Mr. MITCHELL. Before proceeding to the voting, I ask unanimous consent that Senators may be permitted, within 7 days from today, to have printed in the Record opinions or statements explaining their votes.

The PRESIDENT pro tempore. Hearing no objection, it is so ordered.

The majority leader is recognized.

STATEMENT OF SENATOR JEFF BINGAMAN

Mr. BINGAMAN. Mr. President, I would like to take a few moments. I know I have colleagues who are waiting to speak. I wanted to thank and compliment the staff of our committee, the Impeachment Committee, that considered the articles against Alcee L. Hastings.

First I want to compliment and thank the vice chair, the Senator from Pennsylvania [Mr. Specter], for the excellent work that he did on the committee and the leadership he provided. It was a pleasure to work with him, and as always I was extremely impressed with his legal mind and his conscientious approach to the very difficult issue we had.

I also want to thank the other committee members. I believe we had a very attentive and conscientious committee. We worked hard at preparing a good record so the Senate could consider this matter appropriately, and I believe we did so.

I also thank the counsel that helped us. Mike Davidson, of course, who is the Senate counsel, did a superb job, as he always does. I appreciate that.

In addition we had counsel for the Impeachment Committee, Elaine Stone, Mark Klugheit, and Bruce McBarnette, who, all three, helped tremendously with our understanding of the facts and our preparation of the record to present to the Senate, and the preparation of the statements we made to the Senate.

Also I want to thank the staff of the Impeachment Committee, Tony Harvey, from the Rules Committee, Casey McGannon, Isabel McVeigh, Angela Muenzer, Marilyn Poku, and many others who worked with them. I think their work was superb.

As I have indicated in other places, I also believe the House managers and their attorneys did an excellent job, and Judge Hastings and his attorneys certainly did a very professional job presenting their case as well.

Mr. President, I have voted "not guilty" on each of the 17 articles of impeachment presented by the House against Judge Alcee
L. Hastings. I will take a few minutes of the Senate's time to explain my reasons.

The charges brought by the House against Judge Hastings are extremely serious. He is accused, in effect, of having sold his office in the hope of financial gain in 1981, of having lied repeatedly from the witness stand when brought to trial on bribery conspiracy charges in 1983, and of having disclosed confidential information presented to him in his capacity as the supervising judge of a federal wiretap in 1985. In short, he stands accused of a repeated betrayal of the public trust. If guilty of these offenses, he surely has no place on the Federal bench.

However, after listening to nearly 4 weeks of testimony and reading and reviewing both the evidence and the submissions of the parties, I do not find that the evidence presented constitutes adequate proof that Judge Hastings is guilty of the charges against him. That feeling is not the product of any want of diligence on the part of the House managers. They and their counsel have prosecuted this case with skill and with care. Nor is that feeling the product of any notion that the case against Judge Hastings has been pursued for improper purpose. I believe that the judges of the U.S. Court of Appeals for the Eleventh Circuit who were appointed to serve as an investigating committee into the bribery conspiracy and false statement charges, as well as the House of Representatives, properly concluded that there was sufficient evidence of possible wrongdoing so as to merit the filing of articles of impeachment against Judge Hastings. It is simply my conclusion that the evidence, although furnishing grounds for investigation and trial, does not provide a sound basis upon which I can vote for conviction.

Our system of jurisprudence requires that in any proceeding in which serious charges of wrongdoing are leveled against an individual, two basic principles apply. First is the bedrock principle that each individual is presumed innocent of charges brought against him unless adequate proof is presented to the contrary. Here, perhaps due to the particular circumstances of this proceeding, I found that that principle remained, as it should, in the forefront as we considered the evidence. Judge Hastings came before the Senate accused of having conspired to solicit a bribe from two criminal defendants in his court. In 1983, a jury had acquitted him of that same charge. I do not subscribe to the view that that verdict was binding upon the Senate, or that we should deem it conclusive on the question of Judge Hastings' guilt or innocence. Our responsibility was different from that of the jury which heard the criminal charges against Judge Hastings, and I do not believe that its determination that guilt had not been proven beyond a reasonable doubt relieved us of our burden to determine whether Judge Hastings had been shown unfit to hold his high position of public trust. But that jury verdict did serve as an ever-present reminder that Judge Hastings, as any accused, stood before us a presumptively innocent man.

The second fundamental principle, a corollary of the first, is that when the Government accuses an individual of wrongdoing, it must shoulder the burden of proving that the accused is truly guilty of the charge. That is true whether the individual is on trial for the
alleged violation of the criminal laws or is before the Senate on articles of impeachment.

Counsel for Judge Hastings has argued that it may be proper to require proof beyond a reasonable doubt in order to remove him from office. But this is not a criminal proceeding in which the prosecutor should be held to proof beyond a reasonable doubt. Judge Hastings is not here in jeopardy of his life or personal liberty.

On the other hand, I am not persuaded by the House managers' contention that we should be guided by a simple preponderance of the evidence standard. That standard would permit removal upon the conclusion that it is more probable than not that Judge Hastings engaged in the wrongdoing with which he is charged. This is not a routine civil case, where, for example, a property dispute between two individuals must be resolved. Extremely important interests, both private and public, are at stake. For Judge Hastings, his Federal judgeship, his ability to serve in other positions of public service and his reputation are all at risk. For the public, its interests lie not only in seeing that judges who are unworthy of its trust are removed from office, but also, that its judges can make the difficult decisions that are demanded of them, knowing that they cannot lightly be swept from office.

For me, the proper measure in this case falls somewhere between proof beyond a reasonable doubt and a simple weighing of probabilities. Whether that place be called "clear and convincing" or some other legal standard be formulated, it is, at bottom, simply that point along the continuum where we would feel sufficiently convinced that Judge Hastings committed the offense of which he stands accused, so that our duty would lie in favor of his removal. For each of us, that may well be a different place, and I suspect that there will be different judgments made upon this body of evidence. But for me, the proof did not carry me to the necessary degree of certainty.

Article I of the articles of impeachment charges Judge Hastings with having conspired with William Borders to solicit a bribe from Frank and Tom Romano, two brothers whose criminal case was pending before Judge Hastings. The House managers' proof on article I is circumstantial. William Borders has refused to testify in response to the Impeachment Trial Committee's subpoena, choosing incarceration instead. We are left with no testimony from any witness who claims to have heard any discussion between Judge Hastings and William Borders which, on its face, plainly pertained to the alleged conspiracy. We likewise have no piece of physical evidence which documents any such discussion.

The closest we come to anything that could even be urged as direct evidence of Judge Hastings' involvement in the conspiracy is the conversation between the two on October 5, 1981. The conversation, at face value, concerns Judge Hastings' having drafted letters to assist their mutual friend, Hemphill Pride. It is said by the House, however, to be a coded discussion in which Borders tells Judge Hastings that the bribery deal is still on track, even though the judge was late in issuing the Romano forfeiture order that Borders had promised. According to the House, Judge Hastings' statement that he has drafted the "letters to Hemp" means that the Romano order has been written, Borders' statement that "he wrote
some things down for me," is a reference to the $25,000 down payment that he received from the undercover agent on September 19, and Borders' comment that "I was supposed to go back and get some more things," is a reference to the arrangement, made on September 19, that he would return for the balance of the bribe money.

I am not persuaded. It seems unlikely to me that Judge Hastings and Borders would have constructed a code as a means of communication with one another and then have used it over their own telephones, particularly in light of evidence that Judge Hastings had some concern that his telephones were tapped and that Borders had a well-developed system of making pay phone to pay phone calls. I also find the House manager's interpretation of the conversation to be strained. It strikes me as implausible that Borders, in order to deliver the simple message that the deal was still on, would elaborately relay information that was already more than 2 weeks old. Having listened to and examined the words of that conversation, I find it arguably innocuous, and in any event, too ambiguous to be treated as significant evidence of guilt.

What we do have in this case is an array of circumstantial proof from which inferences of guilt could be drawn. We have a pattern of contacts between Judge Hastings and William Borders whose timing appears suspicious when set against both the backdrop of what was transpiring in the Romano case and Borders' corrupt dealings. But the mere fact that these two men, who had a long-standing professional and personal relationship, were in contact does not prove Judge Hastings' involvement in the conspiracy. I am particularly troubled by the fact that, as both sides would agree, the evidence does not reveal the totality of the contacts between Judge Hastings and Borders. It is thus possible that the suspiciousness of the timing of the contacts that are documented in this record is more apparent than real.

We also have a number of events and circumstances, such as the three "shows of proof" allegedly made by Judge Hastings to signal his complicity and the fact that Borders obviously had a source which give him "inside information" about the Romano case, which can be seen as evidence of Judge Hastings' involvement in Borders' corrupt scheme. But for me, those events and circumstances are not sufficiently convincing as proof of guilt.

The "shows of proof," while arguably suspicious, are ambiguous. Judge Hastings continued the Romanos' sentencing in May 1981, as Borders had predicted, but the Romanos' lawyers asked the judge for that relief and there is little, if any, proof that the judge would have known that their lawyer would make such a motion. Judge Hastings did appear at the Fontainebleau as promised by Borders, but that appearance may only signify Borders' skill as a manipulator. Judge Hastings did issue an order returning a substantial portion of the Romanos' forfeited property, as Borders said he would do, but the content of that order was consistent with the law and the delay in its issuance can be explained by other factors. Indeed, the fact that that order was issued a week later than Borders had promised is difficult to reconcile with the picture painted by the House of Judge Hastings and Borders in steady contact to work through the details of the alleged conspiracy. And although Judge
Hastings is unable to do more than conjecture as to how Borders came to know detailed information about the case, if not for him, that is not something which, presuming him innocent, he should be expected to know and explain to us.

Judge Hastings' agitated reaction when he learned of Borders' arrest on October 9 is also troubling. But although his response may not be what I would expect of myself in like circumstances, I do not see his hurried return to his home as convincing evidence that he was distraught and guilty, rather than merely distraught.

Set against the foregoing evidence, is evidence from which an inference of innocence could well be drawn. The evidence showed that Judge Hastings was living within his means and had led a life devoted less to financial gain than to community service. There was no evidence of past misdeeds and no evidence that Judge Hastings' character rendered him at all likely to embroil himself in the serious wrongdoing of which he is here accused.

In sum, too often for my satisfaction, House managers take the view that it is sufficient to prove circumstances from which guilt could be inferred, and at that point, they argue the burden shifts to Judge Hastings to establish his innocence. For example, with regard to the May 11 continuance, the House does not prove that Judge Hastings gave Borders information on his intended action. Rather it points to the testimony of the Romanos' lawyer, "Neal Sonnett, members of his firm and staff and the judge's staff" to the effect that they did not provide the information, and then argues that Judge Hastings has failed to demonstrate a reason "why those persons should not be believed." Similarly, the House managers argue that on September 11, Judge Hastings and Borders met at National Airport to discuss their bribery scheme. But there is no proof of such a meeting. The proof is that the meeting could have occurred and then the argument is made that Judge Hastings has failed to adequately demonstrate that it did not happen.

The question before the Senate on article I, and on each of the other articles as well, is not which version of events—that offered by the House or that offered by Judge Hastings—is more plausible. The question instead is whether the evidence presented by the House satisfied its burden of proof to the satisfaction of two-thirds of the Members of this body. For my part, it does not.

Having concluded that I will vote to acquit on article I, I see no basis for a conviction on any of the false statement articles. The House managers, in their post-trial memorandum, urge that a conviction could be appropriate on article VI and articles X through XV, even after a vote to acquit on article I. However, for each of those articles, I find either insufficient proof that Judge Hastings' testimony was false or, where particular aspects of his testimony were incorrect, insufficient proof that he purposefully lied from the witness stand.

Article XVI contains a charge independent of the 15 articles which precede it. Article XVI charges that in September 1985, Judge Hastings disclosed confidential information to Mayor Stephen Clark, of Dade County, FL, which the judge had learned while supervising a federally authorized wiretap. Mayor Clark so testified. The evidence, however, establishes that Judge Hastings could not have made the disclosure either at the time when, or in
the manner which, Mayor Clark claims that that disclosure occurred. That gaping hole in the proof had not been remedied to my satisfaction by the other proof submitted by the House. I am also troubled by the failure of the House to identify any credible motive for the alleged disclosure. In my view, a vote to convict on article XVI would require reliance on speculation, not proof, and I shall accordingly vote to acquit Judge Hastings of this charge.

I will also vote to acquit on article XVII. Having concluded that the proof is insufficient to establish that Judge Hastings is guilty of any of the preceding articles of impeachment, each of which accuses him of a very specific act or wrongdoing, I am unwilling to vote that the whole—embodied in article XVII—somehow equals more than the sum of its parts.

The oath of each Senator in the consideration of impeachment articles is to "do impartial justice according to the Constitution and laws"—rule XXV, Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials. To my mind that means each Senator must consider the evidence, weigh it in light of his own experiences, and determine whether the guilt of the respondent has been established. I conclude that in this case the evidence falls short.

Mr. President, I yield the floor.

ORAL STATEMENT MADE BY SENATOR SPECTER DURING THE SENATE DELIBERATION ON OCTOBER 19, 1989

Mr. SPECTER. Mr. President, earlier today I circulated a statement on my position, and did so because of the absence of any committee report, trying to summarize my own views cutting down a 6,000-page Record to about 1 percent. And as noted in that statement, I agree with what the chairman, Senator Bingaman, has concluded, and that is to find the respondent not guilty on all the charges.

Historically, I think it is significant to note that the Senate has not paid great deference to the indicting process or articles of impeachment by the House. With some nine Federal judges having been tried by the Senate, five have been convicted and four have been acquitted. My own view is that the case turns on the hard evidence and on that alone.

I comment very briefly about the speech by Congressman Conyers yesterday which I thought directed itself to an issue not in this case. At no time has Judge Hastings ever contended before the Senate committee that he was the victim of racism. That has not been the issue, and I do not think that knocking that issue down is in any way relevant to these proceedings.

There was a 413-to-3 vote by the House. Starting with the issue of wiretap disclosure, I think it is fair to say that was extremely thin. Having been a party to many 99-to-nothing votes, I do not want to comment too much about those lopsided votes. But I call that to the attention of this body in terms of not paying extraordinary deference to that vote, at least by analogy or reference to the wiretap disclosure issue which I believe you will find to be totally unsubstantial.
Nor would I pay great deference to what the Eleventh Circuit Judicial Council has done. If you take a look at those proceedings, while not relevant here, it brings us really to the issues in this case.

I have devoted substantial thought and research to the issue of double jeopardy and the issue of delay and have commented about that extensively in the paper that I have submitted. But in my final thinking, I have not based my decision on that because I think there is a narrower ground and that is the ground of analyzing the evidence in the case.

On the issue of what is the appropriate burden of proof, it is my conclusion that that is proof beyond a reasonable doubt and I do so find for a number of reasons. One reason is the practicality; another is the history; and a third is the verdict of acquittal which has been rendered by a jury in this case, substantially the same case. I believe that the jury acquittal is entitled to great deference because he has been tried and this process is an 8-year process, having started in 1981, running through slightly more than 8 years as we are here today following the incidents of October 9, 1981.

My research carried me back to the Constitutional Convention where the impeachment process was defined, and I found quite a number of comments relating to punishment which I think to be highly significant—Madison, Franklin, Randolph, Morris, and Boudinot. Madison commented that “the case of impeachment will reach the culprit and drag him forth to punishment.”

