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Compendium of Precedents Involving Evidentiary Rulings and Applications of Evidentiary Principles from Selected Impeachment Trials

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ABSTRACT

This is a compilation of evidentiary issues and rulings from the Senate impeachment trials of Judges Nixon, Hastings, Claiborne, Ritter, Louderback, and Swayne. A discourse on what evidentiary rules and principles are applicable in impeachment trials is appended.

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Summary

At the present time, there are no binding rules of evidence or set of evidentiary principles to be applied in Senate impeachment trials. Rather, recourse is taken to the evidentiary rules and principles applicable in contemporaneous court proceedings and to precedents from past impeachment trials to provide guidance for Senate Impeachment Trial Committees or for the full Senate on evidentiary questions which arise in the impeachment context. This report compiles selected evidentiary precedents from the Senate impeachment trials of Judges Walter L. Nixon, Jr., Alcee L. Hastings, Harry E. Claiborne, Halsted Ritter, Harold Louderback, and Charles Swayne. The evidentiary rulings and principles gleaned from this examination are arranged in subject matter categories, and within those categories, in reverse chronological order by trial.

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Compendium of Precedents Involving Evidentiary Rulings and Applications of Evidentiary Principles from Selected Impeachment Trials

This report¹ compiles precedents regarding evidentiary principles applied and rulings made in the Senate impeachment trials of Judge Walter L. Nixon, Jr., Judge Alcee L. Hastings, Judge Harry E. Claiborne, Judge Halsted Ritter, Judge Harold Louderback, and Judge Charles Swayne.² The rulings and principles are arranged in subject matter categories, for ready reference, and within those subject matter categories, are arranged by trial. The trials are arranged within each subject matter category in reverse chronological order, as they are listed above. Each ruling or application of a principle is briefly synopsisized and a citation is provided to the appropriate page of the record of those proceedings.

¹This report is an update of a July 3, 1989 CRS Report 89-413, which bore the same title, written by (name redacted) and (name redacted), Legislative Attorneys, American Law Division, and Karen Crump and Maribel Nicholson, Legislative Research Assistants.

² We also examined the impeachment proceedings relating to Judge George W. English. Because Judge English resigned his office before his impeachment proceeding went to trial in the Senate, there appear to be no evidentiary issues raised or evidentiary rulings made by the Senate in connection with his impeachment.

I. Admissions

Judge Claiborne

On Sept. 6, 1986, the House of Representatives filed a “Motion to Accept Prior Admissions of Judge Claiborne as Substantive Evidence.” The Chairman of the Senate Impeachment Trial Committee granted this motion, subject to specific conditions: The Respondent could, by the commencement of the proceedings on Sept. 15, 1986, submit in writing any objection to receipt of any particular admissions set forth in the motion; and the House Managers were directed to obtain and to file with the Committee promptly a certified copy of Judge Claiborne’s full testimony from his first criminal trial so that the admissions could be evaluated in context. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, S. Hrg. 99-812, Pt. 1, 110-11 (1986) (hereinafter S. Hrg. 99-812, Pt. 1).* Statements covered by this ruling were read into the record of the Senate Impeachment Trial Committee proceedings on Sept. 16, 1986, without objection. S. Hrg. 99-812, Pt. 1, at 622-29.

II. Argumentative or Repetitive Questions

Judge Nixon

The Chairman of the Senate Impeachment Trial Committee raised his own objection to the Respondent counsel's asking the House Managers' witness a third time about a date of a phone call. The witness answered the first two questions Respondent's counsel asked. The Chairman did not allow further questioning on the issue and advised counsel to continue forward or ask another question. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-247, Pt. 2 at 130 (1989) (hereinafter S. Hrg. 101-247, Pt. 2).*

The Chairman raised his own objection to Respondent counsel's third question concerning a visit that another person had completed and then had told the witness about it. The Chairman sustained his own motion stating that the witness had already answered the question twice before. The Chairman directed Respondent's counsel to continue with another question. S. Hrg. 101-247, Pt. 2 at 66.

Judge Hastings

The House Managers objected to a question posed by Respondent's counsel concerning whether a particular fact caused the witness "to suspect what the judges were up to." The House Managers characterized the question as "out of line and inappropriate." The Chairman of the Senate Impeachment Trial Committee overruled the objection. *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-194, Pt. 2A at 55 (hereinafter S. Hrg. 101-194, Pt. 2A).*

Respondent's counsel objected to a question by the House Manager: "You will agree that I have, on three occasions here, presented pretty strong arguments with the accuracy of your recollection of that particular event, would you not?" The Chairman of the Senate Impeachment Trial Committee sustained the objection. S. Hrg. 101-194, Pt. 2A at 640.

The House Manager objected to having a witness not being able to complete his answer. The Chairman of the Senate Impeachment Trial Committee stated that "if the witness would like to complete an answer to any question he is certainly entitled to do that." S. Hrg. 101-194, Pt. 2A at 795.

The House Manager objected to the line of questioning stating that "it is clear that the witness does not recall....The same question seems to be asked two or three times." The Chairman of the Senate Impeachment Trial Committee overruled the objection "if counsel can move quickly through this." S. Hrg. 101-194, Pt. 2A at 917.

Respondent's counsel objected to "the continued persistent line of the same questioning." The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194 Pt. 2A at 1293.

Respondent's counsel objected to a line of questioning as argumentative. The Chairman of the Senate Impeachment Trial Committee sustained the objection. S. Hrg. 101-194, Pt. 2A at 1293.

Respondent's counsel objected to a House Manager's question of whether the witness was aware of a particular rule for the readmission of attorneys to the bar (a two year waiting period). The witness had just testified that she did not know anything about the rules for readmission and respondent's counsel objected that the question constituted an attempt to introduce the rule into evidence. The Chairman sustained the objection. *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-194, Pt.2B at 1796 (1989) (hereinafter S. HRG. 101-194, Pt. 2B).*

Judge Claiborne

House Managers' counsel objected to the form of Respondent's counsel's impeaching questions and to his badgering the witness. The Chairman of the Senate Impeachment Trial Committee sustained the objection. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 99th Cong, 2d Sess., S. Hrg. 99-812, Pt. 1, 575 (1986) (hereinafter S. Hrg. 99-812, Pt. 1).*

Respondent's counsel objected to House Managers' counsel's form of questioning as "not a question." There is no ruling on this objection apparent in the record of the proceedings before the Senate Impeachment Trial Committee. S. Hrg. 99-812, Pt. 1, at 668.

House Managers' counsel objected that the question Respondent was asking had already been asked and answered by this witness. The question was withdrawn. S. Hrg. 99-812, Pt. 1, at 847.

House Managers' counsel objected to the "pejorative" tone of Respondent's counsel's questions to a Government agent witness regarding the witness' not having brought with him documents which he had not been requested to bring. Chairman of the Senate Impeachment Trial Committee stated that it was "fair to inquire what preparations Mr. Halper made and what he brought with him. I think it is also fair to make it clear that Mr. Halper did not have any instructions with respect to bringing any record." S. Hrg. 99-812, Pt. 1, at 900-01.

House Managers' counsel objected that Respondent's counsel step away from a witness and Senator Rudman requested that Respondent's counsel not harass the witness in connection with the redirect examination of Mr. Halper regarding portions of "An Internal Revenue Service Manual," Respondent's exhibit marked for identification as proposed exhibit 24. S. Hrg. 99-812, Pt. 1, at 911.

Respondent's counsel objected to a question by House Managers' counsel to Judge Claiborne with regard to Jay Wright's conduct regarding the judge's tax returns as being a statement and as being argumentative. The Chairman of the Senate Impeachment Trial Committee directed House Managers' counsel to reformulate the question. S. Hrg. 99-812, Pt. 1, at 1015-16.

Respondent's counsel objected to a question by House Managers' counsel to Judge Claiborne as being argumentative and insulting. The Chairman of the Senate Impeachment Trial Committee found the descriptive language used by House Managers' counsel in his question "a little florid." House Managers' counsel withdrew the question. S. Hrg. 99-812, Pt. 1, at 1022.

Respondent's counsel moved to strike a comment by House Managers' counsel during the course of his cross examination of Judge Claiborne, because it was not a statement. House Managers' counsel withdrew the statement and moved to strike what he characterized as a gratuitous response of the witness which preceded his own statement. There is no apparent ruling on the latter motion to strike. S. Hrg. 99-812, Pt. 1, at 1031.

Respondent's counsel asked that Judge Claiborne be permitted to answer a question by House Managers' counsel with regard to whether Judge Claiborne's motive in understating and underpaying his taxes was "sheer greed." The House Managers' counsel followed the question with, "No further questions, Mr. Chairman", without permitting the witness to respond. House Managers' counsel had no objection to the witness being allowed to answer, and the Chairman of the Senate Impeachment Trial Committee stated that the witness had a right to answer. S. Hrg. 99-1041.

Judge Louderback

The Presiding Officer sustained an objection by Respondent's counsel that the question regarding the witness' auditing duties for the Respondent, was argumentative. *77 Cong. Rec.* 3793 (1933)

The Presiding Officer overruled an objection that the question was argumentative, because the House Manager was on cross-examination and allowed a "good deal of latitude." *77 Cong. Rec.* 3874 (1933).

III. Best Evidence

Judge Nixon

Respondent's counsel objected to the House Managers' request to admit into evidence an affidavit of a witness to rebut the Respondent's positive character witnesses. The Chairman sustained the objection on the theory that, if the testimony was important to the House Manager's case, they should have called the witness to testify in person so that he could be cross-examined. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-247, Pt. 2 at 317-18 (1989) (hereinafter S. Hrg. 101-247, Pt. 2).*

Judge Hastings

Respondent's counsel objected to the introduction of transcripts without the tapes being played. The House Manger observed that the tape was already in evidence. Respondent's counsel objected to the introduction of any tape that had not been played. The Vice Chairman of the Senate Impeachment Trial Committee sustained the objection stating: "I have difficulty with just allowing tapes in that are being objected to on the theory that they are in general dealing with the same subject matter that a witness has referred to....If counsel feels these are crucial to the presentation of your case, I would suggest you go ahead and have a witness identify them and introduce them in the way that the rest of the recorded evidence has been introduced." *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-194, Pt. 2A at 331-33 (1989) (hereinafter S. Hrg. 101-194, Pt. 2A).*

Respondent's counsel objected to the use of FBI transcripts of tapes of certain telephone conversations proffered as exhibits by the House Managers rather than Senate transcripts from when those same tapes were played for the Committee. The Chairman of the Senate Impeachment Trial Committee overruled the objection stating, "We will not use our own transcription as the accurate transcript. We will permit the House to present accurate transcripts, and we will use that." S. Hrg. 101-194, Pt. 2A at 300.

The House Managers objected to the procedure to be used with regard to Respondent's witness Margaret Dabreau Owens. The Chairman of the Committee announced that if there was time that afternoon after the conclusion of the House Managers' case, Margaret Dabreau Owens' live testimony would be taken. If there was not time for her to appear that day, her testimony, including both examination and cross-examination, would be videotaped after the Committee recessed for the day. Then if the Committee had further questions, she could be recalled at a later date. The House Managers felt that this would discourage the Members of the Senate from questioning her. The Chairman of the Senate Impeachment Trial Committee overruled the objection noting that any Member who wished to could remain, watch, and participate in the questions. S. Hrg. 101-194, Pt. 2A at 1056.

Judge Claiborne

Respondent's counsel objected to the use of a list of names and citations of eight of Judge Claiborne's opinions as the basis for questions on the substance of those opinions directed to Judge Claiborne by House Managers' counsel. Respondent's counsel argued that the best evidence would be to submit copies of those decisions, rather than the list of them, for the purpose of proving which were tax cases. House Managers' counsel agreed. The Chairman of the Senate Impeachment Trial Committee advised House Managers' counsel to use copies of the opinions instead of the list. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 99th Cong., 2d Sess., S. Hrg. 99-812, Pt. 1, 963 (1986).*

Judge Louderback

The Presiding Officer permitted the witness to relate his knowledge of the issue, but stated the "best evidence" would be from other parties. *77 Cong. Rec. 3620 (1933).*

The records from an insurance company, the Presiding Officer ruled, were the "best evidence," rather than the hearsay testimony from the witness. *77 Cong. Rec. 3624 (1933).*

IV. Chain of Custody

Judge Claiborne

Questions were raised and discussed regarding an exhibit marked for identification as Respondent's Exhibit 26. A copy of this had been obtained by Respondent's counsel from Mr. Watson, a witness who had asserted his 5th Amendment privilege against self-incrimination. Mr. Watson had produced the original of the document from the files he had brought with him to the Senate Impeachment Trial Committee proceedings. The Chairman of the Committee directed that the document should be given to the Clerk of the Committee to be sealed until Mr. Watson could be called to testify as to the chain of custody and to authenticate the document. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 99th Cong., 2d Sess., S. Hrg. 99-812, Pt. 1, 949-56 (1986).*

V. Competency

Judge Hastings

The House Manager objected to the introduction of a transcript since the witness had not identified his connection with the transcript. The Chairman of the Senate Impeachment Trial Committee suggested that “perhaps the witness could properly identify the transcript after we have heard the tape.” *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-194, Pt. 2A at 259 (1989) (hereinafter S. Hrg. 101-194, Pt. 2A).*

Respondent’s counsel objected to House Managers’ counsel’s questions concerning entries in the “judge’s book” on the grounds that the entries were made by a secretary other than the witness. The Vice Chairman overruled the objections. *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, United States Senate, 101st Cong., 1st Sess, S. HRG. 101-194, Pt.2B at 1787.*

A House Manager objected to a question as to a witness’s opinion of another witness’s ability to recall details. The witnesses were husband and wife. The Chairman sustained the objection. S. HRG. 101-194, Pt.2B at 1795.

A House Manager moved that the testimony of a witness not be heard on the grounds that the witnesses testimony would consist entirely of hearsay and that the witness lacked the mental competence required of a witness. The Committee denied the motion. S. HRG. 101-194, Pt.2B at 1809-18.

Judge Claiborne

House Managers’ counsel objected to a question regarding Justice Department and U.S. Attorney practice prior to indictment of an individual on tax-related charges as being beyond the witness’ background and expertise. The Chairman of the Senate Impeachment Trial Committee directed the witness that it was proper for him to respond, if he knew the answer to the question. *Report of the Senate Impeachment Trial Committee, United States Senate, 99th Cong., 2d Sess., S. Hrg. 99-812, Pt. 1, 609 (1986) (hereinafter S. Hrg. 99-812, Pt. 1).*

Respondent’s counsel objected to a question by a House Manager regarding whether the witness had an expert opinion “as to whether a reasonably intelligent taxpayer, with a legal education, could have signed this return in the good faith belief it was correct.” S. Hrg. 99-812, Pt. 1, at 616. Respondent’s counsel’s argument was premised on the theory that the witness had not demonstrated any expertise regarding the standard of willfulness applied in the criminal justice system in tax cases and therefore the witness was incompetent to testify on this point. Further, counsel argued that to answer would be to invade the “province of the ultimate finder of fact by giving his opinion as to the legal conclusion.” *Id.* The Chairman of the Senate

Impeachment Trial Committee directed the House Manager to rephrase the question so that it addressed good faith rather than willfulness. S. Hrg. 99-812, Pt. 1, at 617.

House Managers' counsel objected to a question by Respondent's counsel on the ground that the witness was incompetent to answer a question regarding the conduct of a person that the witness had testified he did not know. Respondent's counsel withdrew the question. S. Hrg. 99-812, Pt. 1, at 667.

House Managers' counsel objected to the form of a question by Respondent's counsel asking the witness what he would have told Judge Claiborne had he discussed his tax return with him as both incompetent and speculative. The Respondent's counsel rephrased the question. S. Hrg. 99-812, Pt. 1, at 710.

