any known to our law -- judicially, politically, historically, and most literally, irrevocable.

Under such circumstances, the Senate's judgment must speak clearly and intelligibly. That cannot happen if the Senate votes for conviction on these articles. Their compound structure and lack of specificity make genuine agreement as to specific wrongs impossible, and those factors completely prevent the electorate from understanding why the Senate as a whole voted as it did. As formulated, these articles satisfy neither the plain requirement of the Constitution nor the rightful expectations of the American people. The articles cannot support a constitutionally sound vote for conviction.

VII. THE NEED FOR DISCOVERY

The Senate need not address the issue of discovery at this time, but because the issue may arise at a later date, it is appropriate to remark here on its present status. Senate Resolution 16 provides that the record for purposes of the presentation by the House Managers

and the President is the *public* record established in the House of Representatives.[136] Since this record was created by the House itself and is ostensibly the basis for the House's impeachment vote, and because this evidence has been publicly identified and available for scrutiny, comment, and rebuttal, it is both logical and fair that this be the basis for any action by the Senate. Moreover, Senate Resolution 16 explicitly prohibits the President and the House Managers from filing at this time any "motions to subpoena witnesses or to present any evidence not in the record."

In the event, however, that the Senate should later decide, pursuant to the provisions of Senate Resolution 16, to allow the House Managers to expand the record in some way, our position should be absolutely clear. At such time, the President would have an urgent need for the discovery of relevant evidence, because at no point in these proceedings has he been able to subpoena documents or summon and cross-examine witnesses. He would need to use the compulsory process authorized by Senate Impeachment Rules V and VI[137] to obtain

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[136] S. Res. 16 defined the record for the presentations as "those publicly available materials that have been submitted to or produced by the House Judiciary Committee, including transcripts of public hearings or mark-ups and any materials printed by the House of Representatives or House Judiciary Committee pursuant to House Resolutions 525 and 581."

[137] Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials (Senate Manual 99-2, as revised by S. Res. 479 (Aug. 16, 1986)). There is ample precedent for liberal discovery in Senate impeachment trials. For example, in the trial of Judge Alcee Hastings, the Senate issued numerous orders addressing a range of pretrial issues over several months including:

- requiring the parties to provide witness lists along with a description of the general nature of the testimony that was expected from each witness months in advance of the scheduled evidentiary hearing;

- requiring the House Managers to turn over exculpatory materials, certain prior statements of witnesses, and documents and other tangible evidence they intended to introduce into evidence;

documentary evidence and witness depositions. While the President has access to some of the grand jury transcripts and FBI interview memoranda of witnesses called by the OIC, the President's own lawyers were not entitled to be present when these witnesses were examined. The grand jury has historically been the engine of the prosecution, and it was used in that fashion in this case. The OIC sought discovery of evidence with the single goal of documenting facts that it believed were prejudicial to the President. It did not examine witnesses with a view toward establishing there was no justification for impeachment; it did not follow up obvious leads when they might result in evidence helpful to the President; and it did not seek out and document exculpatory evidence. It did not undertake to disclose exculpatory information it might have identified.

- requiring the production from the House Managers of other documents in the interest of allowing the Senate to develop "a record that fully illuminates the matters that it must consider in rendering a judgment;"
- setting a briefing schedule for stipulations of facts and documents;
- setting a number of pretrial conferences;
- designating a date for final pretrial statements; and
- permitting a number of pre-trial depositions.

Report of the Senate Impeachment Trial Committee on the Articles of Impeachment Against Judge Alcee L. Hastings, Hearings Before the Senate Impeachment Trial Committee, 101st Cong. 1st Sess. at 281, 286-87, 342-43, 606-07, 740.

The need for discovery in this case is in fact greater than in prior impeachment proceedings. In all other impeachment trials, there were either substantive investigations by the House or prior judicial proceedings in which the accused had a full opportunity to develop the evidentiary record and cross-examine witnesses. *See Id.* at 163-64 (pre-trial memorandum of Judge Hastings).

Nor did the House of Representatives afford the President any discovery mechanisms to secure evidence that might be helpful in his defense. Indeed, the House called no fact witnesses at all, and at the few depositions it conducted, counsel for the President were excluded. Moreover, the House made available only a selected portion of the evidence it received from the OIC. While it published five volumes of the OIC materials (two volumes of appendices and three volumes of supplements), it withheld a great amount of evidence, and it denied counsel for the President access to this material. It is unclear what the criterion was for selecting evidence to include in the published volumes, but there does not appear to have been an attempt to include all evidence that may have been relevant to the President's defense. The President has not had access to a great deal of evidence in the possession of (for example) the House of Representatives and the OIC which may be exculpatory or relevant to the credibility of witnesses on whom the OIC and the House Managers rely.