I would note that in our rolcall on Claiborne we were asked to say guilty or not guilty, and the provision of the Constitution calling for impeachment refers to the party convicted.

The closest case that I can find to this kind of a situation is the Winship decision by the Supreme Court in 1969 which involves delinquency adjudications which are civil in nature for whatever that means. The Supreme Court there said that notwithstanding the fact that it being civil, and it is not to punish, that there is a requirement of proof beyond a reasonable doubt.

Mr. President, I do not know that it is really determinative what standards you articulate. I think that we say in criminal trials that it is proof beyond a reasonable doubt, but it is very hard for juries to really assess what that means as you apply it to the facts, or present the standard of proof by a preponderance of the evidence, and in a fraud case by clear and convincing evidence. It really comes down to a judgment call as to what you think about the evidence.

I am not sure that the evidence meets any standard here; but I think that where you have a judge up for removal, the issue of judicial independence requires a very strict standard. This is not a question of whether we would confirm him if he were before us, today. It is not a question of whether we feel comfortable in going before him, but a question of whether we are going to oust him from office that comes into play. I do not have to lecture this group

As noted in the Appendix to this statement, the Eleventh Circuit proceedings leave much to be desired
on the very critical issue of separation of power. I think it has to be exercised with great restraint.

Now for the evidence, Mr. President: The central charge is conspiracy to take a bribe to influence a case. There is no evidence of any money going to Judge Hastings. The remittance of the forfeiture was clearly required by the existing law. There has been no direct evidence of a conspiracy. That does not end the issue, however, because even circumstantial evidence can establish a case. But I think it is highly probative that there is no showing of any money to Hastings, and that he did not do anything not required by the existing law on sending back forfeiture.

There are two parties to the alleged conspiracy, Judge Hastings and Bill Borders. I think it was a superb performance by Congressman Bryant, and I called him up this morning to tell him so, told him what I intended to do. Nonetheless, I was surprised to hear him argue that there was an adverse influence against Judge Hastings because Borders did not testify, because I believe very strongly that the House did not do what it should have done in bringing Borders forward as a witness. They made some efforts to get him to testify. He first begged off saying that he was under probation. Then the House managers waited for the probation to lapse and went back to him again. They did not seek to compel his testimony by moving for criminal contempt, which they could have. They say they do not have civil contempt powers as we do. But it was only the Senate committee which brought Borders to the hearing, and, as we meet here this afternoon, Borders is in jail on a civil contempt citation.

We are obviously here to find the facts and do justice. But the House has every bit as much duty in that respect as does the Senate.

The prosecuting attorney is a quasi-judicial official who has a responsibility to do justice. It is more than just being an advocate. I go into this issue at some length in the written statement.

And, finally, I do not give any weight on either side to the absence of Border as a witness; but I do not think it is fair to raise an inference against Judge Hastings in the context of what the House did or did not do.

What is the circumstantial evidence? It is very hard to go into very much of this in a limited timeframe, but we will have time for more discussion. The question of motive: What motive does Judge Hastings have to jeopardize his position? $150,000 divided with someone else? There is some speculation that perhaps he was not even doing it for money himself but only for Borders.

Here is a man who devoted his life to public service, a lot of civil rights causes, lived with his mother, was very frugal, took the job as a judge because it brought more pay, is perhaps one of the few judges who is not lobbying for a pay increase. There is nothing in this man's background to suggest that he would put himself at risk for this money.

The House argued that there were three offers of proof that Borders controlled Hastings. I found the evidence at the Fontainebleau Hotel highly suspicious. They discussed the issue of the remittance order which was issued. But the key factor on the order was that it was supposed to have been issued within 10 days, and it was clear
it was totally within the power of Judge Hastings to issue the order if he wanted to.

The evidence showed that his clerk, Jeffrey Miller, has discussed with him the order shortly after a Fifth Circuit opinion on August 27 at which time Judge Hastings said prepare the order.

The House brief argued a third issue and that was the issue of a continuance which they did not present at their oral argument but I believe that our burden is to look at all the evidence.

Borders allegedly said to the FBI undercover agent the case will be continued *sua sponte* on the motion of the judge by himself. That did not happen. An application for the continuance was made by the defense lawyer, Neal Sonnett. What does the House say about that? On page 58 of their brief, they say Neal Sonnett may have orally notified Chambers of his desire for a continuance by the close of business on May 8, 1981. That obviously is wholly speculative.

On the important conversation of October 5, between Hastings and Borders at 5:12, there was an earlier conversation at 4:22 where Borders told Rico that the deal was set, before he talked to Hastings. So how did he know that? Page 65, the House submits that on October 4 there was a conversation between Borders and Hastings. There is no evidence of that. Had that conversation occurred, what is the need for the October 5 conversation?

There has been extensive discussion on the Hemphill Pride letters. Our Senate committee counsel, Mark Klugleit, pointed out to me that they were perfect and pristine.

I raised that question to Judge Hastings. Hastings made an explanation, and, as many of his explanations were, it was not entirely satisfactory. He then contended that he had shown them to John Shorter, Borders’ lawyer, and Shorter confirmed that he was shown the yellow pad which appeared to be the letters. The House brief then assumes that Shorter did not use those letters because he considered them to be fabricated. That is an important factor in the case.

I refer to these items of evidence illustratively. I know it is very hard to grasp them all in the context of this kind of a discussion. They are set forth in the written materials that I have submitted to you. But I believe you will find that on these items which are key to the House case there are speculative inferences which the House engages in.

Then there is the issue of his lack of passion. Again, that is raised by the Senate committee. I raised it with Judge Hastings. He said nobody had asked him about it. Even as he spoke, there was not any passion. I found that surprising; I found it troublesome.

Then I reflect on it, and I am not sure, is it more in sorrow than in anger? But again, it is not the kind of compelling or even clear and convincing evidence.

Then there is the incident of his departure from Washington, DC.

When Judge Hastings was advised on October 9 that his friend, Bill Borders, had been arrested on a charge of a bride committed in his courtroom, he did panic, beyond any question. But there is a lot
of experience about the innocent panicking, as well as the guilty panicking.

He went to a number of pay telephones in the airport and he called Patricia Williams, his lawyer—also another relationship—and he moved from one pay phone to another in a totally inexplicable way.

If he had reason to think that Patricia Williams' phone was being tapped, he had a right to talk to his lawyer in a confidential way. What inference may appropriately be drawn for someone exercising care to be sure that his communication with his lawyer is not overheard?

If someone is about to be questioned by the FBI, I suggest that they do not respond like Judge Hastings did. It did not make a lot of sense. What someone ought to do is say to the FBI, if you want to talk, I will talk to you at a mutually convenient time.

Anybody, guilty or innocent, being asked for an interview with the FBI, who does not then consult counsel and prepare himself, is foolish. That is not the sort of thing anybody wants to rush in and do on the spur of the moment, without consulting counsel and without reflecting on the subject.

Again, it may mean that the House did not articulate the best reason for Judge Hastings' attitude. This, again, comes from counsel of the Senate committee who raises the question: maybe what Judge Hastings really wanted to do was find out what Mr. Borders told the FBI before Judge Hastings submitted to an interview. That might have been a reason which would suggest guilt, and that might have been his reason.

I submit that to you, although, it is on the other side of the ledger from my own view, but I do not think you can speculate about that. When Judge Hastings responded as he did, which was in absolute panic and in irrational panic, that does not suggest to me necessarily that he is guilty.

Where you have a key witness in the case like William Dredge, I think it is important to note that this man has a very extensive criminal record. The committee went to great length to question him. When you get to Dredge's testimony, I suggest you take it with great caution.

At the time he was working with Borders, he was under indictment for distributing drugs, quaaludes, for which he ultimately received a sentence of probation because of his cooperation on the Hastings case. He has a record going back to 1943. He was convicted after being charged with armed robbery, convicted on a later assault with a deadly weapon charge, later in the 1950's, he served 5 years for false payroll checks. The incriminating evidence submitted by Mr. Dredge has to be taken with a super abundance of caution.

Now, Mr. President, in essence, when you take a look at this case, I believe that there are a great many highly suspicious factors. I have summarized them in the statement which I have submitted, but in toto, they constitute, as I view it, only a partial web. And to remove a Federal judge from office, it is my thinking that there cannot be speculation, and there cannot be assumptions at the central part of the prosecution's case.
Because of those factors here, it is my considered view that this man ought to be found not guilty. I thank the Chair.

**STATEMENT OF SENATOR SPECTER EXPLAINING HIS VOTES ON OCTOBER 20, 1989**

Mr. SPECTER. Mr. President, I thank the distinguished Senator from New Mexico [Mr. Bingaman] for his kind remarks. I have the utmost admiration for the job which the chairman, Senator Bingaman, did, in the discharge of the duties of the impeachment trial. The full committee attended to its duties with vigor, diligence and commitment. I would like to pay special thanks to the very devoted staff of the committee: Michael Davidson, Senate Legal Counsel, performed admirably, as did Anthony Harvey; the administrator; Elaine Stone, counsel; Bruce McBarnette, counsel. I ask, Mr. President, there be printed in the Record at this point the list of all of the staff members, each of whom are due accolades for their work on this committee.

There being no objection, the material was ordered to be printed in the Record, as follows:

**IMPEACHMENT TRIAL COMMITTEE**

Michael Davidson, Senate Legal Counsel.
Anthony L. Harvey, Administrator.
Elaine W. Stone, Counsel
Mark A. Klugheit, Counsel.
Bruce O. McBarnette, Counsel.
P. Casey McGannon, Staff Assistant and Exhibits Clerk.
Isabel T. McVeigh, Staff Assistant and Journal Clerk.
Angela Muenzer, Staff Assistant.
Marilyn Poku, Staff Assistant.

**MEMBERS’ STAFF REPRESENTATIVES**

Senator Bingaman, Chairman, Patrick Von Bargen.
Senator Leahy, Cathy Russell and Mark Gerchick
Senator Pryor, John Monahan.
Senator Bryan, John Forrest.
Senator Kerrey, William Hoppner.
Senator Lieberman, John Nakahara and Aaron Bayer.
Senator Specter, Vice Chairman, Ron Weich.
Senator Durenberger, Edward Garvey and Joshua Levy.
Senator Rudman, Jim Farrell and Jonathan Page.
Senator Bond, Chris Leritz.
Senator Gorton, Anthony Lowe.
Senator Burns, Lori Bass.

**INTERNS**

Troy Oechsner, Jeffrey Rackow, Andrea Wintroub, Marc McCaskill.

**PAGES**

Michelle Jenner, Johnnie Kaberle.

Mr. SPECTER. I would like to express thanks to Mark Klugheit, a former partner of mine with Dechert, Price & Rhoads, who came to Washington and worked unstintingly and very effectively. He did an outstanding job.

Mr. President, when I undertook this assignment I had a preconception that the impeachment process ought to be delegated to some other body. I thought, at that time, that it ought not be the
responsibility of the U.S. Congress. We should not take the time of the U.S. House of Representatives to refer articles of impeachment, or should not take the time of the U.S. Senate to hear the matter and make an adjudication.

After participating in this process I have revised my thinking. Obviously the Congress is very busy. We had an enormously busy month in July, in the Senate. But we found time to discharge these duties, and yesterday the Senate went into closed session at 2 and worked until approximately 9:30. The attendance was excellent at the outset. Not unexpectedly, as the hours grew long fewer Senators were in attendance. There was excellent debate, and I think the record will show the Senate acquitted itself very well.

We took on many issues of importance. We have oversight responsibilities which we really cannot discharge in depth which we ought to. But the impeachment process gave us a good opportunity to look at many branches of Government, including the Eleventh Circuit proceedings, including the FBI and other agencies.

I will have more extensive comments on the impeachment proceedings which I will insert in the record.

Mr. President, I ask unanimous consent the full text of my statement appear in the Record at this point followed by an appendix which is referred to in the body of the statement.

There being no objection, the material was ordered to be printed in the Record, as follows:

STATEMENT OF SENATOR ARLEN SPECTER ON THE ARTICLES OF IMPEACHMENT AGAINST JUDGE ALCEE L. HASTINGS, OCTOBER 19, 1989

INTRODUCTION

Mr. SPECTER. The Impeachment Trial of Federal Judge Alcee Hastings represents a landmark in our constitutional history. In the 202 years since the adoption of the Constitution, this is the first time that any Federal official has been impeached after being tried and acquitted by a jury. In essence, the House’s 1988 impeachment of Judge Hastings asks the Senate in 1989—eight years after the events in question, and six years after the jury verdict—to reconsider a jury decision on charges and evidence that, if not identical to those before the jury, certainly are substantially the same. The case thus presents the Senate with unsettled issues touching on the applicability in an impeachment trial of legal concepts such as double jeopardy, collateral estoppel and undue delay.

Moreover, these issues arise here in the Hastings case in the context of a factually complicated matter. The 17 impeachment articles encompass events that center on Judge Hastings’ handling of a criminal trial in 1981; his testimony at his own criminal trial in 1983; and his actions as supervising judge over an FBI wiretap in 1985. To consider fairly all these issues, the Impeachment Trial Committee in the Hastings impeachment heard 18 full days of testimony between July 10 and August 3, 1989. It heard 54 live witnesses (including one, William Borders, who was jailed for his refusal to testify), and two videotaped depositions; it had its record supplemented with the testimony of 25 additional witnesses from prior proceedings, including the criminal trials of Judge Hastings
and William Borders. The committee received 365 exhibits and 155 stipulations of uncontested facts into its record. Its full printed record is over 6,000 pages. The very factual complexity of the matter makes the decision that each Senator must make about the appropriate standard of proof a critical issue.

In my view, the factual and legal complexities of the matter render it a case where a just decision can be made only after extensive study and reflection. After having served as vice chairman of the Impeachment Trial Committee, having had the opportunity to discuss the evidence and legal issues with my colleagues on the committee, having reviewed the briefs and considered the arguments of the parties, and with the benefit of time for my own reflection on the issues, I have decided to announce my decision on the matter of Judge Hastings’ impeachment at this time with the hope that by doing so now and in this way I may assist my Senate colleagues in the difficult task of judging this historic matter. This statement sets forth my thinking and analysis of the evidence and issues raised by this case. Recognizing that this is a matter in which significant evidence and substantial arguments may be marshalled on both sides, I have attempted to discuss the case in its entirety, with recognition of the strengths and weaknesses of both sides.

BACKGROUND

The Constitution delegates the trial of impeached Federal officials exclusively to the Senate. The impeachment of a Federal judge involves an especially significant aspect of this fundamental Constitutional duty because of the importance that our Founders recognized, and our history has confirmed, of an independent Federal judiciary. It is essential that Federal judges be preserved in office, possessed of freedom to exercise independent judgment without fear of the momentary passions or possible partisanship of either the Executive or the Legislature. But it is equally important, because of the inevitable potential for corruption in those who hold office permanently, that there be a fair and just mechanism to remove judges from office if they become corrupt.