House Managers' counsel objected to a question by Respondent's counsel asking a witness what the significance of an arrow on a tax form was. The witness began to state his interpretation of the arrow. House Managers' counsel contended that the witness was incompetent to interpret the arrow since he had not drawn it. Respondent's counsel countered that the witness owned the business and supervised the office and that, if he knew the significance of the arrow, he was competent to testify thereto. The Chairman of the Senate Impeachment Trial Committee asked the witness whether he had discussed this particular matter with the employee who had worked on the return. The witness stated that he did not remember. The questioning by Respondent's counsel proceeded without a direct ruling on the objection. S. Hrg. 99-812, Pt. 1, at 760.

House Managers' counsel moved to strike an expert witness' opinion testimony as to whether a document like Judge Claiborne's tax return would raise an audit if submitted to the IRS. His argument was that the testimony was "incompetent, an invasion of the province of the Senate, and obviously contrary to the facts of this case already in evidence where we know it didn't draw an audit." S. Hrg. 99-812, Pt. 1, at 829. The motion to strike was taken under advisement by the Chairman of the Senate Impeachment Trial Committee. *Id.*

House Managers' counsel objected to a character witness, an attorney who had practiced before Judge Claiborne on tax cases, offering expert testimony on Judge Claiborne's knowledge of the Internal Revenue Code on the ground that he was incompetent to do so. Respondent's counsel countered that the testimony went to the Respondent's integrity and honesty and "truth and veracity as far as assigning of the attorney." S. Hrg. 99-812, Pt. 1, at 914. The Chairman of the Senate Impeachment Trial Committee permitted the testimony to go forward. *Id.*

VI. Cross-Examination

Judge Hastings

The House Manager objected to a characterization of certain testimony. The Chairman of the Senate Impeachment Trial Committee overruled the objection. *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-194, Pt. 2A at 115 (1989) (hereinafter S. Hrg. 101-194, Pt. 2A).*

The House Manager objected to the testimony as not responsive to the question asked by Respondent's counsel. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 203.

The House Manager objected to the witness going beyond the original question. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 210.

The House Manager objected to "any attempt to get Mr. Shuy to characterize the testimony of witnesses about whom he has not been asked to testify. It is way beyond the scope of the direct examination..." The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 592.

The House Manager objected to "being unable to cross-examine this party to the case..." The Chairman of the Senate Impeachment Trial Committee overruled the objection relying on statements by the Respondent and stating: "With that representation, I think we will permit the judge to go ahead and proceed with his cross-examination, if there is any specific objection that counsel wishes to make during the course of that, of course, he is free to make that objection." S. Hrg. 101-194 Pt. 2A at 770-771.

Respondent's counsel objected to a question regarding credit cards and billings as beyond the scope of cross-examination. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194 Pt. 2A at 825.

Respondent's counsel objected to House Managers' counsel questioning of Respondent/witness as to content of a chart noting telephone calls to William Borders, who was subsequently convicted on bribery charges. The Chairman overruled the objection noting that the question was properly within the scope of cross-examination. *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-194, Pt. 2B at 2341 (1989) (hereinafter S. HRG. 101-194, Pt.2B).*

Respondent's counsel objected to House Managers' counsel questioning of Respondent/witness as to phone calls without sufficiently identifying the calls in

question. The Chairman overruled the objection noting that the question was properly within the scope of cross-examination. S. HRG. 101-194, Pt.2B at 2345-346.

Judge Claiborne

House Managers' counsel objected to the form of a question posed by Respondent's counsel as compound and unintelligible. The question was rephrased. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 99th Cong., 2d Sess., S. Hrg. 99-812, Pt. 1, 560 (1986) (hereinafter S. Hrg. 99-812, Pt. 1).*

House Managers' counsel objected to the manner in which Respondent's counsel presented prior inconsistent testimony in his cross-examination of the witness. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 99-812, Pt. 1, at 565-66.

House Managers' counsel objected to Respondent's counsel's characterization of one witness's testimony during the impeachment proceedings in his cross-examination of another witness. The Chairman of the Senate Impeachment Trial Committee suggested that Respondent's counsel had stated the earlier testimony "a little strongly." Respondent's counsel rephrased the question. S. Hrg. 99-812, Pt. 1, at 857-58.

Respondent's counsel objected to a line of questioning by House Managers' counsel during cross-examination of Judge Claiborne as misleading and misrepresenting the document to which the House Managers' counsel referred. The Chairman of the Senate Impeachment Trial Committee permitted House Managers' counsel to continue, but instructed House Managers' counsel to clarify the line of questioning and the purpose it was designed to achieve. S. Hrg. 99-812, Pt. 1, at 962-63.

Respondent's counsel objected to House Managers' counsel's characterization of Respondent's law practice as "sole practitioner" when he was in fact the only partner, but he had associates, and he maintained the office himself. There was no ruling on this objection, but the nature of the Respondent's law practice was clarified. S. Hrg. 99-812, Pt. 1, at 972.

Respondent's counsel objected to a question directed to Judge Claiborne by House Managers' counsel on cross-examination as vague and ambiguous. Because House Managers' counsel rephrased the question, there was no ruling on the objection. S. Hrg. 99-812, Pt. 1, at 1010.

Judge Ritter

The President pro tempore ruled that the scope of cross-examination would be limited to the matters as to which the witness had testified on direct. 80 *Cong. Rec.* 5064 (1936).

When a House Manager objected to a statement that had been volunteered by a witness, the witness was instructed by the Vice President to limit his answers to questions posed by Respondent's counsel. 80 *Cong Rec.* 5166 (1936).

The President pro tem overruled an objection that a witness was volunteering information, and stated that the witness had a right to explain, after he has answered a question. The witness had been asked whether, in testimony before the House Judiciary Committee, he had related his knowledge of certain transactions between Judge Ritter and his former law partner. In response, the witness indicated that he had not been thoroughly questioned at the Judiciary Committee hearing because Respondent's counsel did not have advance notice that he was to be a witness. 80 *Cong. Rec.* 5366 (1936).

Judge Louderback

The Presiding Officer overruled claims of improper cross-examination procedures used by both parties. 77 *Cong. Rec.* 3795, 3862, 3858 (1933).

The testing of the witness' credibility by the House Manager was proper cross-examination ruled the Presiding Officer. He stated that counsel could go into any question connected with the witness, as long as it related to the articles of impeachment. 77 *Cong. Rec.* 3862 (1933).

The Respondent's relationship with his spouse was not an issue in the trial and was therefore improper cross-examination by House Managers. 77 *Cong. Rec.* 3869 (1933).

On redirect examination, the Presiding Officer overruled the objection by a House Manager because the question had been an issue on cross-examination. 77 *Cong. Rec.* 3869 (1933).

Judge Swayne

The Presiding Officer ruled that the scope of cross-examination allowed counsel to question a witness about a document that contained his signature. However, it was not proper for Counsel for the Respondent to offer the document into evidence during cross-examination. 39 *Cong. Rec.* 2622 (1905). The scope of cross-examination could not be extended to allow opposing counsel to offer a document into evidence. Cross-examination was not the appropriate time to rule on the admissibility of the document offered by opposing counsel. 39 *Cong. Rec.* 2900 (1905).

VII. Documentary Evidence

Judge Claiborne

On Sept. 6, 1986, the House of Representatives filed a “Motion to Accept as Substantive Evidence Certain Testimony and Documents.” The Chairman of the Senate Impeachment Trial Committee granted this motion, subject to specified conditions: counsel for the House Managers and for the Respondent were directed to make “all reasonable efforts to produce for the committee either the originals of the documents of the managers’ exhibits or the best copies available”; the Clerk of the Committee, upon notification to the parties, was authorized to make substitutions without further action by the Committee; and the Respondent was given permission to “offer an objection to any particular item of evidence from his second trial if there is a basis for objection other than the fact that prior testimony or exhibits are being used to establish the truth of the matters asserted.” *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, S. Hrg. 99-812, Pt. 1, 110 (1986) (hereinafter S. Hrg. 99-812, Pt. 1).*

Affidavits, requested by the Senate Impeachment Trial Committee, were admitted after arguments from counsel for both parties and were read into the record by Respondent’s counsel. S. Hrg. 99-812, Pt. 1, at 1141-47.

House Managers’ counsel objected to use of a document not in evidence by Respondent’s counsel in his cross-examination of a witness. The document had been in evidence in Judge Claiborne’s second criminal trial. The Chairman of the Senate Impeachment Trial Committee permitted the document to be used in the testimony of the witness. S. Hrg. 99-812, Pt. 1, at 609.

House Managers’ counsel objected to the introduction of an affidavit previously made by the witness as a prior consistent statement proffered by the Respondent’s counsel to rehabilitate the witness after impeachment of the witness by House Managers’ counsel. House Managers’ counsel argued that there had been not attempt to impeach the witness on this point. Respondent’s counsel disagreed. The Chairman of the Senate Impeachment Trial Committee admitted the affidavit. S. Hrg. 99-812, Pt. 1, at 670-71.

House Managers’ counsel objected to admission of a check into evidence on the ground that this witness could not authenticate the check. The objection was overruled on the ground that the check was not offered for its content, but rather as the document the witness personally carried. S. Hrg. 99-812, Pt. 1, at 676-77.

House Managers’ counsel objected to examination by a witness of documents which had not been marked for identification. Respondent’s counsel agreed, and the documents were marked accordingly. S. Hrg. 99-812, Pt. 1, at 861.

Respondent’s counsel objected to a document’s introduction as a prior consistent statement, but not to the document’s admission into evidence otherwise. The prior consistent statement basis for introduction of the document was withdrawn by House

Managers' counsel, and the document was admitted into evidence. S. Hrg. 99-812, Pt. 1, at 905-06.

Senator Warner's used another witness' affidavit in his questioning of a Government agent witness without objection. S. Hrg. 99-812, Pt. 1, at 907.

Respondent's Exhibit 3, a check identified by Respondent, was admitted into evidence without objection. S. Hrg. 99-812, Pt. 1, at 933-34.

Judge Ritter

The Presiding Officer declined to rule in response to the managers' general objection to a substantial number of documents, and ordered the managers to make specific objections after having examined the documents. 80 *Cong. Rec.* 5245 (1936). Manager Perkins objected that letters, which Respondent's counsel wanted to offer into evidence to explain the nature of a particular proceeding, were incompetent, immaterial, and irrelevant. But the Presiding Officer stated:

It is the ruling of the Chair that the letters shall be exhibited to the Managers on the part of the House, and that the Managers on the part of the House may make specific objections to each document to which they wish to lodge objection. There can be no ruling with respect to a large number of documents without specific objection.

80 *Cong. Rec.* 5245-53 (1936).

After a House Manager objected to the introduction of docket sheets without proper identification, respondent's counsel authenticated by means of the witness' knowledge of the documents. 80 *Cong. Rec.* 5347 (1936).

Respondent's counsel withdrew a business report that he sought to have admitted into evidence after one of the House Managers objected to its admission without proof that the contents were "true" and "correct." The document was a list of cases being handled by Judge Ritter's law firm at the time that the firm was dissolved, and was prepared at the direction of a former partner of the judge. The Manager doubted the correctness of the report since the partner stated that he did not keep books. 80 *Cong. Rec.* 5166-67 (1936).

The Presiding Officer ruled that a series of exhibits which one of the House Managers offered in evidence could not be admitted without a showing of relevance. The Presiding Officer stated: "With respect to those [papers] which are objected to, they are excluded until they are connected either with the respondent or with the issue. There is nothing before the Court at the present moment which indicates that they are relevant." 80 *Cong. Rec.* 5242 (1936).

One of the Managers stipulated that official court documents offered by respondent's counsel could be offered in evidence without being further identified or authenticated. The Manager and Respondent's counsel agreed that entire court case files be considered as having been entered into evidence. 80 *Cong. Rec.* 5161 (1936).

When Respondent's counsel objected to testimony concerning the contents of a letter since the letter itself, which had been admitted into evidence, was the "best evidence," the House Manager withdrew the question. 80 *Cong. Rec.* 5242-43 (1936).

Counsel for Respondent and the Managers stipulated concerning the admissibility of two letters and a check. 80 *Cong. Rec.* 5246 (1936).

Judge Louderback

The House Manager objected to the line of questioning by Respondent's counsel as repetitious. The Vice President overruled on the ground that the Senate permitted the witness, once he was on the stand, to explain his testimony, which had been admitted as part of the record in accordance with a stipulation agreement. 77 *Cong. Rec.* 3845 (1933).

The House Manager offered exhibits relating to the case at bar that also included extraneous and irrelevant material. They were admitted in full by Senate vote over the objection that only pertinent matters should be read into the record. 77 *Cong. Rec.* 3516 (1933).

The Presiding Officer admitted materials as evidence, despite the objection by the Respondent's counsel that these matters were answered in the pleading. 77 *Cong. Rec.* 3530 (1933).

The House Manager offered a handwritten memorandum by the Hotel Fairmont auditor. It was admitted by the Presiding Officer, subject to correction by the respondent's counsel. 77 *Cong. Rec.* 3620.

The Presiding Officer admitted materials (an order, a petition, and an application for adjustment of a claim) from a case heard in the Respondent's court. 77 *Cong. Rec.* 3622-24 (1933).

The Presiding Officer admitted copies of appellate transcripts taken from the Respondent's rulings in the Lumbermen's cases. 77 *Cong. Rec.* 3627 (1933).

Judge Swayne

The Senate voted to allow a witness to testify as to what occurred at a trial, even though the trial was of record. 3 *Hinds' Precedents of the House of Representatives* §2264, 597-598; *citing* 39 *Cong. Rec.* 3147 (1905). In the interest of efficiency, House Managers and counsel in the Swayne trial collectively agreed to use certified copies of records as originals. 3 *Hinds' Precedents of the House of Representatives* §2265, 598-600 (1907); *citing* 39 *Cong. Rec.* 2540, 2551 (1905).

A certified copy of the action of a board meeting of county commissioners, inviting Judge Swayne to reside in Tallahassee, was excluded when offered to prove his residence. The Presiding Officer ruled the document was not relevant to the issue

of residence. *3 Hinds' Precedents of the House of Representatives* §2225, 551, 552 (1907); *citing 39 Cong. Rec.* 3145 (1905).

The Senate voted to exclude Congressional debates when counsel for the Respondent offered certain extracts favorable to his interpretation of the statute to which they pertained. The Senate sustained the objection by the House Manager based on the proposition in *United v. Freight*, 166 U.S. 291, 318 (1896), "Debates in Congress are not appropriate sources of information, from which to discover the meaning of the language of a statute passed by that body." *3 Hinds' Precedents of the House of Representatives* §2267, 600-603 (1907); *citing 39 Cong. Rec.* 3164-3167 (1905).

The Presiding Officer excluded a compilation of certificates from clerks of the United States offered by counsel for the Respondent showing the dates Judge Swayne held court. The synopsis of the certificates was ruled to be argumentative. *3 Hinds' Precedents of the House of Representatives* §2259, 594, 595 (1907); *citing 39 Cong. Rec.* 3163 (1905).

VIII. Expert Witnesses

Judge Hastings

Respondent's counsel objected to the use of an expert witness on the ground that psycholinguistics has not been recognized as a field of expertise. The Chairman of the Senate Impeachment Trial Committee overruled the objection stating that the witness "will be permitted to testify for the purpose that the House has indicated it wishes to call him, and that is as to the fact that the conversation is or is not coded, but not as to the substance, the meaning of the conversation." *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-194, Pt. 2A at 526-32 (1989) (hereinafter S. Hrg. 101-194, Pt. 2A).*

Respondent's counsel objected to a question asking the expert witness whether a conversation was about certain letters. The Chairman of the Senate Impeachment Trial Committee sustained the objection observing that "if counsel wishes to ask the witness whether in fact the conversation means what on its face it would appear to mean, I think that's a reasonable line of questioning." S. Hrg. 101-194, Pt. 2A at 536.

Respondent's counsel objected to a statement by the expert witness that a sentence "feels that there is something strange". The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 541.