Should the Senate decide to authorize the House Managers to call witnesses or expand the record, the President would be faced with a critical need for the discovery of evidence useful to his defense -- evidence which would routinely be available to any civil litigant involved in a garden-variety automobile accident case. The House Managers have had in their possession or had access at the OIC to significant amounts of non-public evidence, and they have frequently stated their intention to make use of such evidence. Obviously, in order to defend against such tactics, counsel for the President are entitled to discovery and a fair opportunity to test the veracity and reliability of this "evidence," using compulsory process as necessary to obtain testimony and documents. Trial by surprise obviously has no place in the Senate of the

United States where the issue in the balance is the removal of the one political leader who, with the Vice-President, is elected by all the citizens of this country.[138]

The need for discovery does not turn on the number of witnesses the House Managers may be authorized to depose.[139] If the House Managers call a single witness, that will initiate a process that leaves the President potentially unprepared and unable to defend adequately without proper discovery. The sequence of discovery is critical. The President *first* needs to obtain and review relevant documentary evidence not now in his possession. He *then* needs to be able to depose potentially helpful witnesses, whose identity may only emerge from the documents and from the depositions themselves. Obviously, he also needs to depose potential witnesses identified by the House Managers. Only at *that* point will the President be able intelligently to designate his own trial witnesses. This is both a logical procedure and one which is the product of long experience designed to maximize the search for truth and minimize unfair surprise. There is no conceivable reason it should not be followed here -- if the evidentiary record is opened.

Indeed, it is simply impossible to ascertain how a witness designated by the House Managers could fairly be rebutted without a full examination of the available evidence. It is also the case that many sorts of helpful evidence and testimony emerge in the discovery

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[138] In another context, the Supreme Court has observed that "the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information from which to prepare their cases and thereby reduces the possibility of surprise at trial." *Wardius v. Oregon*, 412 U.S. 470, 473 (1973).

[139] It is not sufficient that counsel for the President have the right to depose the witnesses called by the Managers, essential as that right is. The testimony of a single witness may have to be refuted indirectly, circumstantially, or by a number of witnesses; it is often necessary to depose several witnesses in order to identify the one or two best.

process that may at first blush appear irrelevant or tangential. In any event, the normal adversarial process is the best guarantor of the truth. The President needs discovery here not simply to obtain evidence to present at trial but also in order to make an informed judgment about what to introduce in response to the Managers' expanded case. The President's counsel must be able to make a properly knowledgeable decision about what evidence may be relevant and helpful to the President's defense, both in cross-examination and during the President's own case.

The consequences of an impeachment trial are immeasurably grave: the removal of a twice-elected President. Particularly given what is at stake, fundamental fairness dictates that the President be given at least the same right as an ordinary litigant to obtain evidence necessary for his defense, particularly when a great deal of that evidence is presently in the hands of his accusers, the OIC and the House Managers. The Senate has wisely elected to proceed on the public record established by the House of Representatives, and this provides a wholly adequate basis for Senate decision-making. In the event the Senate should choose to expand this record, affording the President adequate discovery is absolutely essential.

VIII. CONCLUSION

As the Senate considers these Articles of Impeachment and listens to the arguments, individual Senators are standing in the place of the Framers of the Constitution, who prayed that the power of impeachment and removal of a President would be invoked only in the gravest of circumstances, when the stability of our system of government hung in the balance -- to protect the Republic itself from efforts to subvert our Constitutional system.

The Senate has an obligation to turn away an unwise and unwarranted misuse of the awesome power of impeachment. If the Senate removes this President for a wrongful

relationship he hoped to keep private, for what will the House ask the Senate to remove the next President, and the next? Our Framers wisely gave us a constitutional system of checks and balances, with three co-equal branches. Removing this President on these facts would substantially alter the delicate constitutional balance, and move us closer to a quasi-parliamentary system, in which the President is elected to office by the choice of the people, but continues in office only at the pleasure of Congress.

In weighing the evidence and assessing the facts, we ask that Senators consider not only the intent of the Framers but also the will and interests of the people. It is the citizens of these United States who will be affected by and stand in judgment of this process. It is not simply the President -- but the vote the American people rendered in schools, church halls and other civic centers all across the land twenty-six months ago -- that is hanging in the balance.

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