As I have said, this case represents a unique moment in our constitutional history because it is the only occasion when impeachment proceedings were brought against an individual who had been tried by a jury and acquitted. The implications of that fact are a matter for very serious consideration by the Senate. In terms of the public perception of this proceeding, perhaps the most frequently asked question is how can it be fair to try impeachment articles against someone who has already been acquitted by a jury? In that regard, the full Senate last March considered Judge Hastings’ contention that the impeachment proceedings should not go forward because they were barred by the constitutional prohibition against double jeopardy. The matter was argued to the full Senate by both Judge Hastings personally and his counsel, and by all six managers from the House. After deliberation in closed session, the Senate voted 92-1 to deny Judge Hastings’ motion to dismiss. At that time, although I voted with the majority, I expressed the opinion that while double jeopardy should not be an absolute bar to im-
peachment, nonetheless as a matter of fundamental fairness Judge Hastings’ prior acquittal might well be entitled to substantial con-

After a fifty-year void, from 1936 to 1986, the Senate has in the last three years been required to try the impeachments of three Federal judges: Judge Harry Claiborne of Nevada in 1986, and Judges Alcee Hastings and Walter Nixon in this session. Each of these cases has involved a judge subject to impeachment on the basis of matters previously considered by a criminal trial jury. I also note as a matter of interest that there is pending in California another criminal indictment directed against a Federal judge, Robert Aguilar. This apparently increased demand on our obligations as senators, posed by the expansion of the Federal judiciary and the modern willingness to use sophisticated investigative tech-

Each of the recent impeachment cases at some level has forced us to consider the interrelationship between criminal proceedings and impeachment. In the Claiborne impeachment, for example, one of the impeachment articles called for Judge Claiborne’s impeachment solely by virtue of the fact of his criminal conviction, without an independent judgment by the Senate of guilt or innocence. That article was rejected by the Senate on a vote of 46 guilty; 17 not guilty; 35 present and 2 not voting. (Since a conviction requires the affirmative vote of two-thirds of the senators voting, a vote of "present" is equivalent in effect to a vote of not guilty.)

Thus, in both the Claiborne and Hastings impeachments, the Senate has expressed the clear view that it will not be bound in impeachment matters by the determinations of the judicial branch. But that is not necessarily the end point of the inquiry here: the novel issue that remains is whether principles of double jeopardy, collateral estoppel, due process or fundamental fairness require that the jury’s verdict acquitting Judge Hastings, even if not pre-

At the same time we should also be mindful that the Judicial Council of the Eleventh Circuit conducted an extensive inquiry, resulting in a 4909-page record, and urged impeachment. Beyond that, the House of Representatives impeached Judge Hastings on 17 Articles by a vote of 413-3.

Before turning to a discussion of the evidence and legal princi-

• COMMITTEE PROCEEDINGS

Before turning to a discussion of the evidence and legal princi-

assignment on this matter with a seriousness appropriate to the gravity of the constitutional task before it. Even before the hearings commenced in early July, a number of significant issues required decision. The committee considered and established procedures to assure evidentiary hearings that would center on important issues on genuine dispute; it guided the parties through a stipulation process and urged their reliance on testimony from prior proceedings where the issues were either marginal or not really in dispute, so that the committee was able to focus its attention on the heart of the controversy.

After extensive consideration, the committee also decided to grant Judge Hastings' request for pre-hearing discovery. It authorized three depositions on his behalf over which I as vice chairman presided, and one such examination by the House, which did not occur. Although no precedent existed for these examinations, this authorization reflected the committee's determination that Judge Hastings—and, for that matter, the House—be given ample opportunity to develop all evidence necessary to the case. In that vein, the committee also directed its staff to work with the Department of Justice and the FBI to assure that no documents in the files of those agencies material to the case were withheld.

My distinguished colleague, Senator Jeff Bingaman of New Mexico, chaired the proceedings with care, courtesy, and deliberateness. There were significant differences of opinions among the 12 Senators at various stages, and the chairman showed patience and consideration in hearing out all points of view before calling for committee decisions.

The attendance at the hearings was excellent. On only one occasion, the morning of July 20th, did we have serious trouble in securing a quorum. On that occasion, Senator Leahy, a member of this committee who also chairs the Agriculture Committee, recessed an important markup so that senators who were on both the Hastings Committee and the Agriculture Committee could return to establish a quorum. All or almost all of the 12 committee members were in attendance at most sessions.

After the completion of prehearing procedures, on July 10, 1989 our committee commenced hearing evidence. We received evidence over approximately 120 hours of hearings in the course of 18 hearing days, concluded our proceedings shortly after 10:00 p.m. on August 3. The evidentiary hearings generally ran from 9:00 a.m. to 5:30 p.m. We decided to devote these substantial blocks of time in order to avoid having the case presented in a disjointed or fragmented manner. While the proceedings were interrupted occasionally by votes in the House and Senate, that disruption was held to a minimum because the Senate leadership delayed votes on many days until 5:30 p.m. and because the House members when possible agreed to the continuation of the hearings in their absence with their counsel handling the proceedings.

SUMMARY OF THE ARTICLES

There were 17 articles of impeachment which we considered. Briefly summarized, the articles charged:
That in 1981 Judge Hastings conspired with William Borders, a Washington, D.C. attorney, to solicit a $150,000 bribe from two defendants who were being tried before Judge Hastings on racketeering charges (Article I);

That in his 1983 trial on the bribery conspiracy, Judge Hastings lied repeatedly in securing his acquittal (Articles II-XV);

That in 1985 Judge Hastings revealed secret material to a Miami politician that Judge Hastings had learned in his capacity as supervising judge over an FBI wiretap (Article XVI); and

That by virtue of all of the foregoing, Judge Hastings undermined confidence in the integrity of the judiciary. (Article XVII).

I will now discuss briefly the evidence on these articles. Inasmuch as the wiretap disclosure charge, article XVI, is the simplest and most easily decided, I will discuss it first.

EVIDENCE ON THE WIRETAP DISCLOSURE ARTICLE

Article XVI charged Judge Hastings with ruining an FBI undercover investigation by revealing to one of the subjects, Dade County Mayor Steven Clark, confidential information that Judge Hastings had learned in his capacity as supervising judge of the wiretap. The evidence on this charge was weak, and the charge itself insubstantial. Although Mayor Clark testified that it was Judge Hastings who revealed the wiretap information to him, Mayor Clark's testimony as to where and how this took place was contradicted by a host of witnesses; by photographic evidence; and by the very contents of one of the FBI wiretaps. Judge Hastings also presented evidence that, if not fully persuasive, suggested an at least equally plausible explanation of how the wiretap information might have come to Mayor Clark's attention. I had no trouble reaching the conclusion that the House had not proven its case on this article.

In that context, I note that my colleague, Senator Gorton, observed after the House had completed its presentation on article XVI that he hoped Judge Hastings would not waste the committee's time in even bothering to reply to this article:

"If we had greater jurisdiction, I'd have moved to dismiss at the end of the House case. . . . At this point, I can say to the respondent, the only thing they can possibly do by beating this dead horse is cause me to change my mind, which I'm sure that they do not wish to do."

Although Senator Gorton's comment may perhaps have referred as much to his view that article XVI did not present a legally sufficient basis for impeachment, I believe it was the prevailing view among members of the committee that the nature of the charge under this article and the nature of the evidence to support it would not warrant Judge Hastings' removal from office. Evidence presented to the committee showed that when this matter arose in 1985, the Justice Department did not consider it an appropriate matter for prosecution; and in my view that correct determination leads to the similar conclusion that his article and the evidence in support of it are not an appropriate basis for impeachment.
EVIDENCE ON THE BRIBERY/CONSPIRACY AND PERJURY ARTICLES

As I have said, the central article in the case involves charges of conspiracy to solicit a bribe and perjury. Judge Hastings was charged with agreeing with a Washington attorney, William Borders, to fix a racketeering case involving two brothers, Tom and Frank Romano, who were to be sentenced by Judge Hastings. In the House’s view, soon after the Romano case was assigned to Judge Hastings, he in conjunction with Borders began attempting to solicit a bribe from the Romanos. As the House argued, Judge Hastings in May of 1981 continued the Romanos’ sentencing solely for the purpose of demonstrating to them the necessity of paying him a bribe; in July of 1981 Judge Hastings sentenced the Romanos, who were elderly, in bad health and had no criminal history, to substantial jail terms in order to coerce them to participate in a bribe; as a further coercion, Judge Hastings throughout the summer of 1981 refused to follow binding precedents of the U.S. Court of Appeals for the Fifth Circuit that would have required him to return over $800,000 of forfeited property to the Romanos. In the House’s view, only after Judge Hastings believed that the Romanos were prepared to pay a $150,000 bribe, and after the first $25,000 of that bribe was paid to Borders, did Judge Hastings finally issue the order returning the Romanos’ property that the law required.

Judge Hastings denied all of this categorically, as he did in his 1983 trial. He claimed that Borders’ efforts were not part of any conspiracy with him, but rather were part of a “scam” run by Borders and others to obtain payments based on a claimed but totally false ability to exercise influence over Judge Hastings. This defense was presented by Judge Hastings to the 1983 trial jury which acquitted him.

In the House’s view, as alleged in articles II-XV, that acquittal was tainted because it was based on perjured testimony and fabricated evidence. For this part, Judge Hastings urges that those same arguments that his testimony was false and his evidence fabricated were presented to, and rejected by, the 1983 trial jury.

THE HOUSE CASE AGAINST JUDGE HASTINGS

The evidence presented by the House against Judge Hastings was circumstantial in the sense that there was no "smoking gun": that is, no admission of guilt by Judge Hastings, and no witness who directly testified that he had paid money to Judge Hastings or saw or heard Judge Hastings agree to accept a bribe or participate in a scheme with Borders. The fact that the case was entirely circumstantial, however, does not necessarily mean that it was weak or insubstantial. The law has consistently recognized that circumstantial evidence—meaning evidence that involves facts from which inferences are drawn rather than direct observation of the fact at issue—may be as good or better than direct evidence; indeed it is possible to convict someone of first-degree murder based entirely on circumstantial evidence.

However, what the fact that the case against Judge Hastings is entirely circumstantial does mean is that a meticulous scrutiny of the record is required. We must be sure that the facts which corn-
prise the circumstantial case have been established; that the infer-
ences which the House seeks to have drawn from those facts are
appropriate; that there are no other equally appropriate inferences
consistent with innocence to be drawn from those same facts; and
that the chain of circumstantial evidence presented is in its entire-
ty sufficient to lead to a conclusion of guilt.

The fun body of the circumstantial evidence against Judge Hast-
ings is set forth in the report of the Impeachment Trial Committee,
which all members have. I believe that the very difficult presenta-
tion of this mass of evidence was well handled by the House man-
agers. Their case was meticulously presented at the hearings by
Representatives John Bryant, Hamilton Fish, George Gekas, John
Conyers, and Mike Synar and neatly summarized on large charts
which permitted the entire pattern of circumstantial evidence
against Judge Hastings to be grasped and understood. The circum-
stantial evidence presented by the House raised inferences sugges-
tive of guilt. That evidence included:

A pattern of repeated telephone contacts between Judge Hast-
ings and William Borders, including a pay phone to pay phone tele-
phone call on April 9, 1981, which tie in closely either to key
events in the Romano case or to contacts between Borders and the
government's informant, William Dredge;

Judge Hastings' appearance for dinner at the Fontainebleau
Hotel in Miami on September 16, 1981, as Borders had predicted he
would, to give proof of his participation in the bribery arrange-
ment;

Borders' apparent possession of inside information about the
Romano case with no conclusive source other than Judge Hastings;

Judge Hastings' hurried issuance of an order returning the Ro-
manos' property on October 5 and 6, 1981, after Borders had re-
ceived the $25,000 downpayment on the bribe on September 19,
1981;

A suspicious telephone conversation between Borders and Judge
Hastings on October 5, 1981 (tape recorded by the FBI) which the
House contends was a coded discussion of the status of the bribery
arrangements; and

Judge Hastings' abrupt departure from Washington on October
9, 1981 after learning of Borders' arrest and the FBI's desire to
speak with him concerning a "bribery in his courtroom."

The recorded October 5 telephone conversation is particularly
worthy of discussion. On its face it is literally a conversation about
"letters for Hemp": that is, letters which Judge Hastings claims
that he had prepared on October 5, 1981 in support of Hemphill
Pride, a mutual friend of Judge Hastings and William Borders. The
draft "Hemp letters" which Judge Hastings claimed he wrote on
October 5, 1981 were introduced in evidence in both the 1983 trial
and here.

More of the committee's attention was focused on the October 5
phone call and the "letters for Hemp" than any other aspect of the
case. In the House's view, that phone call could not really have
been about help for Hemphill Pride, and those letters could not
have been written on October 5, for a variety of reasons. The
House argued that the literal text of the telephone call seems to
make no sense because Judge Hastings is apparently calling Bor-
ders for information yet receives none. The claim that the telephone call was part of a program of support for Hemphill Pride is in the House's view totally disproven by Pride's testimony that he was not aware of, and did not wish any such efforts by Judge Hastings and Borders, and by the lack of any extrinsic evidence to show that Judge Hastings in 1981 had done anything to be helpful to Pride.

In addition, there was evidence directed to establishing that the draft "Hemp letters" were not prepared on October 5, as Judge Hastings claimed, but rather much later. Those letters are at least suspect since they contained not a single edit or correction despite Judge Hastings' testimony that he wrote them while sitting on the bench presiding over a jury trial. Further, there is some reason to question whether the letters were shown to anyone else by Judge Hastings before December, 1982, when they were turned over to the Federal prosecutors in pretrial discovery. In the House's view, if those letters were genuine, they should have been produced to prosecutors when Judge Hastings turned over other documentary evidence in February, 1982; and the House further contends that, if they existed, Judge Hastings should have made them available as a matter of defense for Mr. Borders in his March, 1982 trial. It is a stipulated matter that Joel Hirschhorn, for a time Judge Hastings' principal defense counsel, never saw the letters.

In all, the House urges that the evidence establishes that the October 5 phone call between Borders and Judge Hastings could not have been about help or letters for Hemphill Pride because no help was being offered and no letters had been drafted. Instead, the House urges, the October 5 phone call was a coded confirmation from Borders to Judge Hastings that the bribery arrangement was still on, that the $25,000 downpayment had been received and that the $125,000 balance was to be expected shortly. Thus, in the House's view, when Judge Hastings in that October 5 conversation told Borders that "I'll send the stuff off to Columbia in the morning," what he was really saying was that the Romano forfeiture order would go out the next day. That theory, the House urges, is dramatically confirmed by Judge Hastings' October 5 direction to his law clerk, Jeffrey Miller, to finish the Romano order "that day"; and by the fact that the order was then mailed out the next day special delivery.

SOME GAPS IN THE CIRCUMSTANTIAL EVIDENCE

The chain of circumstances and inferences that the House presented against Judge Hastings was not, however, without gaps—some of them quite significant. For example, in the House's view, the first demonstration of Judge Hastings' participation in the bribery arrangement was to be the fact that he would continue the Romano sentencing from May 11 without being asked to do so by either party. Yet the transcript of the May 11 proceeding shows that when Judge Hastings took the bench, he stated immediately that he was prepared to proceed with the sentencing and continued the matter only after being requested to do so by the Romanos' defense lawyer. Although the House urges that Judge Hastings must somehow have been advised that the defense lawyer was going to
move for a continuance, there was no evidence to sustain that position.