IX. Hearsay

Judge Nixon

Respondent's counsel objected to the House Managers asking the Manager's witness to testify to statements Respondent made in an interview with White-Shunner which were recorded on a transcript provided to the Committee. The Chairman overruled the objection stating that the witness is entitled to testify as to what he heard and he was available for cross-examination. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Congress, 1st Sess., S. Hrg 101-247, Pt. 2, 20 (1989) (hereinafter S. Hrg. 101-247, Pt. 2).*

Respondent's counsel twice objected to the House Managers' witness testifying to Judge Nixon's testimony to the grand jury since he was not present at the proceedings. The Chairman sustained both objections stating that the witness could only testify as to matters of which he would have direct knowledge. S. Hrg. 101-247, Pt. 2 at 20-21.

Respondent's counsel objected to the House Managers' witness reading questions and answers from his interview with Respondent and from Respondent's testimony before the grand jury at issue in the Articles of Impeachment into the record because the questions and answers would be heard out of context and the witness was not present during the grand jury proceedings. The Chairman overruled the objection because the witness was available for cross-examination. In addition, the full transcript was available for all Senators to read. S. Hrg. 101-247, Pt. 2 at 21-22.

Respondent's counsel objected twice to the House Managers' witness answering a question based upon what he had heard from another witness during a telephone conversation which occurred in 1982. The Chairman sustained the Respondent counsel's first objection stating that the testimony was not necessary. After Respondent's counsel second objection, the House Manager argued that the testimony would corroborate the knowledge of the witness about the Respondent's involvement in the Drew Fairchild case. The Chairman sustained the objection on relevancy grounds. The Chairman stated that there was a lot of hearsay in the testimony but wanted to concentrate on issues surrounding the Articles of Impeachment. S. Hrg. 101-247, Pt. 2 at 165.

Judge Hastings

Respondent's counsel objected to a witness quoting another party to a conversation on the grounds that it was hearsay and that it was being offered as the truth of a matter. The House Manager argued that it was not being offered as the truth but rather as an indication of relationships. The Chairman of the Senate Impeachment Trial Committee overruled the objection. *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-194, Pt. 2A at 90 (1989) (hereinafter S. Hrg. 101-194, Pt. 2A).*

Respondent's counsel asked for a continuing objection on grounds of hearsay to testimony concerning an overheard conversation. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 91.

Respondent's counsel made a long statement expressing concern over the use of testimony with respect to conversations with individuals who are dead or unavailable. He observed that although the hearsay rule has exceptions, it goes to the principle of fundamental fairness since the use of hearsay limits cross-examination. The testimony was admitted. S. Hrg. 101-194, Pt. 2A at 183-85.

Respondent's counsel objected to the testimony of Mr. Sonnet on grounds of hearsay. The Chairman of the Senate Impeachment Trial Committee sustained the objection but the Committee voted to overrule the Chairman. Several Senators made statements concerning their votes. S. Hrg. 101-194, Pt. 2A at 186-90.

The House Manager objected to a question by Respondent's counsel asking for the witness's comments on other individuals' opinions of Judge Hastings. Respondent's counsel responded that hearsay on these individuals had been admitted for the House Managers and "either the rule on hearsay applies or it does not." The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 208.

The House Manager objected to a question by Respondent's counsel asking about the reaction of prosecutors to a situation. The Chairman of the Senate Impeachment Trial Committee sustained the objection "to the extent that the witness is testifying about an unidentified communication to him. If he wishes to be more specific about who he was speaking to, his testimony will be permitted." S. Hrg. 101-194, Pt. 2A at 209.

Respondent's counsel objected on hearsay grounds to a question asking what a witness observed as part of a surveillance team or heard as supervising agent from contemporaneous reports of other agents through their radio transmissions to him. The House Manager argued for the applicability of the hearsay rule exception in the Federal Rules of Evidence 803(1) (present sense impression—statements of out-of-court declarants). The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 248.

Respondent's counsel objected to an answer to a question where the witness was going to describe a conversation with a deceased person. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 1091.

The House Manager sought to exclude the testimony of James Gunn since he understood that the witness would be questioned concerning what he heard in meetings involving other individuals where they were discussing Judge Hastings. The Chairman of the Senate Impeachment Trial Committee ruled that Mr. Gunn could be called as a witness "for the limited purpose of testifying about knowledge he has about Mayor Clark's state of mind or the incidents immediately surrounding this

allegation which make up Article 16, but not for the purpose of general testimony on rainmaking.” S. Hrg. 101-194, Pt. 2A at 1386.

A House Manager moved that the testimony of a witness not be heard on the grounds that the witnesses testimony would consist entirely of hearsay and that the witness lacked the mental competence required of a witness. The Committee denied the motion. S. HRG. 101-194, Pt.2B at 1809-18.

A House Manager objected to a question as eliciting hearsay testimony; Respondent’s counsel cited witness unavailability and the Committee’s prior hearsay rulings. The Chairman overruled the objection. S. HRG. 101-194, Pt.2B at 1836.

A House Manager objected on hearsay grounds to the Respondent/witness’s testimony as to conversations he had had. Respondent’s counsel argued that the testimony showed the Respondent’s state of mind and might be considered part of the “res gestae” [excited utterances upon learning that the FBI had executed a forthwith grand jury subpoena deuces tecum for material in his chambers in his absence]. The Chairman overruled the objection. S. HRG. 101-194, Pt.2B at 2289.

A House Manager objected to the introduction of newspaper story concerning an attorney who withdrew from representation of Respondent prior to his criminal trial. Respondent’s counsel conceded the evidence constituted hearsay but argued for its admission was relevant and probative since it came from an independent source. The Chairman declined to allow admission. S. HRG. 101-194, Pt.2B at 2311-12.

House Managers’ counsel objected on hearsay grounds to respondent’s testimony as to a complimentary comment by the prosecutor in his criminal trial. The Chairman overruled the objection. S. HRG. 101-194, Pt.2B at 2319.

Judge Claiborne

House Managers’ counsel objected to a question by Respondent’s counsel on the ground that it was designed to elicit hearsay. The Chairman of the Senate Impeachment Trial Committee requested that Respondent’s counsel rephrase the question to avoid the objection. Respondent’s counsel rephrased the question. *Report of the Senate Impeachment Trial Committee, hearings before the Senate Impeachment Trial Committee, United States Senate, 99th Cong., 2d Sess., S. Hrg. 99-812, Pt. 1, 568-69 (1986) (hereinafter S. Hrg. 99-812, Pt. 1).*

Respondent’s counsel objected to a question by a House Manager asking a witness to state what a particular entry on a copy of document which he had before him “was or purported to be” on the ground that the question was designed to elicit hearsay testimony. The copy was illegible. The original of the document, which had been in the hands of the Chairman of the Senate Impeachment Trial Committee, was substituted for the copy and the direct examination continued. S. Hrg. 99-812, Pt. 1, at 595-96.

House Managers’ counsel objected to a question by Respondent’s counsel on the ground that it was asking for testimony that, absent the laying of an adequate foundation, would be both incompetent and hearsay. The Chairman of the Senate

Impeachment Trial Committee directed House Managers' counsel to lay a better foundation. S. Hrg. 99-812, Pt. 1, at 667.

House Managers' counsel objected on hearsay grounds to a question by Respondent's counsel asking Respondent's former secretary to state what the reason or substance had been of Respondent's call to the Chief Judge of the U.S. Court of Appeals for the Ninth Circuit. The Respondent's counsel argued that the testimony sought went not to the truth of the communication, but rather to the accuracy of House Managers' counsel's characterization of the Respondent's cessation of performance of his duties as a judge at the time of the indictment as quitting the office, rather than as taking a leave of absence until the matter was resolved. Respondent's counsel offered to rephrase the question, and the Chairman of the Senate Impeachment Trial Committee suggested that he do so. S. Hrg. 99-812, Pt. 1, at 696.

House Managers' counsel objected on hearsay grounds and moved to strike the answer to a question by Respondent's counsel as to whether the witness would agree with the characterization of the tax return he had prepared for Respondent as "an abomination." The witness had answered the previous question as to whether the return had been characterized by others as "an abomination" by stating that it might have been but that he did not remember the use of that specific term. The Chairman of the Senate Impeachment Trial Committee allowed the witness' answer to stand. S. Hrg. 99-812, Pt. 1, at 761-62.

House Managers' counsel objected to the admission of newspaper articles as hearsay. The newspapers were admitted for the limited purpose of exploring Judge Claiborne's state of mind, not for the truth of what the newspapers contained; Respondent's counsel advised the Chairman of the Senate Impeachment Trial Committee that he intended to examine Respondent on the matter of whether he had read the newspaper articles and had been familiar with them at the time they were published. S. Hrg. 99-812, Pt. 1, at 1171-72.

Respondent's counsel objected on hearsay grounds to House Managers' counsel's proffer of a xeroxed copy of a document from the American College of Trial Lawyers expelling Respondent from membership in the organization. Chairman of the Senate Impeachment Trial Committee did not rule on the objection. Rather the Chairman advised House Managers' counsel to get a certified copy of the document and offer it into evidence before the full Senate, to be ruled on there. S. Hrg. 99-812, Pt. 1, at 1183-84.

Judge Louderback

The Presiding Officer overruled the Respondent's counsel's hearsay objection to the witness' answer. *77 Cong. Rec.* 3415 (1933).

The Presiding Officer ruled the witness could answer the questions where he had his own knowledge about the issue, despite counsel's hearsay objection. *77 Cong. Rec.* 3450, 3524, 3525, 3532, 3534, 3535 (1933).

The Presiding Officer overruled the hearsay objection by Respondent's counsel in view of the witness' explanatory answer. *77 Cong. Rec.* 3452 (1933).

The Respondent's counsel's objection to the witness' answer as hearsay was overruled by the Presiding Officer, since the answer was a part of the *res gestae*; and although the Presiding Officer felt the answer was not closely related to the issue (excessive receivership fees), he concluded that it was for the court (Senate) to decide. *77 Cong. Rec.* 3457 (1933).

The Presiding Officer sustained the Respondent's counsel's objection that the witness was stating hearsay on the ground the witness had already testified to this matter. *77 Cong. Rec.* 3463 (1933).

The Presiding Officer sustained the hearsay objection, cautioning the House Manager to demonstrate their allegations, or motions to strike testimony would be entertained. *77 Cong. Rec.* 3467 (1933).

The Presiding Officer found some merit in Respondent's counsel's objection to hearsay and ordered the witness to directly answer the question, but would not strike the testimony from the record. *77 Cong. Rec.* 3620 (1933).

During the examination of the witness, the Presiding Officer overruled a hearsay objection under the assumption that the House Managers would have further questions that would lay the proper foundation. *77 Cong. Rec.* 3621 (1933).

The objection by the Respondent's counsel to testimony as hearsay was overruled by the Presiding Officer, because the House Managers had to be given latitude in their examination. *77 Cong. Rec.* 3624 (1933).

The Presiding Officer overruled a hearsay objection by Respondent's counsel, because the witness' testimony referred to the Respondent acting in his official capacity. *77 Cong. Rec.* 3633 (1933).

Judge Swayne

Counsel for Judge Swayne objected to hearsay testimony when a witness was asked if he had ever heard an attorney complain of absence by the judge from the district. The Senate sustained the objection, because the witness was called to state what some other attorney may have said. *3 Hinds' Precedents of the House of Representatives* §2230, 556, 557 (1907); citing *39 Cong. Rec.* 2467 (1905).

The Presiding Officer sustained an objection to hearsay when the witness repeated a conversation he had had with other people. *39 Cong. Rec.* 2531 (1905).

Counsel for the Respondent objected to the witness "summing up" the testimony of another person. The Presiding Officer sustained the objection by the Manager, because a witness could only state what he knew of the subject matter. *39 Cong. Rec.* 3043 (1905).

The Presiding Officer ruled a self-serving statement by Judge Swayne was admissible, because it was within *res gestae*, when offered to prove the statement was made prior to any view of impeachment. 39 *Cong. Rec.* 3153 (1905). The same statement was not within *res gestae* to prove the judge intended to reside in his district. 3 *Hinds' Precedents of the House of Representatives* §2239, 571-575 (1907); *citing* 39 *Cong. Rec.* 3145, 3146 (1905).

X. Hypothetical Questions

Judge Hastings

Respondent's counsel objected that a House Manager's question on re-cross-examination contained facts not in evidence. The Chairman characterized the question as a hypothetical question and advised the witness that he might answer if he had an opinion. The witness answered the question. *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-194, Pt. 2B at 1720-21 (1989) (hereinafter S. Hrg. 101-194, Pt. 2B).*

Judge Claiborne

House Managers' counsel objected to and moved to strike an expert witness' response to a hypothetical question posed by Respondent's counsel on the ground that Respondent's counsel had misstated the record in his hypothetical question. Respondent's counsel responded that it was a hypothetical question, and further that it included no misstatements. The Chairman of the Senate Impeachment Trial Committee overruled the objection and denied the motion to strike, noting that House Managers' counsel would have an opportunity to clarify or redirect. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 99th Cong., 2d Sess., S. Hrg. 99-812, Pt. 1, 611-12 (1986).*

Judge Ritter

The Presiding Officer permitted the use of hypothetical questions without distinguishing between lay and expert witnesses. *80 Cong. Rec. 5337 (1936).*

An objection raised by Respondent's counsel to a hypothetical question posed to a legal expert was overruled. The law of Florida on a particular point had been put in issue by both parties, and since the witness understood the question, the Presiding Officer thought it was an appropriate one. *80 Cong. Rec. 5240 (1936).*

XI. Lack of Foundation

Judge Hastings

Respondent's counsel objected to the submission of evidence involving vouchers unless another witness would be called. The House Manager stated that this witness would appear and the Respondent's counsel withdrew the objection. *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-194, Pt. 2A at 807 (1989) (hereinafter S. Hrg. 101-194, Pt. 2A).*

Judge Claiborne

Respondent's counsel objected to a question by House Manager on the ground that no foundation had been established to demonstrate that the witness was competent to answer a question requiring knowledge of when the investigation of Judge Claiborne began. No ruling on the objection was necessary, as House Manager then asked a line of questions to establish that foundation. *Report of the Senate Impeachment Trial Committee, Hearings Before the Senate Impeachment Trial Committee, United States Senate, 99th Cong., 2d Sess., S. Hrg. 99-812, Pt. 1, 539-40 (1986) (hereinafter S. Hrg. 99-812, Pt. 1).*

House Managers' counsel objected to a question by Respondent's counsel on the ground that no proper foundation for the question had been laid as to the identity of the witness' accountant and the time and place of the conversation with that accountant which was the subject of the question. Objection sustained by Chairman of the Senate Impeachment Trial Committee. The foundation was established. S. Hrg. 99-812, Pt. 1, at 659.

House Managers' counsel objected to a question by Respondent's counsel on the ground that, unless the witness' testimony could establish adequate foundation, the question sought to elicit hearsay. Chairman of the Senate Impeachment Trial Committee directed Respondent's counsel to lay a better foundation for the question. S. Hrg. 99-812, Pt. 1, at 667.

House Managers' counsel objected to a question regarding conversations between Respondent's tax preparer and Judge Claiborne regarding a tax refund as leading, without allowing the witness' testimony to establish a proper foundation. Chairman of the Senate Impeachment Trial Committee asked Respondent's counsel to lay a better foundation for the line of questions. S. Hrg. 99-812, Pt. 1, at 709-10.

Respondent's counsel objected to a question by House Managers' counsel to a witness about conversations between the witness and her former employer regarding policies on clients' tax matters. The objection was premised on the failure of the House Managers' counsel to establish a foundation as to the time of the conversation. Chairman of the Senate Impeachment Trial Committee directed the House Managers' counsel to establish a foundation regarding the circumstances under which the witness' former employer made the statements attributed to him. S. Hrg. 99-812, Pt.

