CRS Report for Congress

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

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COMPENDIUM OF PRECEDENTS INVOLVING EVIDENTIARY RULINGS AND APPLICATIONS OF EVIDENTIARY PRINCIPLES FROM SELECTED IMPEACHMENT TRIALS

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 trial 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 evidentiary precedents from the Senate impeachment trials of Judges 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 report compiles precedents regarding evidentiary principles applied and rulings made in the Senate impeachment trials of Judge Harry E. Claiborne, Judge Halsted Ritter, Judge Harold Louderback, and Judge Charles Swayne.[1] 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 synopsized and a citation is provided to the appropriate page of the record of those proceedings.

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[1] 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 Questions

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. 99-812, Pt. 1, at 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 argumentive, because the House Manager was on cross-examination and allowed a "good deal of latitude." 77 *Cong. Rec.* 3874 (1933).

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III. Best Evidence

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 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 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. *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).

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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 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. Hearsay

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 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.

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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).

IX. Hypothetical Questions

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 on 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).

X. Lack of Foundation

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.* 3169-3174, 3176 (1905).

XI. Lay Opinions

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).

XII. Leading Questions

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 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 subjection to objection by House Managers. 77 *Cong. Rec.* 3874 (1933).

The Presiding Officer believed the witness, Judge Louderback, was too intelligent to be lead 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).

XIII. Prior Inconsistent Statements Used to Impeach Witness

Judge Claiborne

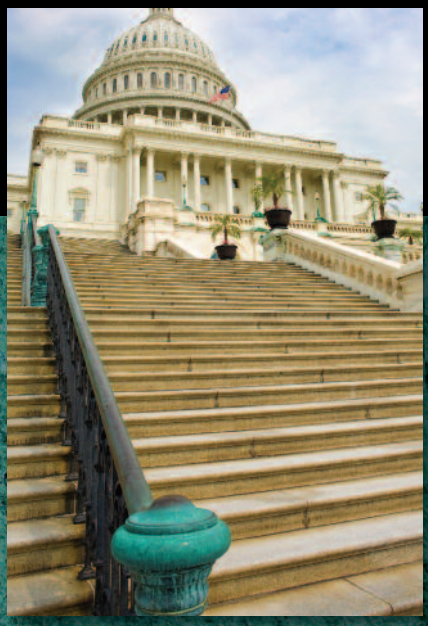
Respondent's counsel used prior trial testimony of the witness, Mr. Wright, with regard to figures reported on Judge Claiborne's tax return as prior inconsistent statements for impeachment purposes. House Managers' counsel objected to the form of the questions used by Respondent's counsel to impeach 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).



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XIV. Refreshing Witness' Recollection

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).

XV. Relevancy or Materiality

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 *Congressional 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).

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XVI. 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).

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

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 it 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).

XVIII. Stipulations

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).

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

XIX. 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).

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XX. Appendix--What Evidentiary Rules and Principles Are Applicable in Impeachment Trials? [2]

[2] This appendix is also available as a separate CRS Report for Congress (89-395 A) by the same title.

Appendix

CRS REPORT FOR CONGRESS

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, 1974), 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*.

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. 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

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[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

Procedure and Practice in the Senate when Sitting on Impeachment Trials."[4]

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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:

> 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

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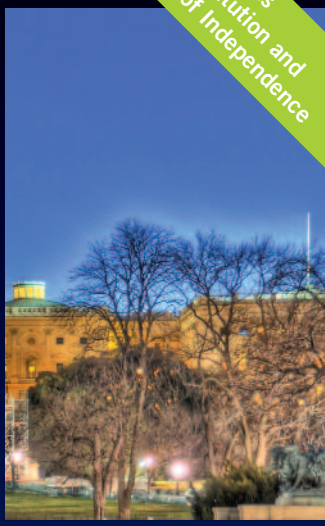

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Frequently the only information from which the thrust of the Senators' reasoning can be gleaned as to a particular determination may be the motions and supporting memoranda or the arguments of counsel with regard to a particular objection or proffer 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 trails 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:

> 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

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(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.

> 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.

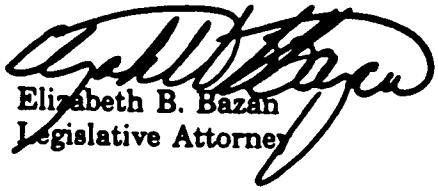
Thus, the Senate Committee on Rules and Administration rejected the notion that the Senate need bind itself to a particular evidentiary standard prior to the trial on Judge Hastings impeachment articles. It noted the prior practice of looking to earlier impeachment practices and observed that in the most recent completed 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.

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.

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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