I note also that in Judge Hastings’ view, as argued by his counsel, the prediction that the sentencing would be put off actually referred to the July sentencing date rather than the May date. Judge Hastings pointed to the very limited evidence of documented phone contacts between Borders and Dredge before May, 1981 as evidence that their dealings regarding the Romano bribe could not have begun in earnest until after the May 11 sentencing date. Thus, Judge Hastings’ imposition of sentence on the Romanos on July 8 without a continuance may itself be a substantial refutation of one of the elements of the circumstantial case against him.

Another gap in the circumstantial evidence has to do with the failure to trace any of the bribe payments to Judge Hastings. Twenty-five thousand dollars was paid by an undercover agent to Borders on September 19; the FBI could find no evidence that any of that money went to Judge Hastings and, indeed, conceded that an examination of his personal circumstances and lifestyle were consistent with what one would expect of an individual living on the salary of a Federal judge. In this regard I note that Judge Hastings has vigorously assailed the FBI’s decision to arrest Borders with the $125,000 balance of the bribe on October 9, 1981 rather than “let the money walk.” Had Borders been permitted to leave with the money, Judge Hastings argues, that would have been a conclusive demonstration of his innocence since none of the money would have gone to him. Judge Hastings offered testimony supporting his view that the investigation was flawed in this way from both the U.S. Attorney and the Chief of the Criminal Division for the Southern District of Florida. However, there was important testimony from other witnesses with significant law enforcement experience that supported the decision to arrest Borders at the scene of the payoff, on the grounds that there would be no way to trace either the money or Borders once he left. Consequently, I do not weigh this factor heavily because of the arguable reasonableness of the FBI action.

Another question left open by the circumstantial evidence proffered by the House has to do with the timing and substance of the telephone conversations intercepted by the FBI on October 5, 1981. As I have noted, in the House’s view the call between Borders and Judge Hastings at 5:12 p.m. was the occasion when Judge Hastings in a coded fashion communicated to Borders that the Romano forfeiture order would go out the next day. Yet at 4:22 that afternoon, there was also an intercepted telephone conversation between Borders and the FBI undercover agent, Paul Rico. In that conversation, some 50 minutes before the Borders/Hastings conversation, Borders told Rico that the Romano forfeiture issue had been taken care of and that the order would go out the next day. This is significant evidence supporting the view that Borders knew the status of the Romano order well before the conversation with Judge Hastings at 5:12 p.m., and thus that Borders had another source of inside information about the Romano case. If that is the case, then of course the 5:12 p.m., conversation had nothing to do with the Romano case or a bribe but instead was exactly as it appeared—a discussion of help for Hemphill Pride.
Probably the most significant gap in the House's circumstantial case was the timing of the Romano forfeiture remittance order. Pursuant to the arrangement between Mr. Borders and the undercover agent, Judge Hastings was supposed to issue an order remitting a sizable portion of the forfeiture within ten days of the $25,000 payment of September 19. That is, it was to be issued by September 29. There is no question about the September 29 date, because these arrangements were made between Borders and Rico on September 19 in a conversation that Rico was tape recording for the FBI. Such an order was issued, but it was issued 17 days later on October 6. There is absolutely no evidence as to why, if Judge Hastings were acting in collusion with Mr. Borders, as represented by Borders, the order was not issued by the promised date. As to the substance of the remittance order, there was strong reason for Borders to have concluded—as did the Romanos' attorney, Neal Sonnett—that such a remittance would ultimately be ordered no matter what because existing opinions of the Court of Appeals for the Fifth Circuit virtually mandated that result.

**JUDGE HASTINGS' TESTIMONY**

In the context of this case—where the prosecution's circumstantial evidence raised inferences of guilt, but where those inferences were at least in part offset by gaps in the circumstantial evidence—clearly the most important witness was the Respondent, Judge Hastings. This is particularly true in the absence of testimony from William Borders. Judge Hastings testified, indeed one could almost say exhaustively, before the committee. He testified on direct examination for a day and one-half; on cross-examination for approximately three hours; and responded to questioning from members of the committee for more than one full day. In his testimony he avoided no issues and offered explanations for all of the circumstantial evidence of guilt directed against him.

Judge Hastings explained his presence at the Fontainebleau Hotel by stating that Mr. Borders had told him he expected to be there on that evening. Judge Hastings gave testimony, which was corroborated by others, including even Mr. Dredge, that Mr. Borders was a cryptic and mysterious individual who sometimes did not show up as expected, and whose speech often contained more confusion than clarity.

The incriminating implications of the taped conversation of October 5, 1981, were undercut to some extent by Judge Hastings' testimony that he and Mr. Borders knew each other so well, and were talking on a subject so familiar to them, that they could communicate in an unusual, clipped manner. The comments of my colleague, Senator Durenberger, bore on this issue when he noted that it was difficult for him (Senator Durenberger) to put himself in the shoes of Judge Hastings, because the differences in their backgrounds may have limited his understanding of the nuances in Judge Hastings' actions:

> It's largely because of a conversation that you had with Senator Specter a little while ago, in which you, I imagine, appropriately said something to him about the fact that it wasn't really fair for him to try to judge some particular behavior of yours on the basis of the way he might behave or the world that he might have observed. And I think as I have observed the difficulty expressed here in the ques-
Lions on all of these issues around this table, the difficulty that people are going to have on this committee, to say nothing of the people who are not on this committee, is going to be whether or not and how far they are going to walk in your shoes versus walking in their own when they go through this kind of material.

Judge Hastings also responded to the prosecution's evidence concerning his claimed delay in the production of the "Hemp letters." He testified that he had made them available as early as March, 1982 to John Shorter, William Borders' trial attorney, and pointed out in confirmation of that fact in Shorter's testimony before the Eleventh Circuit Investigating Committee.

Judge Hastings explained the timing of the issuance of the Romano forfeiture order by the fact that the law clerk familiar with the case, Jeffrey Miller, was due to leave his chambers at the end of October, and Judge Hastings wanted to be sure that the Romano order would be completed before Miller's tenure ended. Judge Hastings' position was supported by Miller's own testimony that in early September, 1981—and therefore before the September 19th $25,000 downpayment from the undercover agent to Borders—Judge Hastings had told Miller "not to agonize about it" and just to give the Romanos their property back. Miller was able to date this conversation with some specificity by reference to a Fifth Circuit decision handed down on August 27, 1981 which he brought to Judge Hastings' attention. In Miller's view, had he been more prompt in carrying out his own responsibilities, the timing would not have created any cause for suspicion against Judge Hastings.

Judge Hastings also explained his precipitous departure from Washington on October 9, 1981 by noting that perhaps his experience with the FBI might not have been the same as that of persons from different backgrounds. Judge Hastings contended that he did not "flee" on October 9 but, as the FBI conceded, went to a place where the FBI would have expected him to be. He went to his girlfriend's home; when the FBI arrived, he invited them in and courteously answered all of their questions.

My own observations on Judge Hastings' testimony were that he carried himself with confidence and is obviously a highly intelligent man. Judge Hastings was impressive and personable. His able counsel, Professor Terrence Anderson, commented in his closing speech that Judge Hastings was "touched with greatness."

Those attributes notwithstanding, I was troubled by Judge Hastings' testimony. There was a disturbing quality to some of what Judge Hastings said in that he seemed more inclined to offer profuse details about matters that were not truly of interest than to respond to very specific questions on particularly relevant points. Perhaps my own "feel" for his testimony has to be qualified in recognition of the eight-year lapse between the events and the Senate hearings, and the circumstances of the relay questioning by senators. After Judge Hastings' direct testimony, he was questioned by counsel for the House of Representatives, and then by the 12 committee members in several rounds of 10 minutes each. It may be that no witness has been subjected to such extensive examination by so many questioners in any previous impeachment proceeding. Most of the questioners were experienced lawyers with prosecutorial backgrounds. The questioning of committee members was incisive in pressing Judge Hastings on the key points of his defense.
That questioning was thorough, perhaps even tough, but nonetheless fair. I firmly believe that the forceful questioning of Judge Hastings aided our inquiry by bringing his positions, and his explanations of the chain of circumstantial evidence against him, into sharp focus. Judge Hastings was fully capable of dealing on even terms with all the questioners, and, at the conclusion of the proceedings, said he had been equitably treated:

Senator Durenberger. . . . As you sit here this morning, whether you slept well or not, what are your feelings about the general fairness of the process of the last three-and-a-half weeks, particularly as you reflect on the people on this side of the table?

Judge Hastings. I feel very good about it, Senator, and it gives me an opportunity to thank you all for your attention. I think through my lawyers and myself I expressed my feelings with reference to the impeachment process, and I think we have reached another plateau that I did not think that we would reach. And I still think it's a mistake to have reached this plateau, but not as it pertains to the members of this committee. You are doing what I believe you believe is the proper thing."

Senator Pryor. . . . I think this proceeding has been extremely fair. And I hope and we hope that you feel it has been Fair.


Judge Hastings. Mr. Chairman, just one thing: I thank you especially and Vice Chairman Specter and each Senator for all of your courtesy. I really do appreciate it.

Earlier on one of the Senators asked me about the process. I have immense respect for the process, and I would—and I don't mean it facetiously—urge upon you that what we have had, regardless of outcome, is a very good impeachment inquiry.

One particular matter in Judge Hastings' testimony which troubled me was the Judge's attitude toward Mr. Borders. Throughout the proceeding, Judge Hastings displayed fiery emotion at many stages, including his denunciation of the FBI, his anger at the Chief Judge of the Eleventh Circuit and his resentment about bearing the burden of testifying on so many stale transactions. Yet at no time did he seem to display emotion or hostility against Mr. Borders who, according to Judge Hastings, betrayed his friendship, subjected him to public humiliation and robbed him of his good name. I asked Judge Hastings why, in the face of his numerous passionate denunciations of many others, he had never complained about Mr. Borders' conduct. Judge Hastings responded matter of factly:

I resent him, Senator, and that's because no one has asked me the way that you have. Alan just asked me a minute ago about it, and I told him he stole my name. There's nothing for me to do about getting bitter with anybody. The object I have is to try to get better. But if you put the question to me directly and as you are putting it, please know that I resent it highly, what has transpired here insofar as anything that he did.

After that unemotional and bloodless reply, I asked the judge:

Judge Hastings, you've expressed yourself about other people. You called his mother, and I can understand his mother is not him. But even in the manner of expressing it as you just did, there isn't the passion in your voice, there isn't the strength, there isn't the outrage. I mean, after all, by your approach to this case, here's a longstanding friend, a trusted friend who has used you to secure $25,000 in cash and to have his hands on another $125,000 in cash, on the representation that he can fix you, based upon a lot of association which a lot of people knew about, a trusted friend betrayed you, subjects you to a criminal prosecution to the Investigat-
And he replied:

I just expressed it to you and I'm sorry Senator, if the fire in my belly is not commensurate with your attitude with reference to what it ought be [sic]. Please know this, that I've testified in two proceedings and I don't believe that anybody until you has asked me that question that way, and I just answered you as best I could. But please, sir, know that I don't like what happened to me. Having to go through this ordeal has been awesome, and I consider that Bill Borders is responsible for that and I don't know what else you would have me say. I'm not the kind of person who would kill somebody, but if I were I would have that kind of attitude.

The videotape, even better than the printed record, illustrates my concern. Perhaps Judge Hastings' attitude toward Mr. Borders is explained by the saying that he responded more in sorrow than in anger.

I was also not totally satisfied by Judge Hastings' explanation on the controversial "Hemp" letters. It seemed to me that, regardless of Judge Hastings' attitude toward Borders, Judge Hastings would have seen to it that those letters were available for use in Borders' defense. The prosecutor at Borders' trial emphasized the absence of those letters in his closing argument. Had Mr. Borders been acquitted, that certainly would have been of considerable tactical advantage to Judge Hastings.

In all, I had four turns of 10 minutes each to question Judge Hastings about the bribery, conspiracy and perjury aspects of the case. In addition to my concern over his lack of apparent animus toward Mr. Borders, my questioning focused on the peculiar circumstantial timing of the contacts between Judge Hastings and Mr. Borders which was frequently coincidental with key developments in the Romano case; the troubling evidence regarding the so-called "Hemp letters," including the pristine condition of the drafts and the belatedness with which they were made available to the prosecution; and the peculiarities of the October 5 phone call, in which, although Judge Hastings apparently called Mr. Borders seeking information, it seems as though no information was passed on by Mr. Borders to Judge Hastings.

Judge Hastings responded to all my questioning. He vigorously asserted that the "Hemp letters" were drafted on the bench as he had testified, and said that he was blessed with the facility to prepare drafts without interlineations or editing, that the drafts were not produced to the prosecution in his case until December 1982 because of tactical battles over the timing of discovery, that in any event he expected the letters to be subjected to careful scientific analysis which could fix the date of their preparation, and that the language of the October 5 phone call could be explained because he and Mr. Borders knew each other well and were conversing on a subject that was quite familiar to both of them. Those explanations, if not wholly convincing, were at least credible.

THE ABSENCE OF WILLIAM BORDERS AS A WITNESS

No discussion of the evidence in this case would be complete without reference to the lack of testimony from William Borders. As is obvious, only William Borders and Judge Hastings know for an absolute certainty whether they had an agreement to solicit a
bribe from the Romanos. I believe our record suffers significantly from the absence of Mr. Borders' testimony.

It became apparent early in the committee's proceedings that neither party intended to call Mr. Borders as a witness. I was not fully satisfied with the explanations for this decision given either by Judge Hastings or the House. In essence both sides seemed unwilling to vouch for Mr. Borders' credibility or to have his testimony associated with their case. While this attitude is understandable as a matter of trial tactics, I am not sure that it is wholly appropriate for the House of Representatives, which has responsibilities not only as the prosecuting party in this impeachment, but also as a public body of the United States with an obligation to see that justice is done. The House of Representatives serves a dual function in impeachment proceedings. It first considers whether the circumstances warrant impeachment; once impeachment articles are voted, it has the responsibility for their presentation to the Senate. As such, the House may be seen as operating in a quasi-judicial capacity in which its obligations as "prosecutor" in the Senate are coordinate with its obligations as a legislative and (in impeachment matters) adjudicative body to develop a full and complete factual record.

It is arguable whether Mr. Borders would have testified under any set of circumstances, but certainly given the relatively short time period between his appearance before the committee and the conclusion of the impeachment inquiry, the civil contempt sanctions facing Mr. Borders for his refusal to testify here seem to be inadequate. Had the House been more aggressive in seeking Mr. Borders' testimony during the investigative phases of its own impeachment inquiry, when it clearly had a duty to develop all evidence and not just evidence that might help convict Judge Hastings—and when (even though it lacks the power of the Senate to invoke civil contempt proceedings) it had available to it the threat of criminal prosecution for contempt of Congress if Mr. Borders refused to testify—it is possible that we might now find ourselves in a position to have the benefit of Mr. Borders' testimony in resolving the question of Judge Hastings' guilt or innocence.