1, at 824. Respondent's counsel renewed his lack of foundation objection after a series of questions. House Managers' counsel countered his argument by stating that the witness had just established the necessary foundation. The Chairman of the Senate Impeachment Trial Committee appears to have agreed that the foundation had been established so long as the House Managers' counsel directed his questions to the specific incident as to which the witness was testifying. The House Managers' counsel did so explicitly in his next question. S. Hrg. 99-812, Pt. 1, at 824.

Judge Louderback

On cross-examination, the Presiding Officer overruled the improper foundation objection by Respondent's counsel regarding the witness' billing. The Presiding Officer felt the question was "competent, although, strictly speaking, perhaps it is not." 77 *Cong. Rec.* 3850 (1933). Respondent's counsel later raised the same objection to a similar question and it was sustained by the Presiding Officer. *Id.*

The Presiding Officer overruled an objection by respondent's counsel, finding proper foundation for the question from the allegations in the articles of impeachment. 77 *Cong. Rec.* 3614-15 (1933).

An objection by Respondent's counsel to the improper showing of managerial services rendered by the witness was sustained by the Presiding Officer. 77 *Cong. Rec.* 3991 (1933).

Judge Swayne

The Presiding Officer sustained the objection to admitting evidence as to poor prison conditions. Counsel for Judge Swayne objected because no foundation was laid showing the judge was responsible for such conditions. 3 *Hinds' Precedents of the House of Representatives* §2283, 636, 637 (1907); citing 39 *Cong. Rec.* 2908 (1905). The Presiding Officer sustained an objection to admitting evidence of other judges entering false certificates of expense. The House Manager objected because no foundation was laid by alleging new facts to support evidence that other judges had engaged in fraud. 3 *Hinds' Precedents of the House of Representatives* §2277, 622-629 (1907), citing 39 *Cong. Rec.* 3169-74, 3176 (1905).

XII. Lay Opinions

Judge Nixon

Respondent's counsel objected to the House Manager's question to the House Managers' witness because the House Manager asked whether he thought that the Respondent helped to have a case involving the witness' son be placed on the inactive case docket. The Chairman sustained the objection. S. Hrg. 101-247, Pt. 2 at 55.

Judge Hastings

Respondent's counsel asked a witness if it would be unusual for a witness to claim in 1985 that his recollection was hazy about events and their timing in 1981. The Chairman of the Senate Impeachment Trial Committee did not permit the question and stated: "I do not think it requires an expert to testify on the question of the length of time people remember. I think the committee is competent to make that judgment without the aid of expert testimony." *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-194, Pt. 2A at 593 (hereafter S. Hrg. 101-194, Pt. 2A).*

Respondent's counsel objected to the House Manager asking Judge Hastings when he was a witness about his theory of legal defense. The Chairman of the Senate Impeachment Trial Committee sustained the objection stating: "We have the unusual circumstance where the judge is also acting as his own attorney. . . . Obviously, if you wish to ask him about any factual matter or opinion that the judge has, I think that is appropriate." S. Hrg. 101-194, Pt. 2A at 1292.

Judge Ritter

An objection by a House Manager to a lawyer's opinion concerning the value of a law practice was sustained since he was not competent to determine the value of a law business. 80 *Cong. Rec.* 5365-66 (1936).

Judge Swayne

Counsel for Judge Swayne objected to the question of whether the witness thought the judge was a resident. The objection was sustained because residency was a question of law and fact and could not be determined by the opinion of lay witnesses. 3 *Hinds' Precedents of the House of Representatives* §2253, 591, 592; citing 39 *Cong. Rec.* 2394 (1905).

The Presiding Officer allowed the opinion testimony of a witness as to whether Judge Swayne seemed angry or resentful during a contempt proceeding. 39 *Cong. Rec.* 2626 (1905).

A witness was not allowed to testify to an impression made on his mind by the judge. The Presiding Officer stated a witness is only entitled to testify as to facts. 39 *Cong. Rec.* 3049 (1905).

XIII. Leading Questions

Judge Nixon

Respondent's counsel objected to the House Managers' counsel question to the House Managers' witness on redirect examination since counsel considered the question as leading because it began with the phrase, "Isn't fair to say." House Managers' counsel did not proceed further with the question and the Chairman did not state a ruling on the objection. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-247, Pt. 2 at 44* (hereinafter S. Hrg. 101-247, Pt. 2).

Respondent's counsel objected to the House Manager's question to the House Managers' witness as leading because it began with, "Is it fair to say." The Chairman permitted the witness to answer the question. S. Hrg. 101-247, Pt. 2 at 47.

Respondent's counsel objected to the House Manager's question to a House Managers' witness as leading because it asked whether the House Manager's statement about the witness' prior testimony was correct. The Chairman overruled the objection stating that the hearing was not in a court of law and that Respondent's counsel had the opportunity to cross-examine the witness. S. Hrg. 101-247, Pt 2 at 48.

Respondent's counsel objected to the House Manager's question starting with, "Did you call," to the House Managers' witness as leading. The Chairman sustained the objection, instructing the House Manager to try not to lead the witness. S. Hrg. 101-247, Pt. 2 at 52-53.

Respondent's counsel objected to the House Manager's question asking whether it was correct that the House Managers' witness discussed his son at his meeting with the Respondent. The Chairman sustained the objection. S. Hrg. 101-247, Pt. 2 at 55.

Judge Hastings

Respondent's counsel objected to a question by House Managers that there was little doubt in anyone's mind regarding the possession of cash. Respondent's counsel noted that the question was leading. The question was withdrawn. *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-194, Pt. 2A at 28* (hereafter S. Hrg. 101-194, Pt. 2A).

Respondent's counsel objected to a question by a House Manager regarding further discussion about a "deal" stating that there had been no testimony regarding whether there was a "deal" and that this was leading and assumed facts not in evidence. The question was rephrased. S. Hrg. 101-194, Pt. 2A at 80-81.

Respondent's counsel objected to a line of questions where the House Managers stated facts and asked if they were correct. The Chairman of the Senate Impeachment Trial Committee asked House managers to "try not to lead the witness quite so obviously...." S. Hrg. 101-194, Pt. 2A at 258.

Respondent's counsel objected to the form of questions by the House Managers in which a statement of fact was prefaced by the phrase: "Does that mean to you that this is . . . ?" The question was rephrased and the Chairman of the Senate Impeachment Trial Committee stated that the witness could respond to the revised question. S. Hrg. 101-194, Pt. 2A at 418.

Respondent's counsel objected to a question that asked further details when the witness said she could not recall. The Chairman of the Senate Impeachment Trial Committee asked House Managers to rephrase the question. S. Hrg. 101-194, Pt. 2A at 511.

Respondent's counsel objected to a question that he characterized as suggesting an answer. The Chairman of the Senate Impeachment Trial Committee asked the House Managers to rephrase the question. S. Hrg. 101-194, Pt. 2A at 518.

Respondent's counsel objected to a question asking the witness if the respondent had said that he was expecting anyone to be joining them. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 519.

Respondent's counsel objected to a question concerning Judge Hastings' familiarity with the hotel dining areas. The Chairman of the Senate Impeachment Trial Committee asked the House Managers to restate the question. S. Hrg. 101-194, Pt. 2A at 520.

Respondent's counsel objected to a question attempting to summarize the witnesses statement. The Chairman of the Senate Impeachment Trial Committee sustained the objection to the extent that it was an objection on the basis that the question was leading. The question was permitted if rephrased. S. Hrg. 101-194, Pt. 2A at 539.

Respondent's counsel objected to a question stating information and asking about its truth. The House Manager told the Chairman that "a leading question is one in which you elicit not previously elicited facts by virtue of the counselor asking the information. These facts have been in evidence now for a week." The Chairman of the Senate Impeachment Trial Committee sustained the objection and stated: "the objection that the question was leading is well-taken. If you could ask the witness a question before stating all the facts in each question, I think that would help him to testify as to what he recalls." S. Hrg. 101-194, Pt. 2A at 616.

Respondent's counsel objected to a question that asked the witness to acknowledge that his trial testimony was different than that at the hearing. The Chairman of the Senate Impeachment Trial Committee sustained the objection observing that the question "has been asked and answered in several forms." S. Hrg. 101-194, Pt. 2A at 638.

The House Manager objected to a question asking the witness whether he remembered a particular tape. The Chairman of the Senate Impeachment Trial Committee sustained the objection stating: "If counsel would ask the witness what he recalls about particular statements or incidents, I think that would be better than recounting to him precisely what the evidence is that counsel would like to have testified to." S. Hrg. 101-194, Pt. 2A at 1303.

Judge Claiborne

Respondent's counsel objected to a question by a House Manager regarding whether the total amount of time the witness had devoted to the case included time waiting for a grand jury and time waiting in a courtroom, because of the leading and suggestive nature of the question. Respondent's counsel noted that this was redirect examination. The House Manager rephrased the question. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 99th Cong., 2d Sess., S. Hrg. 99-812, Pt. 1, 577 (1986)* (hereinafter S. Hrg. 99-812, Pt. 1).

House Managers' counsel objected to a line of questions by Respondent's counsel regarding whether the witness ever discussed the subject of burglaries of his office with Government agents investigating Judge Claiborne on the ground that Respondent's counsel was leading the witness. Respondent's counsel argued that this was not a friendly witness and asked for leeway in the examination. The Chairman of the Senate Impeachment Trial Committee overruled the objection, but cautioned Respondent's counsel that he did call the witness and asked Respondent's counsel to "take due precautions" if he felt that this was an adverse witness. S. Hrg. 99-812, Pt. 1, at 654-55.

House Managers' counsel objected to a question dealing with the date of a series of burglaries of an office building where witness worked at the time in question on the ground that it was a leading question. Chairman of the Senate Impeachment Trial Committee asked Respondent's counsel to rephrase the question. S. Hrg. 99-812, Pt. 1, at 665.

House Managers' counsel objected to a line of questioning by Respondent's counsel regarding the delivery of a letter and a check from Judge Claiborne to Jay Wright on the ground that Respondent's counsel was leading the witness. The Chairman of the Senate Impeachment Trial Committee directed Respondent's counsel to rephrase the question by asking the witness "what she was given." S. Hrg. 99-812, Pt. 1, at 675-76.

House Managers' counsel objected to a question by Respondent's counsel directed to the witness' state of mind at the time she testified in Judge Claiborne's criminal trials on the ground that Respondent's counsel was "leading the witness in areas critical in impeachment of that witness." Chairman of the Senate Impeachment Trial Committee asked Respondent's counsel to rephrase the question. S. Hrg. 99-812, Pt. 1, at 696-97.

House Managers' counsel objected to a line of questioning directed to Mr. Watson regarding Judge Claiborne's tax refund on the ground that Respondent's

counsel was leading the witness. The Chairman of the Senate Impeachment Trial Committee suggested that Respondent's counsel lay a better foundation for his questions. S. Hrg. 99-812, Pt. 1, at 709-10.

House Managers' counsel objected to a question regarding the witness' business on the ground that Respondent's counsel was leading the witness. Respondent's counsel countered on the theory that this was an adverse witness. The Chairman of the Senate Impeachment Trial Committee directed Respondent's counsel to phrase his questions in a manner that avoided the problem of leading the witness. S. Hrg. 99-812, Pt. 1, at 755.

On redirect examination of a witness, House Managers' counsel objected to the form of Respondent's counsel's questions to the witness as leading questions. Respondent's counsel argued that it was necessary to present testimony from Judge Claiborne's tax preparer in order for the Senate Impeachment Trial Committee to know how the return was prepared, but that the witness was not "his witness." He asked that he be permitted to "question the tax preparer in a significant manner." The Chairman allowed the Respondent's counsel to continue with his line of questioning, but cautioned him to "keep within such reasonable bounds that you are not providing dictation for the witness. . . . We want to hear the witness' answers, not your answers." S. Hrg. 99-812, Pt. 1, at 773.

Respondent's counsel requested permission, in advance, to question a witness as a hostile witness. House Manager argued that the time to ask this was when the witness' testimony demonstrated that he was hostile. The Chairman of the Senate Impeachment Trial Committee granted Respondent's counsel's request, but cautioned Respondent's counsel that the Chairman "would keep [him] under very close surveillance." S. Hrg. 99-812, Pt. 1, at 848.

Judge Ritter

The Presiding Officer declined to rule on an objection to what Respondent's counsel claimed to be a leading question because the Manager had not finished asking the question. 80 *Cong. Rec.* 5065 (1936).

The Presiding Officer declined to rule on an objection to a question on redirect that was said to be leading and suggestive since the question had already been answered. The answer was permitted to stand. 80 *Cong. Rec.* 5240 (1936).

Judge Louderback

The House manager objected to a question as leading, but the Presiding Officer permitted the witness to answer. However, the Respondent's counsel withdrew and reframed the question. 77 *Cong. Rec.* 3790 (1933).

The Respondent's counsel sought to lead a witness because of his physical condition (age and cerebral arteriosclerosis), but the Vice President sustained the objection, although sympathetic to the situation. 77 *Cong. Rec.* 3845, 3849 (1933).

The House Manager objected to both the line of questioning and the testimony of a witness regarding assets of a corporation in bankruptcy on the ground that the questions were leading questions. The Presiding Officer overruled the objection and permitted the answer but stated that further questions along this line would be subject to objection by House Managers. *77 Cong. Rec.* 3874 (1933).

The Presiding Officer believed the witness, Judge Louderback, was too intelligent to be led by his counsel. However, the Presiding Officer did warn counsel to refrain from such actions. *77 Cong. Rec.* 3977 (1933).

Judge Swayne

The Presiding Officer stated that neither the House Managers nor Counsel for the Respondent should ask leading questions when examining his witness. *39 Cong. Rec.* 2626, 3043 (1905).

The Presiding Officer sustained an objection to the Manager leading his witness, however the answer of the witness was allowed to stand. *39 Cong. Rec.* 2624 (1905).

Counsel asked the Manager not to lead his witness “quite so much.” The Presiding Officer did not rule, so the answer was allowed to stand. *39 Cong. Rec.* 2467 (1905).

When Counsel for the Respondent objected to leading questions, the Manager replied he was simply bringing the attention of the witness to what he testified to earlier. The Presiding Officer allowed the question. *39 Cong. Rec.* 2393 (1905).

XIV. Prior Inconsistent Statements Used to Impeach Witness

Judge Nixon

Respondent's counsel objected to the House Manager's request to admit into evidence affidavits which would impeach the Respondent's testimony through use of a prior inconsistent statement. The affiants asserted that the Respondent had to know that a company in which he had an interest had a case before him. The affidavits were placed into evidence during the House proceedings with the agreement of both parties. The Chairman sustained the objection because the Respondent's testimony addressed the issue the affidavits raised. The Respondent testified that he knew that the company had cases before him but he did not spot them. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-247, Pt. 2 at 318-19 (hereinafter S. Hrg. 101-247, Pt. 2).*

Judge Claiborne

Respondent's counsel used prior trial testimony of the witness, Mr. Wright, with regard to figures reported on Judge Claiborne's tax return as prior inconsistent statements for impeachment purposes. House Managers' counsel objected to the form of the questions used by Respondent's counsel to impeach the witness using this prior testimony. The Chairman of the Senate Impeachment Trial Committee sustained the objection. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 99th Cong., 2d Sess., S. Hrg. 99-812, Pt. 1, 574-75 (1986) (hereinafter S. Hrg. 99-812, Pt. 1).*

House Managers' counsel used prior court testimony as prior inconsistent statements to impeach a witness. Respondent's counsel objected to one aspect of the use of this testimony. The witness clarified her response, and Respondent's counsel withdrew his objection. S. Hrg. 99-812, Pt. 1, at 681-86, 695.

House Managers' counsel used prior trial testimony as prior inconsistent statements for impeachment purposes in cross-examination of Judge Claiborne. S. Hrg. 99-812, Pt. 1, at 973-74, 975-76, 983-84, 1013, 1179-80. In regard to one such use of the prior trial testimony, Respondent's counsel objected on the grounds that it did not impeach, it was not a prior consistent statement, and it had nothing to do with the witness' testimony. The Chairman of the Senate Impeachment Trial Committee permitted House Managers' counsel to continue if he was prepared to make the record perfectly clear on this point. S. Hrg. 99-812, Pt. 1, at 975-76.

Judge Swayne

Counsel for Judge Swayne was allowed to impeach a witness for prior inconsistent testimony. *39 Cong. Rec. 2716, 2717 (1905).*

XV. Refreshing Witness' Recollection

Judge Nixon

Respondent's counsel objected to the House Manager showing a telephone record to refresh the Respondent's memory because the Respondent already stated that he did not remember where he was on the date shown on the telephone record. The Chairman allowed the House Manager to show the telephone record to the Respondent but said that he did not see the relevancy of the questioning as the Respondent stated that he did not remember where he was. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-247, Pt. 2 at 257* (hereinafter S. Hrg. 101-247, Pt. 2).

Respondent's counsel objected to the House Manager showing the testifying Respondent a document not introduced into evidence. The House Manager stated that the evidence was found to be useful in rebuttal and was discovered after testimony. The Chairman allowed the House Manager to present the document to the Respondent to determine whether the Respondent's memory was revived. S. Hrg. 101-247, Pt. 2 at 257-58.

Judge Claiborne

House Managers' counsel used prior trial testimony of the Respondent to refresh his recollection on cross-examination. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 99th Cong., 2d Sess., S. Hrg. 99-812, Pt. 1, 1011 (1986)* (hereinafter S. Hrg. 99-812, Pt. 1). Respondent's counsel objected, arguing that this was an improper use of and characterization of the prior testimony. Respondent's counsel contended that the witness should be allowed to see the transcript of the prior testimony to refresh his recollection. House Managers' counsel rephrased the question without conceding that the prior question was inappropriate, and let the witness see the transcript. S. Hrg. 99-812, Pt. 1, at 1011.

Respondent's counsel objected to the manner in which a document which belonged to another witness was being used to impeach Judge Claiborne when he was a witness. House Managers' counsel argued that the document was not being used to impeach the witness, but rather to refresh the witness' recollection. Respondent's counsel had no objection to the document's use for this purpose, but objected to the manner in which it was being used to this purpose. The Chairman of the Senate Impeachment Trial Committee did not rule directly on the objection, but he suggested that it should be determined how much Judge Claiborne's recollection had been refreshed by reviewing the document. S. Hrg. 99-812, Pt. 1, at 1014.

Judge Ritter

The Presiding Officer sustained the objection made by a Manager that a memorandum could not be used to refresh the recollection of a witness who had

independent knowledge of a matter and who was to testify on the basis of his independent memory. 80 *Cong. Rec.* 5361 (1936).

A witness, who was an attorney, was asked whether he had attended various hearings in a civil suit. He was allowed to refresh his recollection by reviewing a lengthy list of court documents in the case. The Presiding Officer presented to the Court the question of whether the witness would be allowed the 20 or 30 minutes that he estimated he would need to thoroughly examine the list. The Court did not want to delay the proceedings and refused to grant the witness the time that he needed but permitted him to (a) examine the list that evening and (b) to be recalled. 80 *Cong. Rec.* 5056-58 (1936).

Judge Louderback

The Presiding Officer overruled an objection by a House Manager to respondent's counsel's effort to refresh a witness' memory. 77 *Cong. Rec.* 3462, 3615, 3619 (1933).

The Presiding Officer permitted a House Manager to refresh a witness' memory by showing him certain papers. 77 *Cong. Rec.* 3981-82 (1933).

Judge Swayne

The Presiding Officer thought it was proper to object to counsel for the Respondent questioning a witness on a letter without refreshing his recollection. However, the answer of the witness was allowed to stand. 39 *Cong. Rec.* 2779 (1905).

XVI. Relevancy or Materiality

Judge Nixon

Respondent's counsel objected to wording of the transcript read by the House Managers' witness because the word "to" was left out but was included on the Articles of Impeachment. The House Manager's counsel stated that the Judge stipulated to the accuracy of the transcript. The Chairman noted the objection and stated both counsel would be able to argue the relevancy of the word "to". *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-247, Pt. 2 at 23-24 (hereinafter S. Hrg. 101-247, Pt. 2).*

The Chairman raised his own objection to Respondent's counsel question to the House Managers' witness on cross examination regarding a conversation about the sale of oil interests to Respondent. The Chairman reasoned that the question was not relevant to the Articles of Impeachment as charged. The Chairman stated that he did not want to limit Respondent counsel's questions and urged counsel to continue with another question. S. Hrg. 101-247, Pt. 2 at 35.

Respondent's counsel objected to the relevancy of the House Manager's question to the House Managers' witness concerning the possible costs of the oil wells the Respondent bought. The Chairman sustained the objection because the questions of cost were not relevant to the Articles of Impeachment as charged. S. Hrg. 101-247, Pt. 2 at 50.

The Chairman raised his own objection on relevancy grounds for Respondent counsel's questions concerning whether the House Managers' witness or the Federal Government decided to indict Wiley Fairchild's son. The Chairman stated that he did not want to limit counsel in his cross-examination but he did not see how the line of questioning Respondent's counsel was pursuing was relevant to the Articles of Impeachment as charged. The Chairman urged counsel to continue with another question. S. Hrg. 101-247, Pt. 2 at 121.

Senator Reid objected to the relevancy of Respondent counsel's questions to the House Managers' witness concerning a different case than the one involved in the Articles of Impeachment as charged. The Chairman ruled that counsel should try to ask questions relevant to the Articles of Impeachment as charged. S. Hrg. 101-247, Pt. 2 at 124.

Respondent's counsel objected to the House Manager's questions to the House Managers' witness about the business relationships with the Respondent. The Chairman overruled the objection because Respondent's counsel conducted a searching examination of the witness concerning the business relationships with the Respondent. The House Manager had a right to establish what the witness knows about the Respondent's business relationships. S. Hrg. 101-247, Pt. 2 at 161.

The Chairman advised the House Manager questioning the House Managers' witness about an issue tangential to the Articles of Impeachment to conclude such questions quickly. S. Hrg. 101-247, Pt. 2 at 163.

The Vice-Chairman advised Respondent's counsel that the relevant issue was character of the Respondent not the reversal rate of the Respondent's cases. S. Hrg. 101-247, Pt. 2 at 210.

Judge Hastings

Respondent's counsel objected to a question by a House Manager asking a witness whether he expected the judge in a case to sentence certain individuals stating that, "Mr. Deichert's expectations strike me as a matter of irrelevance and improper." The objection was overruled by the Chairman of the Senate Impeachment Trial Committee. *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-194, Pt. 2A at 32 (hereinafter S. Hrg. 101-194, Pt. 2A).*

Respondent's counsel objected to a question stating: "Why Mr. Deichert was surprised, it does not strike me bears on the issue in this case. We are moving into a fairly central area in that the question is was Judge Hastings surprised? What was his motivation? Whether Mr. Deichert was surprised, whether another prosecutor would have been surprised, this witness's state of mind is not at issue in this case. This is speculation and it is improper." The House Manager replied that the witness "would be expected to have a depth of knowledge about these matters, and his opinion as an expert would be relevant to this hearing." The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 32-33.

Respondent's counsel objected to a question asking for the witness's reaction to an order. The House Manager responded that "if you follow the line of questioning that I have, it will become very important as to what his reaction as an expert on these matters was." The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 40.

Respondent's counsel objected to a question regarding a system of talking over the telephone alleging that the relevance had not yet been established. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 81-82.

A House Manager objected to a line of questioning relating to a resolution introduced before the Board of Directors of the National Association of Criminal Defense Lawyers suggesting that the matter against Judge Hastings be ended. Respondent's counsel argued that the House Manager had opened the door for this questioning when he asked about reading the accounts. The House Manager argued that a copy of the resolution could be introduced but that "it has not at this time been established that it has any probative value whatsoever." The Chairman of the Senate Impeachment Trial Committee overruled the objection after the Respondent's counsel

stated that he would introduce the resolution into evidence. S. Hrg. 101-194, Pt. 2A at 214-15.

Respondent's counsel objected to the introduction of the transcript of hearings from a judicial decision stating "I am not quite sure how Mr. Trafficante comes into the case at this stage or what the relevance of this not thin transcript is to the question of whether there was something going on with the Romanos." The Chairman of the Senate Impeachment Trial Committee thought the point was well taken and asked the House Manager to explain the relevance of the evidence. The House Manager argued that it was necessary to indicate that the case was ongoing and active. The Chairman of the Senate Impeachment Trial Committee asked the Respondent's counsel to stipulate to those facts and denied the admission of the evidence. S. Hrg. 101-194, Pt. 2A at 237-238.

The Respondent's counsel objected to a question asking a witness whether it would make sense for an individual to take money from Mr. Trafficante knowing he could not make good on a promise arguing that, "I have a sense that a grease paint brush of matters that were not alleged in the Articles of Impeachment are now being opened up, and this somehow is becoming a charge that there was a conspiracy with respect to Mr. Trafficante that implicates Judge Hastings, when it (sic) point of fact that was not alleged by the House in its Articles." The House Manager argued that the respondent's case depends upon a characterization of William Borders and the question goes to whether the respondent's characterization of him as a 'rainmaker' makes any sense. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 241-242.

The Respondent's counsel objected to the admission of the entire appointment book on the grounds that the relevant pages had already been admitted. The House Manager responded that he was seeking to have the entire book admitted since the Respondent's counsel had previously objected to the admission of single pages. The Chairman of the Senate Impeachment Trial Committee noted that the relevant pages had already been admitted and sustained the objection on those grounds. S. Hrg. 101-194, Pt. 2A at 356.

The House Manager objected to the admission of a telex on grounds of relevance but withdrew the objection after Respondent's counsel explained that it was being offered to show that, "Dredge told the Government what he would do, what he wouldn't do, and he did not do what they wanted him to." S. Hrg. 101-194, Pt. 2A at 370.

The House Manager objected to the admission of a telex on the grounds of relevance but withdrew the objection after Respondent's counsel explained that it was being offered to show that, "Dredge was running this show, not the Government." S. Hrg. 101-194, Pt. 2A at 371.

The House Manager objected to the admission of a telex on the grounds of relevance but withdrew the objection after Respondent's counsel explained that it was being offered to show that, "there was information that persons knew the contents of the October 5 order prior to its issuing, and that Mr. Murphy knew that." S. Hrg. 101-194, Pt. 2A at 373.

The House Manager asked for clarification of the relevance of a telex and upon explanation raised no objection. S. Hrg. 101-194, Pt. 2A at 377.

The House Manager objected to a question concerning the witness's awareness of complaints from prosecutors about unfairness. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 387.

Respondent's counsel objected to the admission of evidence relating to phone bills on the grounds of relevance. The House Manager stated that the relevance of the evidence would be established by testimony. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 503-04.

Respondent's counsel objected to the admission of evidence relating to message logs, stating that they were not relevant. The House Manager stated that the relevance would be established by testimony. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 505-06.

Respondent's counsel objected to a question asking the expert witness in how many cases his testimony had been excluded from evidence. The Chairman of the Senate Impeachment Trial Committee overruled the objection noting that "this goes to the weight the committee wishes to give to the witness' testimony." S. Hrg. 101-194, Pt. 2A at 533.

Respondent's counsel objected to a question and answer concerning the capacities in which the witness had been involved in legal matters. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 685.

Respondent's counsel objected to the admission of an Eastern Airlines time table as evidence on grounds of relevance. The House Manager stated that this was how they were to prove when a flight was scheduled. The Respondent's counsel argued that absent a showing that Judge Hastings knew of the schedule, it was irrelevant and it showed flights to Miami when Judge Hastings went to Fort Lauderdale. The Chairman of the Senate Impeachment Trial Committee sustained the objection on the grounds that the fact of the time of the flight leaving was already in the record. S. Hrg. 101-194, Pt. 2A at 753-54.

Respondent's counsel objected to the introduction of three exhibits relating to reports of an FBI agent's investigation, a diagram of the third floor of the courthouse, and subscriber information relating to a pay telephone on grounds of relevance. The Chairman of the Senate Impeachment Trial Committee overruled the objections. S. Hrg. 101-194, Pt. 2A at 1010.

Respondent's counsel objected to the statements of a witness referring to what a dead man said on the grounds of relevance and hearsay. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 1091.

The House Manager questioned the relevance of the admission of an article on the work of the Florida southern district court. Respondent's counsel argued that the workload of the court was relevant in determining the significance of other evidence. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. HRG. 101-194, Pt. 2A at 1245-46.

The House Manager questioned the relevance of statistics on the workload of various federal courts compared to the Florida southern district court. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 1246.

The House Manager objected to a question to Judge King asking about a trial he presided over, stating it was irrelevant. Respondent's counsel argued that in this trial the lawyer was charged with having falsely attempted to influence the outcome of the trial. The Chairman of the Senate Impeachment Trial Committee sustained the objection stating that, "I think the committee can take notice of the fact that there are allegations made against judges and public officials in all positions which prove to be groundless. . . . unless this is in some way related to the case, I will sustain the objection." The Chairman stated that questions relating in general to the extent of the problem would be admissible. S. Hrg. 101-194, Pt. 2A at 1248-49.

Respondent's counsel objected, on grounds of irrelevance and speculation, to a witness being asked if he had leaked an undercover operation to someone would he expect his career at the FBI to be over. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 1320.

The House Manager objected to the introduction of a record kept of a telex on grounds of relevance and the fact that the witness did not author it. The Respondent's counsel argued that the document showed that Mr. Borders had been involved in "scamming persons by representing he had the power to influence Federal judges, including judges other than Alcee Hastings." The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 1356-58.

House Managers' counsel objected to the relevancy of questions directed to Respondent/witness by his counsel concerning draft documents prepared by the Respondent while a judge. In response to the relevancy objection, Respondent's counsel argued that the manner and character of the witness's practice of writing drafts had been raised as an issue. The Chairman overruled the objection with the observation that objections (that the documents were short, undated and that the witness could not testify as to where or when they were written) went to the weight of the evidence. S. HRG. 101-194, Pt.2B at 2256.

House Managers' counsel objected to the relevancy of the Respondent judge's docket that the Respondent's counsel sought to introduce. Respondent's counsel indicated that he only sought to introduce a few pages demonstrating the respondent judge's workload at the time of the alleged misconduct with which he was charged. The Chairman sustained the objection with the observation that the Committee might be receptive to introduction of the relevant pages. S. HRG. 99-812, Pt.2B at 2287-288. The House Managers' counsel subsequently objected when Respondent offered

the first nine pages of the docket to show his busy workload. The Chair overruled the objection with the observation that when the Articles were framed to make the Respondent's hurried pattern of activity an issue they made evidence of other explanations for the Respondent's hurried activities relevant. S. HRG. 101-194, Pt.2B at 2303-88.

House Managers' counsel objected to the relevancy of the Respondent's counsel's question to Respondent/witness as to his reaction to the fact that information about his case was widely reported in the media. Respondent's counsel argued that it related to improper leaks by the government and was relevant to an explanation of the Respondent judge attitude towards FBI agents who subsequently interviewed him. The Chairman overruled the objection. S. HRG. 101-194, Pt.2B at 2290.

House Managers' counsel objected on relevancy grounds to the admission of the defense counsel's closing argument in the Respondent's prior criminal trial. Respondent's counsel argued it was relevant for, although the Senate was not bound by the jury's verdict, it had been asked to replicate the jury's task. The Chairman admitted the closing argument into evidence; he refused Respondent's counsel's request that the entire transcript of the criminal trial be admitted, but instructed that it be made available to any Senate members who should wish to examine it. S. HRG. 101-194, Pt.2B at 2493-94, 2496-97.