The issue of having the Senate committee call Mr. Borders as its own witness was raised early in our proceedings and was rejected. The committee continued to be divided on the subject, but finally decided on July 19 to subpoena Mr. Borders. In anticipation of the possibility of Mr. Borders' testimony, the committee had on June 27 obtained an immunity order for his testimony. On July 24, and again on July 27, Mr. Borders appeared before the committee and, notwithstanding the immunity grant, refused to answer any questions. On both occasions, the committee considered and rejected Mr. Borders' objections to giving testimony; when he persisted in his refusal, the committee directed Senate Legal Counsel to initiate proceedings to compel Mr. Borders' testimony. A full Senate resolution was adopted unanimously on August 3. On August 17, the United States District Court for the District of Columbia (per Judge Revercomb) issued an order directing Mr. Borders to answer all questions put to him by the committee and the parties, or else to appear in court "forthwith" and show cause why he should not be held in contempt. Mr. Borders appeared before a session of the
committee over which I presided on August 22 and persisted in his refusal to answer questions notwithstanding my advice that his refusal would subject him to sanctions for civil contempt, and could thereafter result in his prosecution for criminal contempt. Mr. Borders was in fact held in civil contempt on the afternoon of August 22 (per Judge Jackson). Citing personal reasons, he asked for and was given the committee's agreement to defer commencement of his imprisonment until August 25. He has been continuously incarcerated since that date.

The question of how to factor the absence of Mr. Borders' testimony into the evidence in this case is a difficult one. My colleague, Senator Gorton, asked Judge Hastings whether we should not infer from Borders' refusal to testify—in Borders' words at one point to be a part of the "prosecution" of Judge Hastings—that Borders' reluctance to come forward was motivated by a desire to protect Judge Hastings. Judge Hastings of course denied this. Certainly applying generally accepted principles of law, one could hardly say that Judge Hastings in any way possessed an element of control over Mr. Borders sufficient to permit any adverse inference against Judge Hastings from Borders' failure to give testimony.

My own inclinations tend more toward the opposite point of view. As I have said, I believe the House's obligations here are quasi-judicial, and involve a public responsibility to develop a complete record. The House, I believe, had as much interest, and as much duty to secure Mr. Borders' testimony as did the Senate. The House, no less than the Senate, is fundamental in the constitutional process of impeachment, and must perform its role in recognition of the gravity of that task. Even in a criminal trial, the law recognizes that the prosecution is not just an advocate for conviction but also for justice. It is often said that the government wins its case whenever justice is done. In that context, it perhaps may be that the lack of vigor with which the House pursued Mr. Borders' testimony during the investigative phase of its proceedings is a factor worthy of some consideration here. Certainly it is the House which has the burden of proof, and to the extent that there are gaps in the circumstantial evidence where Mr. Borders' testimony, whether believed or not, could have helped fill the voids, the consequence of those gaps should perhaps fall on the House as the party which has the burden of proof.

As other members of the committee are aware, my view throughout these proceedings has been that Mr. Borders was an indispensable witness. I urged the committee to call him in the face of the unwillingness of either side to do so. The matter of how to weigh the absence of his testimony is an aspect of this case on which I have given considerable reflection. In the end, I have concluded to give Mr. Borders' absence as a witness no weight in my own decision because I believe that there are plausible arguments both ways over which interpretation ought to be given to Borders' refusal to testify, but I do believe the importance of the issue makes it worthy of this rather extensive comment for whatever weight my colleagues may choose to give it in their own consideration.
COMMENTS ON THE OVERALL NATURE OF THE BRIBERY/CONSPIRACY AND PERJURY EVIDENCE

In sum, the evidence against Judge Hastings on the bribery conspiracy and perjury articles has, in my judgment, the following aspects:

- No "smoking gun" or direct evidence of guilt;
- A significant chain of circumstantial evidence pointing toward guilt;
- A number of gaps in the chain of circumstantial evidence; and
- A vigorous assertion of innocence by a respondent subjected to lengthy cross-examination and examination by committee members.

This case does not come to us on a clean slate. It comes to us after a jury trial six and one-half years ago where much the same allegations and much the same evidence were presented to a jury, and where a jury concluded under the reasonable doubt standard of proof applicable in those proceedings that Judge Hastings was not guilty.

THE DOUBLE JEOPARDY ISSUE

By a vote of 92-1, the Senate denied Judge Hastings' motion to dismiss the articles of impeachment related to the bribery charge on grounds of double jeopardy. I voted with the majority because of my view that a motion to dismiss ought to be granted at the outset of the proceeding only if there was a conclusive legal bar to going forward. I noted at that time that the Senate could guarantee fairness by reconsidering the issue at the conclusion of the proceeding.

It seemed to me inappropriate for the Senate to summarily dismiss articles of impeachment after the recommendations by the Judicial Council of the Eleventh Circuit and the Judicial Conference of the United States and the 413-3 vote to impeach in the House of Representatives. The underlying policy considerations behind double jeopardy could be best taken into account, in my opinion, in the context of the totality of the circumstances after having heard all the evidence. We would then be in a position to assess the genuineness of Judge Hastings' claims that the Senate trial of his impeachment on articles I through XV (the bribery conspiracy and perjury articles) necessarily encompassed matters embraced within the framework of his 1983 trial in a way that invoked double jeopardy protections.

We are now at such a point. The appropriate starting place for our inquiry, it seems to me, is in the historical development of the double jeopardy protection. That doctrine finds expression not in the text of the Constitution as adopted in 1787, but rather in the Fifth Amendment adopted two years later as part of the Bill of Rights.

When the Bill of Rights was considered, James Madison presented a proposed amendment to the House of Representatives on June 8, 1789 with the following text:

No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public
use, without a just compensation."-1 Annals of Congress 433 (June 8, 1789) [emphasis added]. A similar provision appears in the Journal of the House of Representatives of August 1789:

No person shall be subject, except in case of impeachment, to more than one trial, or one punishment for the same offense; nor shall be compelled, in any criminal case, to be witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."-2 Schwartz, *The Bill of Rights: A Documentary History* [1971] at 1122-23 (emphasis added). But in the form finally enacted, the Fifth Amendment provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Thus, as a beginning point, the textual history of this constitutional provision suggests that "case(s) of impeachment" were not meant to be excluded from the amendment's prohibition against double jeopardy. This would logically account for deletion of the phrase "except in case of impeachment" as a specific exception to the bar on double prosecution.

But that textual construction of the Fifth Amendment is not necessarily conclusive. There is nothing in the *Annals of Congress* or the constitutional histories that sheds significant light on the Framers' intention in modifying the text of the Fifth Amendment to eliminate the referenced exception for cases of impeachment from the double jeopardy protection. It may be that its drafters considered the "except in case of impeachment" language as surplusage in light of the existing language of Article 1, Section 3, Clause 7, which provides:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment according to Law.

That language describes at least one situation in which it is clear that double jeopardy would not prevent both impeachment and criminal prosecution. The drafters may well have contemplated that impeachment proceedings would invariably occur prior to any criminal prosecution, in which case the interrelationship between double jeopardy and impeachment would be fully established by the text of Article I, sec. 3, cl. 7 allowing criminal prosecution to follow conviction in an impeachment proceeding. This is a logical interpretation in light of the fact that much of the constitutional debate surrounding the creation of an appropriate impeachment mechanism and standard ("Treason, Bribery and other high Crimes and Misdemeanors") centered on the Executive, who it has always been assumed could not be prosecuted prior to impeachment.

That, in fact, has been our historical course. Until the 1973 indictment of Court of Appeals Judge Otto Kerner, no court had ever had occasion to consider whether a sitting Federal judge was subject to criminal prosecution. This issue was then decided in *United States v. Isaacs*, 493 F.2d 1124, 1140-44 (7th Cir. 1974), *cert. denied* 417 U.S. 976 (1974):
On the basis of the text of the Constitution, its background, its contemporaneous construction, and the pragmatic consequences of its provisions on impeachment, we are convinced that a federal judge is subject to indictment and trial before impeachment . . . 493 F.2d at 1144.'

The precedent established in the Isaacs case can now be seen as having paved the way for the recent impeachment cases against Judges Claiborne, Hastings and Nixon, all of whom were subject to criminal prosecution before impeachment. To be sure, Judges Claiborne and Hastings also challenged the authority of the government to prosecute a sitting Federal judge, but in both cases those challenges were rejected by the courts. Accordingly, it may now be accepted as a matter of settled judicial precedent that sitting federal judges are subject to prosecution even before impeachment. But those court decisions do not establish what the relation, if any, shall be between the results of a prior criminal trial and a subsequent impeachment. The difficulties of this issue are presented most directly in a case such as this, where impeachment follows an acquittal at trial.

Thus, the Hastings impeachment presents a question of the application of the double jeopardy clause of the Constitution in a way likely not contemplated by the Framers, and in a situation where neither the text of the Constitution nor historical scholarship offer a clear answer. The stark issue of whether an acquittal at trial brings protection against impeachment goes to the heart of the most basic of the protections afforded by the double jeopardy clause: the right to be free from repeated prosecution on the same charge. Within this last decade, the Supreme Court has had occasion to discuss the place of double jeopardy protections in our current jurisprudence. Because of the importance of the principle involved, it is worth repeating the Court's words at some length:

That the [Double Jeopardy] Clause is important and vital in this day is demonstrated by the host of recent cases. That its application has not proved to be facile or routine is demonstrated by acknowledged changes in direction or in emphasis

Footnotes at end of statement.
An acquittal is accorded special weight. "The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal," for the "public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though "the acquittal was based upon an egregiously erroneous foundation!" If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair. The law 'attaches particular significance to an acquittal.' This is justified on the ground that, however, mistaken the acquittal may have been, there would be an unacceptably high risk that the Government, with its superior resource, would wear down a defendant, thereby "enhancing the possibility that even though innocent he may be found guilty." [W]e necessarily afforded absolute finality to the jury's verdict of acquittal—no matter how erroneous its decision.—United States v. DiFrancesco, 449 U.S. 117, 127-30 (1980) (citations omitted; emphasis in original).

The Court's explication makes clear that in our society an individual's right to be free from successive prosecutions after once being acquitted of criminal charges outweighs any countervailing concern that the verdict may have been a mistake. This principle is a bedrock of our constitutional history, and indeed of the English common law.

But, as powerful as that principle may be, and as fundamental as those protections are, their application is not unlimited. Those protections extend "... to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute" Ex Parte Lange, 85 U.S. 163, 169 (1874); they do not, however, necessarily extend to non-criminal proceedings. Even where a non-criminal proceeding is based on the same facts as a prior criminal case, and even if it involves the imposition of monetary penalties, double jeopardy will not act as an automatic bar. Helvering v. Mitchell, 303 U.S. 391 (1938). In denying Judge Hastings' application to stay our impeachment trial on double jeopardy grounds, the United States District Court for the District of Columbia observed that double jeopardy would not preclude a Senate trial because "impeachment is not a criminal proceeding." Hastings v. United States Senate, 716 F.Supp. 38, 41 (D.D.C. 1989). The District Court's opinion concluded, however, by noting that "[a]t trial the Senators themselves may again weigh if they see fit Judge Hastings' claim that he has been wrongly tried because of his earlier acquittal." Id. Thus the question of whether and how the Constitution's ban on double jeopardy shall apply to Judge Hastings' impeachment expressly remains an issue for the Senate's consideration.

Recent judicial decisions hold that the question of the applicability of double jeopardy protections to noncriminal proceedings following an acquittal turns on the issue of whether the second action is "punitive." Thus in One Lot Emerald Cut Stones v. United States, 409 232, 235 (1972), the Supreme Court upheld a civil forfeiture following a criminal acquittal and said:

"The forfeiture is not barred by the double jeopardy clause of the Fifth Amendment because it involved neither two criminal trials nor two criminal punishments..." And in United States v. One Assortment of 89 Firearms, 465 U.S. 354, 366 (1984), the court upheld the forfeiture of the defendant's firearms notwithstanding his prior acquittal on the same issues in a criminal case; the court said that in the absence of evidence that the forfeiture sanction was "punitive," or "an addition-
al sanction for the commission of a criminal act," neither the principle of "collateral estoppel nor the Double Jeopardy Clause affords a doctrinal basis for such a rule of preclusion. 3

Thus, as a matter of constitutional and legal inquiry, the extent to which double jeopardy protections may apply in an impeachment proceeding following a criminal trial may depend on whether impeachment is viewed as an "additional sanction" for criminal conduct, and thus punitive, or simply remedial. That question, in turn, leads back into an analysis of the Constitution's text and history. Our research has disclosed no conclusive authority. But there are significant references in contemporaneous debates to suggest that the Framers may well have considered impeachment punitive, and thus within the currently understood scope of the double jeopardy protection.

In the records of the Constitutional Convention, as reported in the Journal of James Madison, a number of relevant references may be noted from the debate on the question "shall the executive be removable on impeachment?"

Col. Mason. . . . Shall the man who has practised corruption [and] by that means procured his appointment in the first instance, be suffered to escape punishment, by repeating his guilt?

Doc. Franklin. . . . It would be the best way therefore to provide in the Constitution for the regular punishment of the Executive where his misconduct should deserve it, and for his honorable acquittal when he should be unjustly accused."

Mr. Randolph. The propriety of impeachments was a favorite principle with him. Guilt wherever found ought to be punished. The Executive will have great opportunities of abusing his power; particularly in time of war when the military force, and in some respects the public money will be in his hands. Should no regular punishment be provided it will regularly be inflicted by tumults and insurrections."

Mr. Govr. Morris. . The Executive ought therefore to be impeachable for treachery; Corrupting his electors, and incapacity were other causes of impeachment. For the latter, he should be punished not as a man but as an officer and punished only by degradation from his office." (Emphasis added).4

Additional contemporaneous suggestions that impeachment, although not necessarily criminal, was nonetheless viewed by our Framers as punitive can be found in the comments of James Madison and Elias Boudinot during the debate in the First Congress in 1789 on the establishment of executive departments and the power of removal from office.

Mr. Boudinot. . . . When the committee come to consider the clause respecting the removal by impeachment, they will find it is intended as a punishment for a crime and not intended as the ordinary means of rearranging the departments."

Mr. Madison. . . . But if the President shall join in a collusion with this officer, and continue a bad man in office, the case of impeachment will reach the culprit and drag him forth to punishment." (Emphasis added).5

There is, to be sure, considerable scholarship that also suggests that impeachment should not be viewed as "punitive." A number of factors support this view, perhaps most importantly the American departure from the then-existing English practice under which an impeachment tribunal could impose criminal penalties in addition to removal from office. See, 1 Story, Commentaries on the Constitution, Section 803 at 586-7 (1905). But in my view, the early ref-
ferences to grounds for impeachment as a "crime" and to the impeachment process as "intended as a punishment" are of special significance because they were made at a time after the text of the Constitution had already limited the penalty on impeachment to removal from office—thus suggesting that such removal may well at that time have been viewed as a "punitive" action.

Under our constitutional system impeachment in fact has both remedial and punitive aspects: remedial in the sense of removing corrupt officials from office; and punitive in the sense that removal from office takes from the officeholder a very valuable position with substantial property interests attendant to it. It subjects the convicted officeholder to public condemnation and ignominy in a way that perhaps exceeds criminal prosecution. From the perspective of the officeholder, impeachment is unquestionably punitive; from the perspective of society, it is punitive and remedial.

The significance of the punitive aspects of the impeachment process are particularly important in light of the Supreme Court's observations this past May (subsequent to our denial of Judge Hastings' motion to dismiss) on the humane and personal aspects of the Constitution's double jeopardy protections:

But while recourse to statutory language, structure, and intent is appropriate in identifying the inherent nature of a proceeding, or in determining the constitutional safeguards that must accompany those proceedings as a general matter, the approach is not well suited to the context of the 'humane interests' safeguarded by the Double Jeopardy Clause's proscription of multiple punishments. . . . This constitutional protection is intrinsically personal. Its violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state.