Judge Claiborne

On Sept. 11, 1986, the House of Representatives filed a "Motion *in limine* to Exclude Irrelevant Evidence Proffered by Judge Harry E. Claiborne." This motion was taken under advisement on Sept. 15, 1986. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 99th Cong. 2d Sess., S. Hrg. 99-812, Pt. 1, 471 (1986)* (hereinafter S. Hrg. 99-812, Pt. 1). On Sept. 17, 1986, the Chairman of the Senate Impeachment Trial Committee announced his ruling on this motion. He observed that he had previously held on Sept. 10, 1986, that Respondent would be limited to no more than 10 character witnesses. S. Hrg. 99-812, Pt. 1, at 115-16. The Chairman announced that with regard to the issue of whether Government agents had influenced witnesses who would be appearing before the Committee or before the full Senate, testimony from two specified Government agents, one from the FBI and one from the IRS, and from two of Respondent's witnesses would be heard. The motion *in limine* was granted in all other respects, subject to the Respondent's right to renew his application for specific additional subpoenas, if warranted in light of testimony of any witnesses appearing before the Committee. In addition, the Chairman noted that the Respondent would be free to move, after the conclusion of the Committee proceedings, that the full Senate permit the testimony of additional witnesses. S. Hrg. 99-812, Pt. 1, at 689-92. On Oct. 7, 1986, Senator Dole moved that the Senate not hear additional witnesses in this case. The Senate agreed to this motion by a roll call vote the same day. *Proceedings of the United States Senate in the Impeachment Trial of Harry E. Claiborne, A Judge of the United States District Court for the District of Nevada, 99th Cong., 2d Sess., S. Doc. 99-48, 155-56 (1987)* (hereinafter S. Doc. 99-48).

Respondent's counsel objected to a motion by a House Manager to admit House Exhibit 34, Respondent's 1978 tax return, into evidence on the ground that the 1978 tax return was irrelevant and immaterial since 1978 was not one of the years in question under the articles. The House Manager argued that the document was relevant because it bore upon the writeoff of certain items from Respondent's law practice which were at issue in the case. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 99-812, Pt. 1, at 536-37.

Respondent's counsel objected to admission of House Exhibit 35, a page from the witness' diary and time record of Saturday, April 5, 1980, on the grounds of relevance and materiality. A House Manager argued that a proper foundation for its admission had been made as a business record and that certain entries on the page were relevant to the case. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 99-812, Pt. 1, at 544.

Respondent's counsel objected to the admission of House Exhibit 38, a form 2119 for the sale or exchange of a principal residence of Respondent for 1980, on the ground that it was outside the scope of the articles. A House Manager argued that the exhibit went to the issue of the amount Respondent claimed as income in 1979 and 1980 and how accurate that claimed amount was. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 99-812, Pt. 1, at 597-98.

House Managers' counsel objected on relevancy grounds to a question by Respondent's counsel as to the cross-checking of the witness' tax return with Respondent's tax return by their accountant, noting that this same subject matter had been excluded by Judge Hoffman in Judge Claiborne's second criminal trial on this basis. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 99-812, Pt. 1, at 660.

House Managers' counsel objected to testimony by a witness proffered as an expert criminal defense tax lawyer on the ground that the witness' anticipated testimony was within the scope of evidence which had been excluded as irrelevant by the Sept. 17, 1986, ruling of the Chairman of the Senate Impeachment Trial Committee on the House "Motion *in limine* to Exclude Irrelevant Evidence Proffered by Judge Harry E. Claiborne", S. Hrg. 99-812, Pt. 1, 689-92. Respondent's counsel argued that the witness, after being qualified as an expert, would provide testimony which would impeach the testimony of the House Managers' witness on the question of whether or not a tax return like Judge Claiborne's would "raise a red flag" when submitted to the IRS. The Chairman of the Senate Impeachment Trial Committee permitted the testimony of the witness to go forward within those parameters. S. Hrg. 99-812, Pt. 1, at 826. House Managers' counsel renewed his objection to the testimony of this witness on the same grounds after some of that testimony had occurred. The Chairman overruled this objection, but cautioned Respondent's counsel to stay within the defined limits of permissible inquiry and advised House Managers' counsel that he could later move to strike this testimony if appropriate. S. Hrg. 99-812, Pt. 1, at 828-829. House Managers' counsel later moved to strike this testimony as incompetent and an invasion of the province of the Committee. This motion was taken under advisement. S. Hrg. 99-812, Pt. 1, at 829.

House Managers' counsel objected to a line of questioning directed to a character witness for the Respondent on the ground that it was designed to elicit testimony in the area of "targeting" which was excluded by the ruling of the Chairman of the Senate Impeachment Trial Committee on the House "Motion *in limine* to Exclude as Irrelevant Evidence Proffered by Judge Harry E. Claiborne", S. Hrg. 99-812, Pt. 1, at 689-92. The Chairman of the Committee directed the Respondent's counsel to avoid the area of "targeting" because it had been excluded in its earlier ruling. S. Hrg. 99-812, Pt. 1, at 840.

The Chairman of Senate Impeachment Trial Committee cautioned Respondent's counsel to keep his line of questions with regard to Government agent witnesses to the territory defined by the Chairman in his ruling on House "Motion *in limine* to Exclude as Irrelevant Evidence Proffered by Judge Harry E. Claiborne", S. Hrg. 99-812, Pt. 1, at 689-92. In particular, permissible areas of inquiry were whether witnesses were subjected to pressure and whether their testimony was shaped or influenced. S. Hrg. 99-812, Pt. 1, at 862.

A question was discussed as to whether or not the members of the Senate Impeachment Trial Committee were limited in their questions to Government agent witnesses to the area defined by the Sept. 17, 1986, ruling of the Chairman of the Committee on the House "Motion *in limine* to Exclude as Irrelevant Evidence Proffered by Judge Harry E. Claiborne", S. Hrg. 99-812, Pt. 1, at 689-92. The Chairman of the Committee held that the Committee members were so limited, subject to possible later expansion of the field of inquiry. S. Hrg. 99-812, Pt. 1, 873-78.

House Managers' counsel objected to Respondent's counsel's line of questioning to a Government agent witness as being outside the parameters of the Sept. 17, 1986, ruling of the Chairman of the Senate Impeachment Trial Committee on the House "Motion *in limine* to Exclude as Irrelevant Evidence Proffered by Judge Harry E. Claiborne", S. Hrg. 99-812, Pt. 1, at 689-92. The Chairman of the Committee sustained the objection in part, instructing Respondent's counsel that he could ask the witness who his supervisor was and who gave him orders. S. Hrg. 99-812, Pt. 1, at 884-85.

House Managers' counsel objected to Respondent's counsel's line of questioning to the second Government agent witness as being outside the parameters set by the Sept. 17, 1986, ruling of the Chairman of the Senate Impeachment Trial Committee on the House "Motion *in limine* to Exclude as Irrelevant Evidence Proffered by Judge Harry E. Claiborne", S. Hrg., 99-812, Pt. 1, at 689-92. House Managers' argued that the line of questioning was designed to elicit information as to whether or not Judge Claiborne had been "targeted" by the Government. The Chairman of the Committee sustained the objection. S. Hrg. 99-812, Pt. 1, at 888-89. Later in this witness' testimony, House Managers' counsel again raised this objection to a question by Respondent's counsel regarding whether the 1978 count of the indictment against Judge Claiborne was contingent upon the credibility of Joseph Conforte. The Chairman overruled the objection, with cautionary instructions to Respondent's counsel that the inquiry was permissible only if material to the question of whether the Government agents influenced or shaped witness testimony. S. Hrg. 99-812, Pt. 1, at 893.

House Managers' counsel objected to admission of Respondent's proposed Exhibit No. 25, pertinent pages of the IRS manual, as irrelevant. The Chairman of the Senate Impeachment Trial Committee overruled the objection and admitted the exhibit. S. Hrg. 99-812, Pt. 1, at 912.

Judge Ritter

An affidavit was admitted on proof of its relevancy. 80 *Cong. Rec.* 5346 (1936).

The Senate sustained the ruling of the Presiding Officer that a certificate from the clerk of a court was inadmissible since it was not relevant. Respondent's counsel had sought to admit the certificate to establish the volume of business pending in that court, and that a particular case in issue in the impeachment trial was just one case in a busy court. But the Presiding Officer ruled that there was no issue as to the amount of business in the court. 80 *Cong. Rec.* 5346 (1936).

A trust deed was admitted on proof of its relevancy. The lengthy document was printed in the *Record*. 80 *Cong. Rec.* 5140-61 (1936).

The Presiding Officer stated that "mere collateral matters should not be permitted to take up the time of the Senate." 80 *Cong. Rec.* 5331 (1936).

Judge Louderback

The Presiding Officer sustained an objection by Respondent's counsel that the witness' initial actions (against the Respondent) were alleged in the articles of impeachment and detailed accounts of such action were not of concern to the court. 77 *Cong. Rec.* 3633 (1933).

The Presiding Officer sustained an objection that the House Manager's question, regarding the membership liquidation policy of the San Francisco Stock Exchange, was immaterial. 77 *Cong. Rec.* 3621 (1933).

An objection of the Respondent's counsel regarding the legal redress of a third party was sustained by the Presiding Officer. 77 *Cong. Rec.* 3535 (1933).

The Presiding Officer sustained a hearsay objection by Respondent's counsel and required the House Managers to demonstrate the relevancy of their witness' testimony after the testimony or deposition of another witness. 77 *Cong. Rec.* 3613 (1933).

The Presiding Officer did not permit the Respondent's counsel to question the witness about legal action taken on a particular case which was irrelevant to the trial. 77 *Cong. Rec.* 3712 (1933)

Despite the irrelevancy of the line of questioning, the Respondent's counsel was permitted to question a witness concerning the character of another witness to rebut testimony given by the later witness. 77 *Cong. Rec.* 3715 (1933).

Upon the objection by a House Manger to the relevancy of the questioning, the Presiding Officer limited the Respondent's counsel to a few questions. *77 Cong. Rec.* 3790, 3874, 3791 (1933).

The Presiding Officer overruled an objection and allowed a witness to answer a House Manager's question to show the excessiveness of fees paid. *77 Cong. Rec.* 3855 (1933).

The witness was permitted to respond to a question, rather than have the Respondent's counsel explain the witness' auditing duties for a particular holding company at issue in the trial. *77 Cong. Rec.* 3874 (1933).

The Presiding Officer permitted the witness' summarization of the value of a receiver's services on the ground it would not injure either party involved in the trial. *77 Cong. Rec.* 3993 (1933).

The Presiding Officer overruled an objection by Respondent's counsel and permitted the inquiry although, in a strict sense, the question was not relevant. *77 Cong. Rec.* 3854 (1933).

Evidence relating to events occurring prior to Respondent's appointment to the Federal bench (Judge Louderback's rulings in state cases) was admitted by the Presiding Officer to establish matters pertinent to the impeachment proceedings. *77 Cong. Rec.* 3513-14, 3846-47 (1933).

Judge Swayne

In the impeachment trial of Judge Swayne, the Presiding Officer explained that Counsel for the Respondent and the Managers for the House could raise objections to the relevance of evidence. However, an objection could not be made to a question posed by a Senator. The Senate cited to the impeachment trial of President Andrew Johnson:

The Chief Justice ruled that neither the managers nor the counsel had a right to object to a question of law being put by a member of the Senate but might discuss the admissibility of the evidence to be given in the answer to such question.

40 Cong. Globe 169 (1868).

The Presiding Officer sustained an objection to testimony by a lay witness to a question of law posed by a Senator. *39 Cong. Rec.* 2393, 2394 (1905).

The Presiding Officer ruled that the number of times a witness saw Judge Swayne in his district was relevant to the issue of residence, but not to whether his absences inconvenienced attorneys. *39 Cong. Rec.* 2532, 2533 (1905).

Testimony as to the character of one attorney who was an associate of Judge Swayne was immaterial. The Presiding Officer sustained the objection of counsel to the collateral attack on the character of the judge. *39 Cong. Rec.* 2908 (1905).

The Senate excluded statements made by Judge Swayne before the House investigating committee. Managers on the part of the House sought to introduce the statements as evidence of the judge's improper use of a railway car. *3 Hinds' Precedents of the House of Representatives* §2270, 609-613 (1907); *citing 39 Cong. Rec.* 2539, 2540 (1905). The admissibility of the statement was submitted to the Senate by the Presiding Officer. The Senate decided the statements were not admissible. *3 Hinds' Precedents of the House of Representatives* §2270, 611, 613. (1907).

The Presiding Officer admitted evidence on the expenditures of the judge, because the pleading raised the issue. Whether or not expenses were less than the sum charged was material to proving the charge that Judge Swayne made false certificates of expenses. *3 Hinds' Precedents of the House of Representatives* §2224, 551 (1907); *citing 39 Cong. Rec.* 2240, 2241 (1905).

As to the charge that Judge Swayne wrongfully committed persons for contempt, the Presiding Officer ruled testimony as to poor prison conditions was immaterial and aimed to prejudice the Senators. *39 Cong. Rec.* 2718, 2719 (1905).

XVII. Sequestration of Witnesses

Judge Claiborne

Respondent's counsel requested that, while each of the Government agent witnesses testified, the other two Government agent witnesses be sequestered; and that, when the Government agent witnesses were not testifying, they refrain from discussing their testimony with each other. The Chairman of the Senate Impeachment Trial Committee granted this request. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 99th Cong., 2d Sess., S. Hrg. 99-812, Pt. 1, 850-52 (1986).*

XVIII. Questions Calling For Speculation or Conclusions on the Part of the Witness

Judge Nixon

The House Manager asked the House Managers' witness why the Respondent told the witness that he spoke to another person about a particular case. Respondent's counsel objected to the response of the witness because it was the witness's speculation as to the motives of the Respondent in talking with another person. The Chairman sustained the objection and struck the witness's statement from the record. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-247, Pt. 2 at 167 (hereinafter S. Hrg. 101-247, Pt. 2).*

Senator Heylin objected to the House Manager's question to the Respondent's witness concerning whether the Respondent was accurate in saying that he did not discuss the issues of an open case because that was the issue that the full Senate would have to decide. The Chairman sustained the objection because the witness was there to address the Respondent's character and could not make an statement bearing on the ultimate decision of the case. S. Hrg. 101-247, Pt. 2 at 223.

Judge Hastings

Respondent's counsel objected to a question which asked the witness if under certain circumstances a judicial opinion might have been reversed. The Chairman of the Senate Impeachment Trial Committee overruled the objection. *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-194, Pt. 2A at 617 (1989) (hereinafter S. Hrg. 101-194, Pt. 2A).*

Respondent's counsel objected to a question which asked the witness what kind of sentence he might expect the judge to hand down as speculation. The Chairman of the Senate Impeachment Trial Committee overruled the objection and stated that the witness could respond if he had an expectation or an opinion at that time. S. Hrg. 101-194 Pt. 2A at 617.

Respondent's counsel objected to a question asking the witness whether he would present an application for a wiretap to Judge Hastings at this time. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194 Pt. 2A at 1105.

Respondent's counsel objected, on grounds of irrelevance and speculation, to a witness being asked if he had leaked an undercover operation to someone, would he expect his career at the FBI to be over. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194 Pt. 2A at 1320.

Respondent's counsel objected to a House Manager's question as speculative that asked whether the contrary testimony of a prior witness was in error. The Chairman overruled the objection and the witness repeated her testimony. S. HRG. 101-194, Pt.2B. at 1751.

Judge Claiborne

Respondent's counsel objected to a question by a House Manager as calling for speculation on the part of the witness with regard to "all possible sources" for the information involved. The House Manager countered, arguing that the witness could testify as to whether he had any other sources for the particular information involved. He further stressed the relevance to the case. The Chairman of the Senate Impeachment Trial Committee overruled the objection. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 99th Cong., 2d Sess., S. Hrg. 99-812, Pt. 1, 547 (1986) (hereinafter S. Hrg. 99-812, Pt. 1).*

House Managers' counsel objected to a question by Respondent's counsel regarding the witness' prior inconsistent statement in testimony during Judge Claiborne's second trial and moved to strike on the grounds that the question asked for and received a speculative answer and that it was an improper question for impeachment purposes. The Chairman overruled the objection, stating that, "If the witness knew the answer to the question, he would not have to speculate." S. Hrg. 99-812, Pt. 1, at 574-75.

House Managers' counsel objected to a question by the Respondent's counsel regarding a prior inconsistent statement in trial testimony by the witness and moved to strike the answer on the grounds that the question asked for and received a speculative answer. Respondent's counsel contended that neither the question nor the answer was speculative. The Chairman of the Senate Impeachment Trial Committee overruled the objection and directed the witness to give the best answer he could at this time. S. Hrg. 99-812, Pt. 1, at 580-81.

House Managers' counsel objected to a line of questioning by the Respondent's counsel with regard to what those who had broken into the witness' offices might have seen or done. The Chairman of the Senate Impeachment Trial Committee sustained the objection. S. Hrg. 99-812, Pt. 1, at 657.

House Managers' counsel moved to strike the last portion of the witness' answer from "probably" forward. Without objection it was stricken. S. Hrg. 99-812, Pt. 1, at 664.

House Managers' counsel objected to a question as to whether Ms. Travaglia could have asked the witness more than five times for help on the Claiborne tax return on the ground that the question called for speculation on the part of the witness. The Respondent's counsel rephrased the question. S. Hrg. 99-812, Pt. 1, at 760.

House Managers' counsel objected to an answer by a witness to a question by Respondent's counsel and moved to strike the answer as speculative. The objection was not ruled upon by the Chairman of the Senate Impeachment Trial Committee.

The Respondent's counsel asked the witness a series of questions in response to which the witness admitted that his responses were speculative. S. Hrg. 99-812, Pt. 1, at 761.

House Managers' counsel objected to a question directed to Respondent designed to elicit his feelings with regard to whether or not, after Sept. 1, 1978, he was the subject of strike force, FBI or IRS interest. He argued that questions should elicit facts, not feelings. Respondent's counsel countered that the crucial issue of state of mind was reflected in feelings, thought processes and emotions. The Chairman of the Senate Impeachment Trial Committee stated that "since Judge Claiborne is the impeached person, I think we need to exercise discretion here, and allow some latitude. I think the question does go to the issue of intent, and we will let you go forward." S. Hrg. 99-812, Pt. 1, at 929.

Respondent's counsel objected to a question by House Managers' counsel asking the Respondent why Jay Wright had asked him particular questions. Respondent's counsel's objection was on the theory that the question called for a conclusion and speculation on the part of the witness. Respondent replied to the question before the Chairman of the Senate Impeachment Trial Committee ruled on the objection. The Chairman stated that the objection was moot. S. Hrg. 99-812, Pt. 1, at 1008.

Judge Ritter

The Presiding Officer sustained an objection by Respondent's counsel to a question that called for a conclusion by a lay witness. The question was reframed and after an objection was again made, the Presiding Officer directed the witness to "state what occurred." 80 *Cong. Rec.* 5135 (1936).

When Respondent's counsel objected to a question that called for a conclusion by a lay witness, the House Manager voluntarily reframed the question. 80 *Cong. Rec.* 5253 (1936).

When the House Manager objected to a question as being conclusory, Respondent's counsel reframed the question and qualified it with "to your knowledge." The Presiding Officer stated that the reframed question was proper. 80 *Cong. Rec.* 5334, 5337 (1936).

Judge Louderback

The Presiding Officer overruled an objection by Respondent's counsel to a question that called for the opinion or conclusion of the witness. The witness was allowed to answer the question. 77 *Cong. Rec.* 3413, 3417, 3522 (1933). The Presiding Officer, however, sustained counsel's objection where the witness was not qualified to answer the question. *Id.* at 3413.

The objection by Respondent's counsel to a question as incompetent and calling for the opinion or conclusion of the witness was overruled by the Presiding Officer. 77 *Cong. Rec.* 3523 (1933).

The objection by Respondent's counsel to a question that called for the opinion of the witness was overruled by the Presiding Officer. *77 Cong. Rec.* 3524 (1933).

The Vice President overruled the objection by Respondent's counsel to a question calling for the opinion and conclusion of the witness and reiterated, "The jury trying this case is an intelligent jury . . . and a statement made by the witness in response to a direct question will not influence the jury. *77 Cong. Rec.* 3450 (1933).

The Respondent's counsel objected to a question calling for the witness' opinion and conclusion. The Presiding Officer overruled and permitted the witness to answer if he had the knowledge. *77 Cong. Rec.* 3452, 3518, 3532, 3869 (1933).

The Vice President permitted the witness to "state the facts within his knowledge," over an objection by Respondent's counsel as to whether the witness showed unusual interest. *77 Cong. Rec.* 3450, 3533 (1933). When the Respondent's counsel objected to the witness' same opinion and conclusion, the Vice President stated "it was for the court [(Senate)] to determine whether there was great excitement" and permitted the witness to state the facts. *Id.* at 3451.

The Vice President determined that the Senate, sitting as the court, could draw its own conclusion from the witness' testimony concerning interest in the stock exchange. *77 Cong. Rec.* 3507 (1933). However, a question calling for the witness' opinion as to a different aspect of the stock exchange was not admissible. *Id.* at 3507.

In view of the opening statement made by Respondent's counsel and testimony previously presented, the Presiding Officer overruled an objection that a question called for an opinion and a conclusion on the part of the witness. *77 Cong. Rec.* 3465 (1933).

The Presiding Officer sustained the objection to a House Manager's question calling for the witness' opinion and conclusion. The witness was ordered to just state the facts. *77 Cong. Rec.* 3453 (1933).

The Respondent's counsel objected to a question calling for the opinion and conclusion of the witness. The Presiding Officer sustained the objection, stating that the witness had previously answered the question. *77 Cong. Rec.* 3472 (1933).

The Vice President permitted a House Manager to question a witness about certain stock exchange activities in the interest of protecting the public, overruling an objection by the Respondent's counsel. *77 Cong. Rec.* 3779 (1933).

XIX. Stipulations

Judge Nixon

Respondent's counsel objected to the Chairman asking the Respondent's witness about a matter to which the parties had stipulated. The Chairman overruled the objection and directed the witness to answer the question. *Report of the Senate Impeachment Trial Committee, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-247, Pt. 2 at 215* (hereinafter S. Hrg. 101-247, Pt. 2).

Judge Hastings

Respondent's counsel objected to the redundancy of reading the stipulations and then asking the witness to repeat them. The Chairman of the Senate Impeachment Trial Committee overruled the objection. *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-194, Pt. 2A at 257* (1989) (hereinafter S. Hrg. 101-194, Pt. 2A).

Respondent's counsel agreed to stipulate to certain telephone numbers being correct but objected to the witness. The Chairman of the Senate Impeachment Trial Committee overruled the objection. S. Hrg. 101-194, Pt. 2A at 524.

Judge Ritter

Rather than calling a witness who was present, the Respondent and the Managers stipulated to the witness' testimony. The witness, a secretary, would have testified to a minor matter, the fact that her boss, a judge, was in his office during September and October, 1929. *80 Cong. Rec. 5255* (1936).

The Respondent and the Managers stipulated as to the author of a letter where certain initials, but no signature, appeared at the bottom of the document. *80 Cong. Rec. 5325* (1936).

Judge Louderback

Stipulations in writing by both parties were received by the Senate as if the facts therein agreed upon had been established by evidence. *77 Cong. Rec. 3503, 3506, 3796, 3860* (1933).

The Vice President ruled that, in view of the fact that the witness might be present in the Senate Chamber at the time, the Respondent would not be injured by the reading of his deposition testimony. The parties had previously stipulated that the deposition testimony of this witness could be read into the record at the impeachment trial by either party. *77 Cong. Rec. 3503* (1933).

Judge Swayne

Managers for the House and counsel for the Respondent stipulated to admission of deposition testimony of a witness who was too nervous to appear before the tribunal. 39 *Cong. Rec.* 2391 (1905).

XX. Testimony of Additional Witnesses Foreclosed

Judge Claiborne

On Oct. 7, 1986, Senator Dole introduced a motion that the Senate not hear additional witnesses in this case. The full Senate agreed to this motion by roll call vote on the same day. *Proceedings of the United States Senate in the Impeachment Trial of Harry E. Claiborne, A Judge of the United States District Court for the District of Nevada*, 99th Cong. 2d Sess., S. Doc. 99-48, 155-56 (1987).

XXI. Work Product

Judge Hastings

Respondent's counsel expressed his desire to obtain work products from the Department of Justice since there was no longer a prosecution. The House Manager objected to this arguing that "the work product privilege is not something designed to protect a particular piece of litigation. It is something that would allow an attorney to be very candid and open in his thoughts, knowing that at a later time he will not have to disclose the work product." *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings, Hearings before the Senate Impeachment Trial Committee, United States Senate, 101st Cong., 1st Sess., S. Hrg. 101-194, Pt. 2A at 194-195 (1989) (hereinafter S. Hrg. 101-194, Pt. 2A).*

XXII. Appendix

What Evidentiary Rules and Principles Are Applicable In Impeachment Trials?

This report addresses the question of whether, as a general matter, the Senate has bound itself to a particular set of evidentiary rules such as the Federal Rules of Evidence or common law rules in impeachment proceedings. We examine the “Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials” (hereinafter the Impeachment Rules) and the pertinent precedents on this matter. Our discussion includes those instances where the issue has been considered by the Senate in particular impeachment proceedings, and how the matter has been resolved in those proceedings.

The Impeachment Rules

The Impeachment Rules themselves do not explicitly address the question of what rules of evidence are applicable to the impeachment setting. Some of these rules, however, do provide some insight into the roles of the Presiding Officer and of the other Senators in dealing with questions of an evidentiary nature. Rules VII, XI, and XVI are of particular interest.

Rule VII provides:

VII. The Presiding Officer of the Senate shall direct all necessary preparation in the Senate Chamber, and the Presiding Officer on the trial shall direct all the forms of proceedings while the Senate is sitting for the purpose of trying an impeachment, and all forms during the trial not otherwise specially provided for. And the Presiding Officer on the trial may rule on all questions of evidence including, but not limited to, questions of relevancy, materiality, and redundancy of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision without debate; or he may at his option, in the first instance, submit any such question to a vote of the Members of the Senate. Upon all such questions the vote shall be taken in accordance with the Standing Rules of the Senate.

The appointment of a committee to take evidence, where the Senate deems this appropriate, is addressed in Rule XI. If this procedure is used, the full Senate retains the authority to make evidentiary determinations on issues of competency, relevancy and materiality regarding the evidence which the committee has received. Rule XI states:

XI. That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer

of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

Responsibility for deciding questions with regard to the admission of evidence is also mentioned in Rule XVI:

XVI. All motions, objections, requests, or applications whether relating to the procedure of the Senate or relating immediately to the trial (including questions with respect to the admission of evidence or other question arising during the trial) may be made by the parties or their counsel shall be addressed to the Presiding Officer only, and if he, or any Senator, shall require it, they shall be committed to writing and read at the Secretary's table.

As is apparent by the rules quoted above, these set the context in which evidentiary questions are to be decided, but they do not shed any light upon the standard by which such questions are to be determined. For enlightenment on the latter issue, we now turn to the brief discussion of evidentiary matters in *Procedure and Guidelines for Impeachment Trials in the United States (Revised Edition)*, S. Doc. No. 33, 99th Cong., 2d Sess. 52-54 (August 15, 1986), to *Jefferson's Manual*, H.R. Doc. No. 279, 99th Cong., 2d Sess. (1987), and to precedents from the thirteen impeachment trials which have occurred to date.

Impeachment Precedents

Our examination of precedents preceding the impeachment trial of Judge Claiborne in 1986 is drawn from *Hinds' Precedents of the House of Representatives* (1907) (hereinafter *Hinds'*), *Cannon's Precedents of the House of Representatives* (1935) (hereinafter *Cannon's*); and *Deschler's Precedents of the United States House of Representatives* (1977) (hereinafter *Deschler's*). Each of these compilations includes references to the Constitution, the laws and decisions of the Senate and those of the House of Representatives. Information regarding Judge Claiborne's trial has been drawn from B. Reams, Jr., and C. Gray, *The Congressional Impeachment Process and the Judiciary: Documents and Materials on the Removal of Federal District Judge Harry E. Claiborne* (1987) (hereinafter *Claiborne*), and to the *Congressional Record*. References in the trial regarding Judge Alcee L. Hastings are to the *Procedure for the Impeachment Trial of U.S. District Judge Alcee L. Hastings in the United States Senate, Report of the Committee on Rules and Administration, United States Senate, to Accompany S. Res. 38 and S. Res. 39*, S. Rep. 101-1, 111-12

(1989) and to the *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings*, S. Hrg. 101-194, Pt. 1, at 293 (1989).

We begin our consideration of the precedents with a caveat. Some matters, including evidentiary matters, may not be debated by the Senators in impeachment trials and, in those instances where debate is permitted, the debate and deliberations are held in closed session under recent practice. As a result, the reasoning of the Senators in regard to particular questions, including evidentiary questions, in the context of an impeachment trial is often not readily apparent from the resources available.³ See Rules XX, VII, and XXIV of the “Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials.”⁴ Frequently the only information

³ In *Procedure and Guidelines for Impeachment Trials in the Senate (Revised Edition)*, S. Doc. No. 33, 99th Cong., 2d Sess. 47-48 (August 15, 1986), there is some discussion of debate in the impeachment context:

Orders at the Trial:

A Senator may propose an order, but he may not explain or debate it. Any debate in open session would have to occur between the managers on the part of the House and the counsel for the respondent.

During the trial of Secretary of War Belknap in 1876, a Senator proposed an order fixing the time for further pleadings on behalf of the respondent, which was discussed by the counsel for the respondent and a manager on the part of the House of Representatives. At this point, Senator Allen Thurman of Ohio attempted to also debate the order but was reminded by the President pro tempore that debate was not in order.

Debate by Senators on any question is not allowed in open session. Rule XXIV provides that all “the orders and decisions shall be voted on without debate.”

Under the rules governing impeachment trials, Senators are not permitted to engage in colloquies, or to participate in any argument.

A request to abrogate the rule requiring questions by Members of the Senate during an impeachment trial to be in writing, or that a member of the San Francisco bar be permitted to sit with the House Managers to assist them in the development of the facts in an impeachment trial, were not held to be debatable.

Adoption of Senate Resolution 479, 99th Congress, 2d Session, further clarified Rules VII and XIX regarding debate and colloquy by Senators. Rule VII was changed by the insertion of the phrase “without debate” in the second sentence. The intent of this change is to make it clear that a decision by the Senate to overrule or sustain a ruling of the Presiding Officer is not to be deliberated in open session. This change would conform Rule VII with the other impeachment rules, e.g. Rule XXIV, which provide that decisions on these and other matters shall be “without debate, except when the doors shall be closed for deliberation.” The Senate added three new sentences to Rule XIX, which read as follows: The parties or their counsel may interpose objections to witnesses answering questions propounded at the request of any Senator and the merits of any such objection shall be made as provided in Rule VII. It shall not be in order for any Senator to engage in colloquy. August 16, 1986, Congressional Record (for August 15, 1986) pp. S11902-S11903.) [sic].

⁴ Rule XX states:

(continued...)

from which the thrust of the Senators' reasoning can be gleaned as to a particular determination may be the motions and supporting memoranda or the arguments of counsel with regard to a particular objection or proffer of evidence, and the ultimate resolution of the issue through the admission or exclusion of the evidence involved. This final disposition may be reflected in a roll call vote on the motion or objection, or may be inferred from the subsequent conduct of the trial with regard to that evidence.