In making this assessment, the labels 'criminal' and 'civil' are not of paramount importance. It is commonly understood that civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties. Ibid. The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law, and for the purposes of assessing whether a given sanction constitutes multiple punishment barred by the Double Jeopardy Clause, we must follow the notion where it leads . . . Simply put, a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment. —U.S. v. Halper, supra, 109 S.Ct. at 1901-2.

In my analysis of the relationship between double jeopardy protections and the impeachment process, which relies in significant measure on decisions of the court and the opinions of judges, I do not mean to suggest that the Senate's action in impeachment cases is in any way either subject to judicial review or bound by judicial precedents, or indeed by judicial interpretations of particular constitutional provisions. But the decisions and interpretations of the courts should be highly instructive to us. In our system of Government it has been the courts that through the years have been called upon to construe, define and apply the provisions of our Constitution and protections of our Bill of Rights. Their decisions reflect our values and our evolving notions of justice. The recent commentaries of the Supreme Court on the scope of the double jeopardy protection occur as the product of a process of reasoning, criticism and reflection about this concept spanning 200 years. Although we are a branch of Government coequal with the judiciary, and by the Constitution vested with "sole" power to try impeachments, I believe that the words and reasoning of judges who have struggled with the meaning and application of the Constitution and its provisions ought to be given great heed because that jurispru-
dence embodies the values of fairness and justice that ought to be the polestar of our own determinations.

As the Supreme Court noted in *Halper*, the double jeopardy clause protects "humane interests" that are "intrinsically personal." I do not believe that those interests may be shunted aside or ignored merely on the basis of a label that impeachment is a "non-criminal" proceeding. In the context of the proceedings against Judge Hastings, where it is now apparent that the evidence and charges on Articles I through XV are coextensive with matters that either were or could have been presented to the trial jury in 1983, I am not prepared to say that we now hear this case on a clean slate, or are free to decide it as we would if it had never been considered by a jury.

I continue to believe that the Senate acted wisely last March in denying Judge Hastings' motion to dismiss the impeachment articles against him outright on the basis of double jeopardy. There are enough non-criminal and non-punitive aspects to an impeachment proceeding that a prior acquittal should not be automatically preclusive of impeachment. Indeed, if the constitutional double jeopardy bar were applied rigidly, we would be precluded from impeaching not only acquitted judges but convicted judges as well. For, as applied to criminal cases, double jeopardy principles preclude not only a second trial after acquittal but also a second trial after conviction—as might occur in an effort by a prosecutor to obtain a more substantial conviction or a longer sentence. Thus if the double jeopardy bar were applied rigidly to impeachment proceedings, we would be foreclosed from impeaching even those judges convicted and sentenced—an obviously undesirable result. We might then find ourselves forced to proceed with inappropriate haste in impeachment matters to reach a judgment before a criminal trial began and double jeopardy protections applied.

But now, having heard the evidence, I believe that the principles of fairness and finality which underlie our constitutional double jeopardy protections, and the related civil law doctrines of collateral estoppel and *res judicata*, require that we recognize that when a public official comes before us impeached on the basis of charges for which a trial jury has already acquitted him, we hear such a case in a way different than we would if the individual had been convicted, or never subject to a criminal prosecution at all. Ultimately, there are aspects of impeachment that touch on "intrinsically personal humane interests," and aspects of punishment in the sanctions flowing from impeachment, to the point that a prior acquittal may not simply be ignored. We are required to act in a way that gives appropriate consideration to such a verdict, and that recognizes that the organs of the state have already failed in one attempt to prove that individual's guilt of the charges against him.

**THE DELAY BETWEEN THE EVENTS AND THE IMPEACHMENT TRIAL**

Before turning to a discussion of the appropriate standard of proof, one other legal aspect of the case requires comment. The articles of impeachment were returned against Judge Hastings by the House in August, 1988. Article I charges Judge Hastings with a bribery conspiracy ending in October 1981. Articles II through XV
charge him with giving perjured testimony at a trial in February, 1983. Judge Hastings has argued, both prior to and during the committee proceedings, that the delay between the date of the alleged offenses and the House impeachment and Senate trial should in and of itself act as a bar to his impeachment. While I do not subscribe to that view, nonetheless certain points that Judge Hastings makes in this context are important in considering what deference should be given now, eight years after the fact, to a jury verdict rendered much closer in time to the events at issue.

As a beginning point in this analysis, I note that had a criminal indictment for the first time been returned against Judge Hastings in August 1988 on either the bribery conspiracy or perjury allegations, that indictment would have been barred by the five-year Federal statute of limitations. 18 U.S.C. Section 3282. While the criminal statute of limitations is certainly no bar to an impeachment proceeding, the policies behind such statutes have a great deal to do with our views of fairness in adjudicative proceedings. As the Supreme Court observed in *Burnett v. New York Central R. Co.*:

Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes 'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded and witnesses have disappeared.' '-380 U.S. 424, 428 (1964) (citation omitted).

Indeed, in the criminal law context, it has been recognized that even for indictments returned within the statute of limitations period, lengthy and inappropriate delay in the institution of criminal proceedings could rise to the level of a violation of due process. Such delays, the Supreme Court has said, may require criminal charges to be dismissed where the delay "caused substantial prejudice to [a defendant's right] to a fair trial and ... the delay was an intentional device to gain tactical advantage." *United States v. Marion*, 404 U.S. 307, 324 (1971). These principles were refined but reaffirmed six years later by the Supreme Court in *United States v. Lovaseo*, 431 U.S. 783 (1977). Applying these principles, in *United States v. Barket*, 530 F.2d 189, 192 (8th Cir. 1976) the Court of Appeals for the Eighth Circuit noted that the circumstances of particular cases would require a "delicate judgment" over whether a delay in bringing criminal charges was sufficiently unjustified and sufficiently prejudicial that our basic notions of due process would preclude a criminal prosecution.

In this case, Judge Hastings argues that there has been substantial prejudice to his position from the length of the delay preceding his impeachment. Judge Hastings has pointed out that while telephone and travel records are available today for certain individuals and entities central to the case, they are missing for others; he urges that in those missing records would be proof that his contacts with Borders were not conspiratorial but routine, proof of a more corrupt relationship between Dredge and Borders that the remaining evidence established. Judge Hastings also has pointed out a number of individuals who may well have had significant relevant knowledge about the case who are either dead, missing or currently incompetent to testify: Tom and Frank Romano, "Brother" Moscato, Willie Dara, Santo Trafficante and Joseph Nesline are prime examples. In the situations of Tom Romano and Joseph Nes-
line, their present unavailability forced us to include in the committee's record hearsay declarations of their out-of-court statements as testified to by other witnesses, which would possibly have been held to be improper evidence under the Federal rules.

Judge Hastings' claims of actual prejudice from this missing or lost evidence have at least some demonstrated substance. In his 1983 trial he was able to contrast the physical appearance of Frank Romano with that of the undercover agent, Paul Rico, and argue to the jury—apparently persuasively—that since he (Judge Hastings) knew Frank Romano well, it was obvious that he could not have been a co-conspirator with Borders because his participation in a conspiracy would have prevented Borders from being duped by an individual who could not be mistaken for Frank Romano.

It should also be noted that the 1983 trial proceedings did not include any evidence from or about the government's informant, William Dredge, or events prior to September 1981. Thus phone and travel records relating to Dredge, as well as to the aspects of the case touching on Joseph Nesline, Santo Trafficante, and the activities of the Romano brothers and "Brother" Moscato in March and April 1981, were not part of the trial proceedings—so Judge Hastings had no occasion in 1983 to be concerned about gathering or preserving that evidence.

Of course, whether any of those records or individuals would in fact have provided evidence favorable to Judge Hastings is an open question, but in my view their absence during our 1989 hearings when they were available for the 1983 trial is another reason why we ought today to exercise extreme care in making the "delicate judgment" referred to by the Court of Appeals of whether a fair trial can now be had on these eight-year-old charges.

When voting against the preliminary motion to dismiss on grounds of double jeopardy, I stated then that the jury verdict should be considered at the conclusion of the hearings on the overall issue of fairness. After studying and reflecting on double jeopardy and delay, I believe those issues may warrant dismissal of these impeachment charges, but I think it preferable not to reach those issues since this matter can be concluded on narrower grounds without establishing an unnecessary precedent.

STANDARDS OF PROOF

In matters tried in the courts, the law generally recognizes three different levels of certainty of proof. The lowest threshold, which is that which must be met by plaintiffs in most civil cases, is proof by the preponderance of the evidence—that is, proof that the conclusion urged is more probable than the contrary conclusion. In a case tried on the preponderance of the evidence standard, it is the plaintiff's burden to "tip the scales" and if at the end of the case the evidence weighs evenly for both sides, the jury is required to find against the plaintiff because he is the party with the burden of proof.

For some classes of civil case, however, where the nature and importance of the issues require a greater degree of certainty, the law recognizes a more difficult standard of proof: proof by "clear and convincing evidence." This standard has been held to require proof
that a party's position is "highly probable," as opposed to simply more likely than not. The kinds of cases where this elevated standard of proof is invoked vary between jurisdictions, but usually include claims of fraud, claims to enforce non-written contracts and claims of the invalidity of properly recorded patents. This high standard of proof is also required in a libel suit brought by a public official who must show by "clear and convincing evidence" that a defamatory falsehood was published with actual malice.

Finally, for criminal cases, the law imposes an even more rigorous standard of proof, requiring that a conviction may be had only upon "proof beyond a reasonable doubt." The requirement of proof beyond a reasonable doubt is most commonly defined in Federal criminal cases as "proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his own affairs." The requirement of proof beyond a reasonable doubt in criminal cases has been said to be evocative of the "deeply held feeling that the combination of all-too-fallible witnesses and serious sanctions requires that the sanctions should be imposed only where guilt seems virtually certain." The question before us is whether any of these standards is appropriate in the context of this case, where the substantial allegations have already been considered and rejected by a jury under the reasonable doubt standard, and where the passage of time has at least raised a question as to whether a fairer and more complete presentation of the evidence is possible today than it was six years ago when the jury sat.

In the Claiborne impeachment, Judge Claiborne offered a motion to establish "beyond a reasonable doubt" as the standard of proof for that impeachment proceeding. That motion was defeated by a vote of 75 to 15. At the same time, however, the chair made clear that in rejecting reasonable doubt as a standard for the full Senate, there was no intention to suggest that reasonable doubt was not an appropriate standard to be applied by individual senators. Indeed, in Claiborne, a number of senators explicitly adopted a reasonable doubt standard of proof. My own view in the Claiborne matter was that in a case which sought impeachment based directly on charges which constituted violations of Federal criminal laws which had already been presented to and accepted by a trial jury, proof beyond a reasonable doubt was an appropriate standard.

Of course, an impeachment proceeding does not fit neatly into any of the categories of "civil" or "criminal" matters for which the law has clearly delineated standards of proof. Certainly a strong argument can be made that where impeachment articles are based on charges that constitute violations of criminal law, the criminal law standard of proof ought to be applicable. The Supreme Court in In Re Winship, 39 U.S. 358 (1970), made clear that the Constitution required use of the reasonable doubt standard in juvenile proceedings, notwithstanding the fact that such proceedings are neither criminal nor necessarily punitive. In its opinion, the Court noted the relation of the necessity for proof beyond a reasonable doubt to the stigmatization produced by a criminal conviction and to the necessity that the "moral force" of the law "not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." 397 U.S. at 363-4. These factors seem
to me to be equally at work in an impeachment proceeding. When senators are called upon to vote on an article of impeachment, we do not say "aye" or 'nay" as we do on all other occasions. Instead, we articulate our vote by saying "guilty" or "not guilty." I have no doubt that the Senate's vote of guilty in an impeachment is to the officeholder as much a stigma and condemnation as the result in any criminal case, and that consequently such a decision should only be reached based on a standard of proof that does not permit people to have doubt about whether an innocent man has been unjustly condemned or punished. We may recall that when Vice President Agnew pled guilty in 1973 to a criminal charge of tax evasion, he received no jail sentence because, in the view of the prosecutors and the sentencing judge, his resignation from office—in essence his acceptance of the consequence of an impeachment—constituted sufficient punishment.

However, I do not believe it is necessary that we adopt a rigid standard of proof for all impeachments. There is much wisdom in Mr. Justice Brandeis' pronouncement when concurring in Ashwander v. Valley Authority, 297 U.S. 288, 347 (1936), that Constitutional issues should not be decided "... if there is also present some other ground upon which the case may be disposed of." There is no occasion today that requires the determination of the requisite standard of proof for every Senate impeachment trial; indeed, the question of the appropriate standard of proof may well vary with the nature of the allegations or charges. We should remember that, historically, impeachment trials have sometimes dealt not so much with questions like the ones we face here of whether or not a crime was committed, but rather (as in the impeachment trial of President Andrew Johnson) whether particular conduct constituted an impeachable offense.

In the Hastings impeachment proceeding, for the first time in our history the Senate is asked to render judgment on a Federal official who already has been acquitted by a jury in a criminal trial. What is the impact of that factor? The impeachment committee specifically asked the parties to address that question in their briefs, and I believe this issue has been at the center of much of the public attention to this proceeding. A review of judicial precedents brings little direct help in answering the question because of the application of the double jeopardy principle which I have already discussed: if the subsequent proceeding is "punitive," double jeopardy invokes the prior acquittal as an automatic bar, and if the subsequent proceeding is not punitive, double jeopardy principles do not apply.

Thus, it is necessary to find some judicial analogy which will permit us to apply the principles of fairness that underlie the double jeopardy protection in a context, like impeachment, that has substantial punitive and substantial remedial aspects. Perhaps the most apt analogy in judicial proceedings will be in those situations where a jury's verdict (although not a verdict of acquittal in a criminal case, since that is invariably final) is reviewed by the trial judge, or where a trial judge's factual determinations are reviewed by an appellate court. It is sometimes said that a trial judge "cannot usurp the functions of a jury" and "can only disturb a jury verdict to prevent a miscarriage of justice." What constitutes a
miscarriage of justice is not clearly defined in the law, but the concept is commonly applied to mean that a jury's verdict must be sustained unless it is contrary to the "clear" or "great" or even "overwhelming" weight of the evidences.

In a similar vein, the Federal Rules of Civil Procedure say that a district court's findings of fact shall not be set aside by an appellate court unless "clearly erroneous." The Supreme Court of the United States in United States v. United States Gypsum Co., 333 U.S. 364 (1948) said this occurred when: "... the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." 333 U.S. at 395 (emphasis added). Building on that standard, in Anderson v. Bessemer City, 470 U.S. 564, 573, the Supreme Court said: "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." 470 U.S. at 573. As the Court went on to say: "The reviewing court oversteps the bounds of its duty... if it undertakes to duplicate the role of the lower court... courts must constantly have in mind that their function is not to decide actual issues de novo... If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently."—Id. at 573-4 (emphasis in original; citations omitted).

The Supreme Court in Anderson explicitly rejected a line of court of appeals decisions by distinguished judges (including Judges Augustus Hand and Jerome Frank) that appellate courts have the right to substitute their own fact findings for those of the lower court if those determinations did "not rest on credibility determinations, but [were] based instead on physical or documentary evidence or inferences from other facts." Id. at 574. Even in that situation, the Supreme Court said, there must be "deference to the original finder of fact;" such deference to the original fact finder is all the more warranted, the Court said, when factual "findings are based on determinations regarding the credibility of witnesses." Id. at 574-5.

In this case, of course, a jury had the opportunity to see and hear the same witnesses that the Committee did. Indeed, as I have noted, the jury had the opportunity to hear from a number of witnesses who had become unavailable by the time of our proceedings. The principles of fairness and finality that underlie our double jeopardy protections urge that the jury's response to those witnesses and that evidence ought to be substantially credit by us unless some manifest error is shown. The Court's conclusion in Anderson, that where "the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one... requiring them to persuade three more judges at the appellate level is requiring too much", id. at 575, may aptly be invoked here to suggest that where Judge Hastings has already succeeded in the defense of his case before a jury of twelve citizens, it perhaps requires "too much" that years after that fact he undertake the same burden of persuasion before one hundred Senators.
The Senate correctly concluded that it was not "too much" to require Judge Hastings to proceed with his defense on the articles of impeachment. As I believed then, and continue to believe, the mere fact of the House's overwhelming vote for impeachment following upon the recommendations of the Judicial Council of the Eleventh Circuit and the Judicial Conference of the United States required that we hear the case. But, having heard the case, there can be no question that the jury's verdict, rendered much closer in time, and reached after a fair and vigorous trial on both sides, should be given considerable deference in our decision unless it can be shown to have been clearly erroneous, or to have constituted a miscarriage of justice. To simply say that we disagree is not enough.

To sustain a conviction on the articles presented here, the House should be required to prove its case beyond a reasonable doubt; and, for the bribery conspiracy and related perjury articles, must do so in a way that shows that the jury's verdict was clearly in error or constituted a miscarriage of justice.

An appropriate manner to weigh the evidence is with an analysis of the central arguments of the House brief on the charge of conspiracy to obtain a bribe.

EVALUATION OF EVIDENCE SUMMARIZED IN THE HOUSE BRIEF

On key Article I, the corrupt conspiracy to obtain a $150,000 bribe, the House brief argues: 10

"1. Pattern of Contacts"—The House brief refers to contacts between Judge Hastings and William Borders in the same time frame as alleged dealings between William Dredge and Borders. Little, if any, reliance should be placed on Dredge's testimony. There are significant discrepancies between Dredge's testimony at this hearing and the testimony he gave on prior occasions. The existing documentary records for Dredge's phone contacts with Borders tend to confirm his prior testimony that his involvement with Borders did not begin until after his May 1981 arrest. Dredge has a serious criminal record with multiple convictions. At the time of Dredge's contacts with Borders, Dredge has the obvious motivation to extricate himself from pending Federal criminal charges on drug violations.

At the time Dredge dealt with Borders, Judge Hastings and Borders had reason to have contacts on other matters, aside from Hemphill Pride or the Romano, case, such as the propsective invitations to President Carter and Attorney General Bell to the National Bar Association meetings or the contemporaneous lawsuit which Borders had against President Reagan.

The House brief then argues:

"2. Three separate times Borders offered proof of Judge Hastings' involvement. Three separate times Judge Hastings complied." (p. 55)

According to the House contention:

"Borders made three separate 'offers of proof for the purpose of persuading the Romanos that he could control Judge Hastings. In each instance Judge Hastings took the promised action." (p. 55)

The House assertion is not factually correct.
The first was Borders’ prediction that Judge Hastings would continue the Romano brothers’ sentencing on his own initiative. The evidence is unequivocal that when Judge Hastings took the bench on May 11, he stated that he was prepared to proceed with the sentencing and continued the sentencing only after a request from defense counsel. The House seeks to rebut this key fact by stating: "Further, Neal Sonnett (defense counsel) may have orally notified Chambers of his desire for a continuance by the close of business on May 8, 1981."

What Neal Sonnet "may" have done is obviously pure speculation. There is no evidence that he did so.

A second issue cited in the House brief on the three "offers of proof" refers to the promise that within 10 days of the payment on the bribe, Judge Hastings would issue an order returning to the Romanos a substantial part of the forfeited property.

That admittedly did not happen.

The $25,000 was paid to William Borders on September 19. The order was not issued until October 6. In addition, Judge Hastings’ law clerk testified that the Judge had directed a return of the Romanos’ forfeited property in late August or early September 1981, a date fixed with reference to the Fifth Circuit Court of Appeals opinion of August 27 mandating that result.

The third "offer of proof" in the House brief refers to the September 16 "show" at the Fontainebleau. Judge Hastings' appearance at the hotel on that date is highly suspicious. Judge Hastings testified that he expected Borders for dinner but there is no evidence of a place setting for Borders or other corroboration of such an expectation by Judge Hastings. However, other evidence demonstrated Borders to be unreliable at fulfilling commitments such as appearing at appointments like dinner; but on one contention out of three "offers of proof," there is some circumstantial evidence.

The House brief then argues:

"3. More examples of Judge Hastings' complicity: the April 9 pay phone call; the October 5 coded conversation; the October 9 flight from Washington; Hastings and Borders' Relationship." (p. 72)

The House introduced evidence of a suspicious telephone call on April 9, 1981 from a pay phone in the Miami Federal courthouse to a pay phone in the District of Columbia Federal courthouse charged to Judge Hastings' residence. The House contends that the call was made at a suspicious time based on the suspect testimony of William Dredge. This call was not introduced into evidence at Judge Hastings' 1983 trial. Judge Hastings did not deny making the call, did not remember it and could not recall any purpose for it eight years after the fact. Since the call was charged to his home it is likely that he made it but not conclusive. It is at least somewhat speculative that Borders was the recipient.

The House brief then places great reliance on the coded telephone conversation of October 5. "p. 75. The House asserts:

"The evidence that the October 5 conversation is in code is insurmountable." (p. 81) I strongly disagree with the characterization "insurmountable" and I found the testimony of the expert witness, Dr. Roger Shuy, unpersuasive.

Aside from the contention of a coded conversation, the October 5 call, in conjunction with the so-called Hemphill letters, was suspi-
cious, but hardly rising to the level of the House's contention. The House contends the 5:12 call on October 5 contained a coded communication from Judge Hastings to Borders that the order was going out reducing the forfeiture. But that argument is undercut by the earlier telephone call at 4:22 on the same day from Borders to Rico that the order was going out. The House brief seeks to answer that gap by stating:

"The House submits that during the afternoon or evening of Sunday, October 4, Borders finally reached Judge Hastings after leaving a message at his home." (p. 82)

That assertion is wholly speculative because there is no such evidence. Had that call been made, however, there would have been no reason for the October 5 call from Judge Hastings to Borders.

The House contention is further refuted that Borders' coded communication to Judge Hastings on October 5 was that he had gotten the $25,000 down payment from the statement "he wrote some things for me... and then I was supposed to go back and get some more things." Had that conversation been the source of information from Borders to Judge Hastings that the $25,000 down payment had been paid, why would Judge Hastings already have issued the instruction for the forfeiture remittance? The House theory of the case was that such information had long since been communicated to Judge Hastings to warrant the remittance order.

The perfect text of Judge Hastings' handwritten letters for Hemphill Pride is curious, perhaps even suspicious, but Judge Hastings may well be able to draft such a perfect text. Had the draft letters been the product of a thoughtfully contrived plan, a careful contriver would probably have inserted some strikeovers.

The House brief then emphasizes Judge Hastings' failure to disclose the Hemphill Pride letters as circumstantial evidence of guilt. That assertion was directly contradicted by Judge Hastings' testimony that he showed those letters to William Borders' attorney, Mr. John Shorter. The House brief then contends:

... the letters, if offered at all, were assumed by Borders' attorney to be fabricated." (p. 91)

No evidence was offered to that effect. It is a House assumption that the letters were "assumed" by Borders' attorney to be fabricated. In proceedings before the Eleventh Circuit, John Shorter confirmed Judge Hastings showed him the draft letters.

The House brief then states "the third compelling indication of Judge Hastings' guilt is the circumstance surrounding his departure from Washington, D.C. on October 9, 1981." Judge Hastings' conduct on that day does show a high state of anxiety and worry, but not necessarily guilt. No matter who sophisticated and poised a lawyer or a judge—or a senator—might be, there would be an understandable sense of concern and anxiety on hearing that the FBI wanted to question that individual, a judge, when a friend had just been arrested for taking a bribe in his courtroom. Anyone would be foolish to respond to that situation by walking into an interrogation without preparation and counsel. Any lawyer worth his salt, as Justice Jackson aptly put it, would insist on reviewing the facts, analyzing the situation and preparing that person, even an experienced judge, before submitting to such questioning.
It is also understandable that a resident of another state would prefer to be in his home area instead of in Washington, D.C. A more reasoned response by Judge Hastings would have been to call the FBI agent and set a convenient date a few days later in his home area for such an interview, but who among us is totally composed and wise at all times under all circumstances? And Judge Hastings did submit to extensive questioning later that day by the FBI at the home of his friend, Ms. Patricia Williams, in Florida.

The final key House contention on the central article I states:
"d. The Relationship of Judge Hastings and William Borders since the Conspiracy Accusation Belies Respondent's Innocence." (p. 88)

This contention essentially relies on the inferences between Borders' illegal activities and his contemporaneous contacts with Judge Hastings. There is no question that Judge Hastings and William Borders had an appropriate personal, social and professional relationship prior to these events in 1981. There can be no guilt by association.

The evidence does not support the House assertion at page 91 of its brief about Judge Hastings' "inexplicably solicitous" attitude toward William Borders. I disagree with the House's conclusions on the basis of my examination of Judge Hastings on this issue. After reflection, it is my sense that Judge Hastings' attitude may well be explained by the expression that he acted more in sorrow than in anger.

Beyond an analysis of the House brief, I note the following as key elements of the evidence which raise at least a reasonable doubt and demonstrate that the jury's verdict was neither clearly erroneous nor a miscarriage of justice:

"Testimony from Judge Hastings' law clerk, which was uncontradicted, that Judge Hastings had directed a return of the Romanos' forfeited property in late August or early September, 1981, and thus in advance of the $25,000 payment on September 19—a fact totally at odds with the House's theory that Judge Hastings would only return the forfeited property after the bribe downpayment;

"The undisputed evidence that despite Borders' commitment on September 19 that the forfeiture remittance order would go out by September 29, that did not occur. There is no reason why Judge Hastings could not have gotten that order out within that time frame had he sought to fulfill such a commitment;

"The uncontradicted evidence that in a conversation at 4:22 p.m. on October 5, 1981, Borders told the undercover agent that the forfeiture order would go out the next day, prior to the communication with Judge Hastings in which the House alleges that he learned this fact—thus inferentially corroborating Judge Hastings' claim that he was not the source of Borders' knowledge about the case and that the 5:12 p.m. call was innocent;

"The inconsistency in the House's claimed interpretation of the October 5 Hastings/Borders conversation as a code, in that if Borders' statement to Judge Hastings at 5:12 p.m.—"See, I had, I talked to him and he, he wrote some things down for me"—is meant to be Borders' communication to Judge Hastings that he's received the $25,000 downpayment, there could be no basis for claiming that Judge Hastings' direction to his law clerk much earlier in the day to finish the Romanos forfeiture order was based on the $25,000 payment from Rico to Borders on September 19, because Judge Hastings would not have known about it until he spoke with Borders at 5:12 p.m.;

"The fact that it would be most unlikely for Mr. Borders to have been deceived into believing that Paul Rico was really Frank Romano if Judge Hastings, who was quite familiar with Romano's physical appearance and personality, was truly a participant in the scheme;

"The absence of evidence that the $25,000 paid to Borders on September 19 found its way to Judge Hastings;
"The background and circumstances surrounding the informant, William Dredge (over whose pretrial deposition I presided), including his criminal history, his ever-changing story and his demeanor, which left me unwilling to accept any part of his testimony as a basis on which to convict Judge Hastings;

"The uncontradicted evidence of Judge Hastings' excellent standing in the community; and

"The uncontradicted evidence of Judge Hastings' living a lifestyle that was not lavish, and where financial rewards were not important to him."

On the totality of this record on Article I, weighing the incriminating circumstantial inferences against the exonerating factors and giving due weight to his other unblemished lifetime record, I conclude there is insufficient evidence to convict.

Articles II through IV. For the same reasons that I think the verdict should not be guilty on article I, I reach the same conclusion with respect to the charges that Judge Hastings lied in his 1983 trial. Virtually all the matters that are contained in Articles II through XV, as allegedly false statement by Judge Hastings, were argued by the prosecution to the trial jury as false. Obviously, the jury did not accept those arguments.

Of course, it is not inevitable that we reach the same determination on these articles, or any of them, as Article I. There is always the theoretical possibility that although Judge Hastings may not have been proven guilty of conspiracy to solicit a bribe, he might have been proven to have lied in his own defense. In my judgment, however, such a verdict would be not only wrong but unseemly. To simply prosecute an acquitted man for perjury because he testified to his own innocence violates principles of fairness which have been emphasized as the underpinnings of our constitutional ban on double jeopardy. The courts have recognized that perjury prosecutions following acquittals can be tainted by prosecutorial vindictiveness and subject to dismissal for that reason. It seems to me that if we are not convinced that Judge Hastings conspired to accept a bribe, for the same reasons we ought not to be convinced of the falsity of his testimony in stating that he did not so conspire; and we also ought to accept his testimony that, to the extent he said anything incorrect in his own trial defense, those mistakes were inadvertent. For those reasons, I will vote to acquit on Articles II through XV.

Article XVI. As discussed above, the case against Judge Hastings on the wiretap disclosure article was neither convincing nor substantial. While there was direct evidence in the testimony of Mayor Clark, a number of factors made Mayor Clark a less than wholly credible witness; and a host of contradictory evidence, much of it undisputed, proved convincingly that what Mayor Clark said happened could not have occurred, certainly not in the way that he said it occurred.

Article XVII. Article XVII contains no independent allegations and has no independent evidence to support it. Inasmuch as I intend to vote against impeaching Judge Hastings on the substantive charges against him, I will vote the same way on a "catch-all" article which reiterates previous charges.
FOOTNOTES

1. Judge Kerner resigned after conviction rather than face impeachment. In 1929 and 1941, two other Federal judges had been subject to indictment, but did not question the jurisdiction of the court to prosecute them before impeachment.


5. See generally, Devitt and Blackmar, "Federal Jury Practice and Instructions," Sections 11.14 (Reasonable Doubts); 71.14 (Preponderance of the Evidence); and Sections 84.08 and 87.0; (Clear and Convincing Evidence). See also, McCormick, LAW OF EVIDENCE, Sections 339-41 (1972).


APPENDIX TO FLOOR STATEMENT OF SENATOR ARLEN SPECTER: THE RELATIONSHIP BETWEEN IMPEACHMENT PROCEEDINGS AND LEGISLATIVE OVERSIGHT FUNCTIONS

After 50 years without an impeachment trial being heard in the Senate, the last three years have seen three impeachment trials: those of Federal judges Harry Claiborne of Nevada, Walter Nixon of Mississippi and Alcee Hastings. Some Senators, including particularly my distinguished colleague from Alabama, Senator Heflin, have expressed a view that the constitutional mechanism for removal of Federal judges established by the Framers is not workable in the context of our contemporary legislative responsibilities, and have urged a constitutional amendment which would remove from the Congress the responsibility for impeachment and trial of inferior Federal judges.