During the trial of Judge James H. Peck, the Senate, on January 7, 1831, heard argument on the issue of whether the strict rules of evidence, as applied in the courts, were applicable in impeachment trials to assist it in determining the appropriateness of a witness being asked to give an opinion on an issue of fact before the Senate. The respondent in the case favored relaxation of the rules of evidence in the impeachment trial context so that the witness involved might be permitted to voice such an opinion. The House managers opposed this position, arguing that the strict rules of evidence should be applied and that the opinion testimony be excluded. By a vote of 7 yeas to 35 nays, the Senate sustained the objection of the House of Representatives to the proffered evidence of the respondent. III *Hinds'* § 2218, at 537-539.

This decision seems consistent with the British impeachment practice as reflected in *Jefferson's Manual*, § 619, at 302-303:

⁴(...continued)

XX. At all times while the Senate is sitting upon the trial of an impeachment the doors of the Senate shall be kept open, unless the Senate shall direct the doors to be closed while deliberating upon its decisions. A motion to close the doors may be acted upon without objection, or, if objection is heard, the motion shall be voted on without debate by the yeas and nays, which shall be entered on the record.

Rule VII, quoted above, states that where a formal vote is requested on any evidentiary questions, it shall be submitted to the Senate for decision without debate. Rule XXIV similarly provides that:

XXIV. All the orders and decisions may be acted upon without objection, or, if objection is heard, the orders and decisions shall be voted on without debate by yeas and nays, which shall be entered on the record, subject, however, to the operation of Rule VII, except when the doors shall be closed for deliberation, and in that case no Member shall speak more than once on one question, and for not more than ten minutes on an interlocutory question, unless they be demanded by one-fifth of the Members present. The fifteen minutes herein allowed shall be for the whole deliberation on the final question, and not on the final question on each article of impeachment.

Closed doors are also mentioned in *Procedure and Guidelines for Impeachment Trials in the Senate (Revised Edition)*, S. Doc. No. 33, 99th Cong., 2d Sess. 42 (August 15, 1986):

Senators do not debate in any impeachment trial unless the Senate is sitting in closed session when debate is allowed as provided in Rule XXIV.

During the trial of Halsted L. Ritter, a Senator moved that the doors of the Senate be closed, which was agreed to. The galleries were cleared and the respondent and his counsel withdrew from the Chamber, and debate was in order.

Judgment. Judgments in Parliament, for death have been strictly guided per legem terrae, which they cannot alter; and not at all according to their discretion. They can neither omit any part of the legal judgment nor add to it. Their sentence must be secundum non ultra legem. *Seld. Jud.*, 168, 171. This trial, though it varies in external ceremony, yet differs not in essentials from criminal prosecutions before inferior courts. *The same rules of evidence*, the same legal notions of crimes and punishments, prevailed; for impeachments are not framed to alter the law, but to carry it into more effectual execution against too powerful delinquents. The judgment, therefore, is to be such as is warranted by legal principles or precedents. *6 Sta. Tr.*, 14; *2 Wood.*, 611. The Chancellor gives judgment in misdemeanors; the Lord High Steward formerly in cases of life and death. *Seld. Jud.*, 180. But now the Steward is deemed not necessary. *Fost.*, 144; *2 Wood.*, 613. In misdemeanors the greatest corporal punishment hath been imprisonment. *Seld. Jud.*, 184. The King's assent is necessary to capital judgments (but *2 Wood.*, 614, contra), but not in misdemeanors, *Seld. Jud.*, 136.

(Emphasis added); see also III *Hinds'* § 2155, at 485-86. One might note at this juncture that the British impeachment proceedings were essentially criminal proceedings, the judgments available in such proceedings including traditionally criminal sanctions such as fines, imprisonment, and death. In contrast, the American impeachment system is limited in the judgments available to removal from office or removal and disqualification from future offices of public trust. Although the American impeachment process has its roots in the British impeachment process, and the British practice can at times provide enlightenment, one must bear their differences in mind when considering the precedential value of the British impeachment practice to the American impeachment process.

In the 1862 impeachment trial of Judge West Humphreys, strict adherence to the rules of evidence was required, particularly since the respondent did not appear himself or through counsel. III *Hinds'* § 2395, at 817. The impeachment trial of President Andrew Johnson in 1867-1868 also provides some insight regarding the appropriate evidentiary standards to be applied in the impeachment context. On April 16, 1868, Mr. Charles Sumner of Massachusetts proposed a declaration of opinion designed to relax the strictness of evidentiary rules to be applied in the impeachment trial. The proposed declaration said:

Considering the character of this proceeding, that it is a trial of impeachment before the Senate of the United States, and not a proceeding by indictment in an inferior court;

Considering that Senators are, from beginning to end, judges of law as well as fact, and that they are judges from whom there is no appeal;

Considering that, according to parliamentary usage, which is the guide in all such cases, there is on trials of impeachment a certain latitude of inquiry and a freedom from technicality;

And considering, finally, that already in the course of this trial there have been differences of opinion as to the admissibility of evidence;

Therefore, in order to remove all such differences and to hasten the dispatch of business, it is deemed advisable that all evidence offered on either side not trivial or obviously irrelevant in nature shall be received without objection, it being understood that the same when admitted shall be open to question and comparison at the bar in order to determine its competency and value, and shall be carefully sifted and weighted by Senators in the final judgment.

The motion was tabled by a vote of 33 yeas to 11 nays. III *Hinds*' § 2219, at 540.

In impeachment proceedings, recourse has often been taken by both respondents and House Managers to standards applied in judicial practice for their arguments regarding evidentiary points. *See, e.g.*, III *Hinds*' § 2223 (laying foundation for evidence); III *Hinds*' § 2224 (materiality); III *Hinds*' § 2225 (relevancy); III *Hinds*' § 2226 (best evidence rule); III *Hinds*' § 2230 (hearsay); III *Hinds*' § 2231 (foundation, competency); III *Hinds*' § 2232 (competency); III *Hinds*' § 2233 (relevancy and materiality); III *Hinds*' § 2239 (relevancy, competency). At times such recourse has been by application of accepted standards without reference to particular cases, and at times by citation to and reliance upon specific cases.

In the impeachment trial of Judge Harry E. Claiborne in 1986, two motions were filed which gave rise to arguments by counsel on evidentiary principles in support and in opposition to the motions. In the House of Representatives' memorandum in support of their "Motion to Accept Prior Admissions of Judge Claiborne as Substantive Evidence," the House observed that:

The *Rules of Procedure & Practice In the Senate When Sitting on Impeachment Trials* contain no specific standard for when evidence is admissible in an impeachment trial. The Rules only imply that the general standard used in courts across the country that evidence be relevant and material applies. (Rule VII).

. . .

Although the Federal Rules of Evidence are not binding on the Senate, they do offer guidance on what types of evidence are admissible. . . .

"Memorandum in Support of Motion to Accept Prior Admissions of Judge Claiborne," at 1-2, published in *Claiborne*, at 394-395. The House Managers placed reliance upon Rule 801(d)(2) of the Federal Rules of Evidence and the accompanying Advisory Committee Notes to the proposed Rule 801(d)(2) in their argument that an admission of a party did not have to be supported by a guarantee of trustworthiness and therefore should be admitted whether made under oath or not. *Id.*, at 2, published at *Claiborne*, at 395. In addition, to support their argument that "[a]dmissions made by Judge Claiborne's counsel during the trial should also be binding on Judge Claiborne in this impeachment," *id.*, at 2-3, published in *Claiborne*, at 395-396, the House Managers cited *McCormick on Evidence*, sec. 267, p. 791 (3d ed. 1984), for the proposition that, "An in-court admission by an attorney generally is held by courts to bind the client, event though the attorney is not sworn as a witness." This suggests that the House Managers, in their memorandum in support of this motion, relied both upon the Federal Rules of Evidence and upon a treatise which addresses more general common law principles. Similarly, their argument seems to indicate a view that the Senate is not bound by either the Federal Rules of Evidence or common law principles, alone, in its consideration of evidentiary questions in an impeachment trial, but rather can use both as sources of guidance.

To assist the arguments of the House of Representatives in its "Memorandum in Support of Motion *In Limine* to Exclude Irrelevant Evidence Proffered by Judge Claiborne," the Managers looked to both the Federal Rules of Evidence and to federal case law. The Managers consulted Rules 402 and 401 of the Federal Rules of

Evidence regarding irrelevant evidence and the definition of relevant evidence, in addition to several cases on the exclusionary rule. “Memorandum in Support of Motion *In Limine*, at 2, 6-9, published at *Claiborne*, 493-497-500.

Judge Claiborne, in his “Reply to House of Representatives Motion *In Limine* to Exclude Irrelevant Evidence Proffered by Judge Claiborne,” at 9, published in *Claiborne*, at 514, referred to *Moore’s Federal Practice*, Sec. 404.12, to support the position that evidence in the form of testimony by character witnesses was logical and relevant. In his “Memorandum of Points and Authorities,” Judge Claiborne relied upon Rule 803(3) of the Federal Rules of Evidence, Section 803(3) of *Moore’s Federal Practice*, and several federal district court and court of appeals cases in his arguments on evidentiary matters. Further, he observes that “Memorandum IV on the Rules of Evidence for Senate Impeachment Trials,” published in *Impeachment, Miscellaneous Documents, Committee on Rules and Administration of the United States Senate*, Comm. Print, 93rd Cong., 2d Sess., 239 (August 7, 1974), “deemed [it] advisable that *all* evidence not trivial or obviously irrelevant *shall* be received without objection[,] [*i*]d. at 243”, in an impeachment trial. “Memorandum of Points and Authorities,” at 5, published at *Claiborne*, 519-520. Judge Claiborne, like the House Managers, appears to rely both upon case law and the Federal Rules of Evidence to support his arguments.

In *Procedure for the Impeachment Trial of U.S. District Judge Alcee L. Hastings in the United States Senate, Report of the Committee on Rules and Administration, United States Senate to Accompany S. Res. 38 and S. Res. 39*, S. Rep. 101-1, 111-12 (1989), the Senate Committee on Rules and Administration addressed a request by Respondent Alcee Hastings’ counsel to clarify what evidentiary rules would be applied in the impeachment proceedings regarding Judge Hastings. The Committee stated:

G. RULES OF EVIDENCE

Respondent has requested that the Senate state whether the Federal Rules of Evidence or common law rules of evidence will apply in the Senate proceedings. The Committee finds that no such declaration should be made by it. Any such determination should be made by the body that hears the evidence in the case.

“The Rules of Impeachment” by Stanley Futterman, 24 Kan. L. Rev. 105 (1975) contains a discussion of the evidentiary rules used by the Senate in impeachment proceedings. Futterman states, “... The Senate has understood itself to be making evidentiary determinations under the rules of evidence applicable in courts of law [and] equity.[”]

In the past, the Senate has determined the admissibility of evidence by looking to Senate precedents rather than court decisions. A Senate vote is the ultimate authority for determining the admissibility of evidence.

In the Claiborne impeachment proceedings, the House managers argued that the Senate is not bound by the Federal [R]ules of Evidence, but they suggested that those rules should be looked to for guidance. The managers were careful to cite to the analogous federal rule when arguing motions.

Professor Burbank concludes that the Claiborne proceedings confirmed the Senate’s wisdom in refusing to adopt detailed rules of evidence for impeachment trials and cautions against wholesale borrowing from the Federal Rules of

Evidence. Burbank stated, "It is not hard to imagine a trial governed by a detailed body of rules becoming bogged down in technical disputes, with the ascertainment of facts the victim."

Although the Senate applies generally accepted rules of evidence, it would serve no useful purpose to declare any particular system to be supreme. *Impeachment: A Handbook*, (1974) by Professor Charles Black of Yale University, discusses the entire impeachment process. Professor Black suggests that technical rules of evidence designed for juries have no place in the impeachment process.

Both the House and the Senate ought to hear and consider *all* evidence which seems relevant, without regard to technical rules. Senators are in any case continually exposed to 'hearsay' evidence; they cannot be sequestered and kept away from newspapers like a jury. If they cannot be trusted to weigh evidence, appropriately discounting for all the factors of unreliability that have led to our keeping some evidence away from juries, then they are not in any way up to the job, and 'rules of evidence' will not help.

Simpson is "Federal Impeachments", *supra*, discussed rules of evidence in impeachment proceedings. Simpson noted:

. . . the Senate has invariably received all the evidence which it deemed relevant, from any witness who had personal knowledge of the facts, no matter by whom it was to be proved, and left its weight to be determined upon final consideration.

The Senate must retain its freedom to review evidence issues as they present themselves. The Senate should not restrict itself unnecessarily by making its decisions in a vacuum, before the trial has even begun.

Thus, the Senate Committee on Rules and Administration rejected the notion that the Senate need bind itself to a particular evidentiary standard prior to the trial on Judge Hastings impeachment articles. It noted the prior practice of looking to earlier impeachment practices and observed that in the previous impeachment trial, that of Judge Claiborne, the House Managers cited to the Federal Rules of Evidence to provide guidance, while recognizing that those rules are not binding on the Senate in the impeachment context.

Further, in addressing a number of pretrial issues raised by the parties in the impeachment trial of Judge Alcee L. Hastings to the Senate Impeachment Trial Committee, Chairman Bingaman announced the ruling of the Committee on the matter of governing evidentiary principles as part of the "Disposition of Pretrial Issues" on April 14, 1989, p. 13, *published in Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee L. Hastings*, S. Hrg. 101-194, Pt. 1 at 293 (1989):

Sixth, the parties have expressed an interest in the evidentiary principles that will govern these proceedings. The committee's task is to receive and report evidence to the Senate. The Senate reserves the power to determine the competency, relevancy, and materiality of the evidence received by the committee. The committee is not bound by the Federal Rules of Evidence, although those rules

may provide some guidance to the committee. Members of the Senate sit both as judges of law and fact. Precise rules of evidence are not needed in an impeachment trial to protect jurors, lay triers of fact, from doubtful evidence. In the end, the task of members of the Senate will be to weigh the relevance and quality of the evidence.

Conclusions

The precedents reviewed above suggest that in the past the Senate has preferred to take guidance from the evidentiary standards current in the judicial branch at the time of the impeachment at hand or from prior impeachment practice, rather than binding itself to a specific set of rules or standards as an immutable form to which the evidence introduced in an impeachment must conform. This approach has permitted the Senate greater flexibility in the admission of evidence which it has deemed relevant, material, and credible. The Humphreys case suggests that the Senate may be particularly strict in its construction of evidentiary standards where the respondent in the impeachment trial has not appeared in person or by counsel. The Senate's refusal to relax its adherence to the then current rules of evidence in that case suggests that the Senate may be particularly attentive to these rules where the protections of the respondent's interests inherent in an adversarial proceeding are absent. However, the Peck trial, where the Senate also rejected a move to relax the applicable rules of evidence to permit the respondent to introduce witness testimony to which the House objected, appears to reflect the fact that the Senate may adhere to the strict rules of evidence current at the time of an impeachment trial even where the respondent is present with counsel. On the other hand, in the recent proceedings with respect to Judge Claiborne and Judge Hastings, the Senate has refused to bind itself to a specific set of evidentiary rules.

The Senate is the final arbiter with regard to evidentiary questions, as well as other issues of fact and law, in an impeachment trial. Should the Senate so choose, it can admit evidence which might not be admissible in a court of law under applicable rules of evidence. The absence of a binding set of evidentiary rules in the impeachment setting may create some uncertainty for House Managers and their counsel and for Respondent and his counsel in their preparation of their cases for the impeachment trial. In addition, it may make the task of the Senate in ruling upon evidentiary matters more difficult because of the absence of hard and fast standards to apply. However, while guidance may be gleaned from the evidentiary rules and principles applicable in the courts at the time of the impeachment proceedings and from prior precedents from earlier impeachment trials, the flexibility inherent in the absence of a binding set of rules permits the Senate to temper its evidentiary rulings to its perception of the probative weight of the evidence offered, balanced against its potential to prejudice or mislead, rather than to strict adherence to a more inflexible standard.

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