In the 202 years since the adoption of the Constitution, as the country has grown and our legal system become more complex, the ranks of the Federal judges of the district courts and courts of appeals have expanded from 13 to 741. It may be that with so many Federal judges impeachment trials will become more commonplace, placing difficult demands on the already crowded agenda of the House and Senate. For this reason, some argue, the Constitution should be amended so that the Congress would retain responsibility only for impeachment proceedings against members of the executive branch and the Supreme Court—with problems of corruption or disability of all other Federal judges assigned to some other tribunal.

Before participating in Judge Hastings' impeachment hearings, I favored such a constitutional amendment. After serving as vice-chairman of the Impeachment Trial Committee, I now believe that
the issues raised in any judicial impeachment, including judicial integrity and independence of the judiciary, are sufficiently important to require our attention notwithstanding our other workload. Speaking with respect to the Senate, I believe that through the use of Rule XI committees, and with diligent and consistent effort by the members of those committees and of the full membership, we have been able to discharge our constitutional obligations in the Claiborne, Nixon and Hastings proceedings appropriately, and without detracting from our other responsibilities.

Additionally, my experience as a member of the Hastings committee has convinced me of another reason that it is important that the Congress and the Senate remain a part of the impeachment process even at the level of inferior Federal judges. As Members of the national legislature, both Representatives and Senators have oversight responsibility of many of the organs of our government involved in the criminal justice system. In the three impeachment proceedings recently concluded, the Members of the impeachment committees—and indeed the whole Senate—have had an opportunity to hear and observe in a concentrated way matters which ought to raise serious concern over how some of the agencies of the executive branch and the courts for which we have oversight responsibility have operated.

In the Hastings impeachment, we had occasion to hear a great deal that was disturbing regarding the functioning of the FBI, the Department of Justice, and even the Eleventh Circuit Investigating Committee operating under the strictures of our recently enacted Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 28 U.S.C., secs. 331 et seq. In the Hastings impeachment we heard evidence, among other things, that an FBI agent who was directed to conduct a telephonic interview of Judge Hastings told Judge Hastings that he was "not under investigation" when in fact the FBI was at that very moment urging the Justice Department to target Judge Hastings for indictment; in questioning that I put to him that FBI agent justified his conduct as follows:

Q: Would there be some circumstances where you would feel justified in saying to Judge Hastings that you were not investigating him in response to his question, when in fact you were investigating him?
A: That could be a situation as well.
Q: Well, under what circumstances could that be your approach?
A: Possibly in those circumstances to see if there might be a possibility of soliciting additional information from a subject of a target, you would not want to disclose that that person was the subject of an investigation.
Q: Well, would you consider it proper to say to a man under investigation in response to a direct question by him, that he was not under investigation, when in fact he was?
A: It would depend on the situation, but in certain circumstances I could see where I would not want to disclose the fact that the person is the subject. It just depends.

I for one do not believe that this is appropriate policy for the FBI or the Justice Department.

In addition, testimony in the Hastings case revealed what I believe a number of Committee members felt was a significant misuse of the subpoena process. On Friday, October 9, 1981, the day William Borders was arrested, a number of FBI agents arrived at Judge Hastings' chambers in Miami. They were not in possession of a search warrant, but had with them a subpoena ducès
**tecum** requiring the production of documents before a grand jury the following week. Armed only with that subpoena, they demanded that all the documents called for be delivered to them forthwith; they refused to let people come and go in Judge Hastings' chambers; they separated Judge Hastings’ personnel from each other; they told a federal magistrate who had come to Judge Hastings’ chambers that he was required to leave; and they used the occasion to look through papers on the top of Judge Hastings’ desk. This conduct is particularly troublesome because, it must be remembered, the FBI and Department of Justice are themselves parties to many matters that would be before Judge Hastings. The use of a subpoena *duces tecum* as if it were a search warrant, entitling them to the free run of Judge Hastings’ chambers, raises the possibility of the disclosure of the judge’s thoughts and work in progress on matters in which the government is a party in a way that could severely prejudice the rights of the parties adverse to the government. We ought to find out if that kind of procedure is accepted by the Department of Justice and the FBI as appropriate and routine behavior in the course of serving a subpoena; if it is, we ought to give serious thought to whether some statutory restraint should be interposed.

In addition, the events in this case revealed that significant portions of the evidence against Judge Hastings, which were subject to grand jury secrecy, appeared in the Miami newspapers almost immediately after Borders’ arrest. Despite a massive investigation by the Justice Department, no conclusion was reached as to how that could have occurred.

In the Hastings impeachment we also had occasion, possibly for the first time, to have a close examination of the functioning of a judicial investigating committee under the 1980 Judicial Councils Reform and Judicial Conduct and Disability Act. I believe it is safe to say that I and a number of my colleagues were distressed by what we observed. Under the statute, there is no provision giving witnesses who appear before the Investigating Committees the right to be represented by counsel, and each of the various Judicial Conferences are largely free to establish their own rules of procedure. 28 U.S.C. 372(c)(11). While the investigating committees’ procedures may be likened to those of a grand jury, with similar needs for secrecy, at least in the grand jury setting there is opportunity to have any arguably improper or overreaching conduct by the prosecutor reviewed by a supervising judge. Here, by contrast, the supervising judges are themselves the investigators, with the result that, at least based on what we observed in the Hastings investigation, the rights of those appearing as witnesses, and those under investigation, may not be fully protected.

For instance, when Joel Hirschhorn appeared as a witness and attempted to assert attorney/client and work product privileges for a memorandum that he had prepared in the course of defending Judge Hastings, the presiding judge, without benefit of brief or argument, simply stated that "the committee has determined that [Mr. Hirschhorn’s memorandum prepared as a checklist of things

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to do in defending his client] is not privileged or protected under the attorney's work product or that it has been waived."

Similarly, another attorney, Kenneth Robinson, was directed to testify concerning his conversations with an individual who had sought his representation, William Dredge, without any opportunity for Dredge to contest the summary denial of any attorney/client privilege Dredge may have had for his conversations with Robinson.

Finally, I note that the Investigating Committee's questioning of Judge Hastings' former law clerk, Jeffrey Miller—undertaken in a context where Mr. Miller had no counsel or representation of his own—had an offensive quality about it. The Investigating Committee, which had called Miller to testify before it for the third time, simply refused to accept testimony that Miller was giving that was favorable to Judge Hastings. For example, note the following "question" directed to Miller by one of the presiding judges:

Let's get down with it now. How much did the instructions have to do with it?
You have attempted to explain not by saying, well, if you hadn't followed the instructions, the judge would have signed it anyway, if that is so, why did you change it? Why did you obey his instructions if you thought had you followed your original theory that he would have signed it anyhow?
This takes a lot of explaining, and we haven't heard yet, Mr. Miller, and we are searching for the truth in this thing.

This questioning, it must be remembered, was directed to a young lawyer, unrepresented by counsel, in a proceeding where the displeasure of the inquiring judges at his testimony was manifest; there is a very real feel of the star-chamber in such an examination. It suggests that the judges may have moved well beyond being inquirers and have become instead inquisitors.

It may be that as a result of our observations in the Hastings impeachment proceeding we will now want to give consideration to whether witnesses before judicial investigating committees should be guaranteed the right to be represented by counsel, or whether we will want to take more direct control over the manner in which such investigations will be conducted. It may be that Congress should amend the Judicial Councils Act to establish rules of procedures which will guarantee fairness to witnesses, and to the subjects of investigation, and to provide a mechanism for appropriate review so that the judges conducting such an inquiry are not also themselves the arbiters of the propriety of their own conduct.

I think it is important also to take note that it is not just in the Hastings impeachment where the Senate has heard evidence that ought to give us concern about the operations of the criminal justice system and certain aspects of the judiciary. In the recently concluded Nixon impeachment hearings, it was a central point of the defense case that the principal witnesses against Judge Nixon had their testimony shaped and coerced by overaggressive prosecutors. Having not myself yet had a chance to consider the evidence in the Nixon case, I make no judgment as to the truth of those allegations, but I do note their disquieting similarity to some of the matters that we heard in Hastings and in Claiborne.

Indeed, in the Claiborne case, although we voted to convict Judge Claiborne, I believe many of us left that proceeding with a genuine sense of distress regarding what we had seen presented to us re-
garding the conduct of the Justice Department and the IRS. We saw disturbing demonstrations of selective targeting of subjects for prosecution, manipulation of evidence and witnesses, and other misconduct. Other than myself, 17 Senators had occasion to file floor statements discussing their reaction to the events in Claiborne. Of those 17, 8 (or nearly half)—Senators Bingaman, Hatch, Pryor, Heflin, McConnell, Bumpers, Levin, and Gore—had occasion to observe that the prosecutorial and governmental misconduct that they observed in the Claiborne case ought to be the subject of further inquiry. As Senator Bingaman put it: "It is clear from the debate which has taken place here in the Senate that many members are concerned not only about the evidence of overreaching by the Government in this case, but other instances of similar overreaching."

Senator Bingaman went on to call for the Judiciary Committee to hold oversight hearings. My other distinguished colleague, Senator Pryor, similarly observed: "There is no responsible doubt in my mind about another aspect of this case, and that is the long arm of the United States Government and the abuse of power that ultimately led to Judge Claiborne's conviction."

Similarly, Senator Levin commented: "I was greatly disturbed by the conduct that the government was alleged to have exhibited in this case. The evidence clearly suggests that the Government engaged in a pattern of selective prosecution, prosecutorial overreaching and perhaps intimidation of witnesses and other improprieties. I support a full investigation of those charges as they relate to Mr. Claiborne in particular and other cases as well."

Notwithstanding the views of these senators, no such hearings have as yet been held. I believe with what we have now seen in the Hastings and Nixon matters, time is past due for such hearings. We have a need to balance zealous and effective law enforcement and judicial administration with respect for the rights of citizens and their constitutional protection.

None of these matters would likely have come to our attention but for the Constitution's requirement that we undertake the obligation to try impeachment cases. I know that four weeks of full hearing days in the Hastings impeachment was a considerable burden for me and for my 11 colleagues on the Hastings committee. I am sure that the time commitments of the 12 senators on the Claiborne and Nixon committees represented an equally significant measures of effort and inconvenience for them. I know the difficulties for this entire body of the time that is spent considering and deliberating these matters on the floor.

I know also that impeachments present additional difficulty for us in that most of us have never had the occasion to act as judges where we must call a man guilty or not guilty, and we may perhaps find that role difficult.

For all that, however, I believe that there is an overriding value in the Senate continuing to act as the body that tries the impeachment of all federal officials including federal judges. We enact laws that govern the operations of the FBI, the Justice Department and the IRS, as well as the administrative functioning of the courts. Sitting as judges in an impeachment proceeding we have occasion to see in a closeup and firsthand way how those laws and the agencies
CONCLUDING COMMENTS OF SENATOR SPECTER ON
OCTOBER 28, 1989

Mr. SPECTER. For the record on the proceedings of the impeachment of Judge Hastings, I am including the written statement which I circulated to my colleagues on October 19, 1989, the appendix to that statement, the oral statement which I made in the Senate’s deliberations on October 20, 1989, plus these few supplemental thoughts.

The 7 hours of debate and deliberations by the Senate on October 19 confirmed my view expressed in my written statement that the Constitution should not be changed so that the Senate should continue to make the ultimate decision on impeachment proceedings. Judge Hastings’ case presented many complex issues which merited a judgment by the U.S. Senate. The independence of the Federal judiciary is one of the highest values in our society, and there is no better body than the U.S. Senate to make the ultimate decision on removal of a judge, especially in the context of the racial overtones, the jury acquittal, the long delay, the complex facts and the circumstantial evidence.

After much reflection, it is my firm judgment that there is one major error in the impeachment process and that is the absence of a defined standard burden of proof. In the impeachment of Judge Claiborne, the Senate expressly rejected establishing the standard of proof beyond a reasonable doubt with the result that each Senator is left to apply his or her own standard on that important issue.

For many reasons, I believe that is a major mistake. The Respondent, as a matter of fundamental fairness, is entitled to know the standard by which he is being judged. The public has a right to know the applicable standard. It is not sufficient to say that the standard on burden of proof is left to the individual judgment of each Senator because that leaves the matter vague, indefinite, speculative, and subject even to individual whim or caprice. The Senate prides itself on being the world’s greatest deliberative body. On many matters, it is not realistic to articulate a precise standard for the judgment on treaties or nominations or public policy on legislation. However, in an impeachment, it is my view that the Senate ought to establish a standard on burden of proof so that all will know what the rules are.

Beyond these considerations, the establishment of a standard on burden of proof would help the Senators themselves. During the course of our long hearings, members of the committee would repeatedly ask and discuss among ourselves what was the appropriate burden of proof. During the deliberations and in the corridors and in the dining rooms, my colleagues would ask what was the appropriate standard, saying that they were at a loss for the context in which to judge the complex case. I heard a number of my colleagues, who voted guilty, state that they would have voted not guilty if the standard had been proof beyond a reasonable doubt. The Prevailing view seemed to be that a lesser standard, even less
than clear and convincing evidence, was appropriate to remove a Federal judge from office.

I totally respect the judgment of my colleagues in disagreeing with my view of the appropriate standard on burden of proof, but do believe that standard should be established. It is inappropriate for the Senate as a whole or individual senators to render judgment without an established procedure including a known standard on burden of proof.

The Senate deliberations focused squarely on the difference on impeachment with removal from office contrasted with the judgment of guilt in a criminal case. Those deliberations were very illuminating as Senators approached these issues with various perspectives.

Reflecting back on the entire process, for me it boils down to a case of the United States of America versus Alcee L. Hastings whether it was the criminal case, the Eleventh Circuit judicial proceedings, the indictment process in the House or the final judgment in the Senate. After the jury acquittal, the unavailability of key witnesses and documents in 1989, and the overall process pitting the Government against an individual over an 8-year proceeding, it seemed to me that Judge Hastings should be ousted from office only if the case was proved beyond a reasonable doubt. I found the charges not proved.

STATEMENT OF SENATOR CHARLES E. GRASSLEY

Mr. GRASSLEY. Mr. President, Federal judges are, under our Constitution, afforded lifetime tenure during times of good behavior. This provision of article III is the cornerstone of an independent judiciary.

But in exchange, Federal judges must subscribe to the highest ethical and moral standards. Like "Caesar's wife," they must be, simply, beyond reproach, even suspicion. By their actions, judges must not undermine the integrity and impartiality of the judicial branch of Government.

At issue is, quite frankly, the public's trust and confidence in the officials who constitute our judicial branch. Inasmuch as the public cannot remove a Federal judge from office, it is left to the legislature to protect the public trust and confidence in the judiciary. Thankfully, the House and Senate have only rarely been asked to take the ultimate step of removal from office by impeachment.

That this great power is rarely employed does not, however, mean we should retreat from it when appropriate.

By his actions in 1981 and at his subsequent trial, Judge Hastings has gravely damaged the public's trust and confidence. At one time or another, every branch of our Federal Government has called into question the conduct and integrity of Judge Hastings: the executive, when the Justice Department brought the indictment in 1981; the judiciary, by the Eleventh Circuit council recommendation to impeach in 1986; and the legislature, by the House vote of 413 to 3 last year to impeach for various high crimes and misdemeanors and malfeasance in office. This is unprecedented.

To absolve Judge Hastings of these charges—any one of which, if true, being enough to remove him from office—we are asked to re-