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Standard of Proof in Senate Impeachment Proceedings

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Summary

The Constitution gives the United States Senate the responsibility for trying impeachments, but does not address the standard of proof that is to be used in such trials. This report concludes that an examination of the constitutional language, history, and the work of legal scholars provides no definitive answer to the question of what standard is to be applied. In the final analysis the question is one which historically has been answered by individual Senators guided by their own consciences.

At best, the constitutional provisions concerning the power of impeachment provide only indirect guidance in analyzing the question of what standard of proof is, or should be, applicable to Senate impeachment trials. Nevertheless, those words are the starting point for discussions about the nature of impeachment proceedings and the standard of proof that is or should be applicable to such proceedings. The role of each house of Congress is outlined in Article I. Briefly, the Constitution confers on the House of Representatives "the sole Power of Impeachment."[1] A bit more is said of the role of the Senate:

> The Senate shall have the Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: and no Person shall be convicted without the Concurrence of two thirds of the Members present.
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> Judgment in Cases of Impeachment shall not extend further than 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. [2]

[1] U.S. Const., Art. I, Sec. 2, clause 5.

[2] U.S. Const., Art I, Sec. 3, clauses 5 and 6.

Impeachment is also addressed in the Executive Article of the Constitution wherein it is said that: "The President, Vice President, and all Civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."[3] Finally, the Judicial Article provides that, "The trial of all Crimes except Impeachment, shall be by Jury; ...."[4] These few words provide the constitutional framework for a discussion of the standard of proof in impeachment proceedings, but no definitive answer as to what standard is to or should be applied.

The use of certain words such as "try," "convicted" and "conviction" suggests that impeachment might be likened to a criminal proceeding, where the standard of proof is beyond a reasonable doubt. This position was enunciated in the Minority Views contained in the Report of the House Judiciary Committee on the impeachment proceedings against President Nixon.[5] In their view the appropriate standard of proof for the Senate was that applicable to criminal cases.[6] For support they rely, in part, on the constitutional language cited above.

The position that proof beyond a reasonable doubt is required has been advanced, as one might expect, by defendants in impeachment proceedings, while the House Managers (who present the case for conviction) have urged a lower civil standard - preponderance of the evidence. Thus, in the Senate trial of the impeachment of Judge Harry Claiborne in 1986, his attorneys filed a motion to designate beyond a reasonable doubt as the applicable standard for the Senate in reaching its determination. In the brief in support of the motion they argued that the constitutional language made it clear that an impeachment trial was in the nature of a criminal proceeding; the standard of proof in all criminal trials is beyond a reasonable doubt; historically impeachments have been conducted in the nature of a criminal proceeding; and the consequences for the defendant were grave, requiring the prosecutors to be held to the highest standard of proof, beyond a reasonable doubt.[7]

The response of the House Managers in opposition to the Claiborne motion noted that the reasonable doubt standard was designed to protect criminal defendants who risked "forfeitures of life, liberty and property." (Quoting *Brinegar v. United States*, 338 U.S. 160, 174 (1949)) Such a standard was inappropriate, they maintained, because the

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[3] U.S. Const., Art. II, Sec. 6.

[4] U.S. Const., Art. III, Sec. 2, clause 3.

[5] H.Rept. 93-1305 at 377-381.

[6] Because of the nature of the impeachment and trial process and the different roles played by the Senate and House of Representatives, the minority felt it necessary to examine the standard appropriate for the Senate as a predicate to any attempt to assess the appropriate standard for a proceeding in the House. Their analysis led them to conclude that the appropriate standard for the Senate was beyond a reasonable doubt (H.Rept. 93-1305 at 379-80) and for the House, clear and convincing evidence (Id. at 381).

[7] Gray & Reams, The Congressional Impeachment Process and the Judiciary: Documents and Materials on the Removal of Federal District Judge Harry E. Claiborne , Volume 5, Document 41 (Motions Referred to the Senate by the Senate Impeachment Trial Committee), IX (Judge Claiborne's Motion to designate "Beyond a Reasonable Doubt" as the Standard of Proof in the Impeachment Trial (and supporting memorandum)) (1987) (hereinafter GRAY & REAMS).

Constitution limits the consequences of a Senate impeachment trial to removal from office and disqualification from holding office in the future, explicitly preserving the option for a subsequent criminal trial in the courts. Added support for their position was drawn from the fact that the framers, while borrowing some terms associated with criminal law from the English impeachment model, expressly rejected the English practice allowing the imposition of traditional criminal punishment, including forfeitures of life, property and liberty. Contrary to the defendant, they found that historically, the Senate had rejected the analogy to a criminal proceeding, citing the Ritter impeachment in 1936 as precedent.[8]

During the course of the floor debate on these motions the attorney for Judge Claiborne quoted statements by Senators Robert Taft, Jr., Sam Ervin, StromThurmond, and John Stennis indicating that they would apply the beyond a reasonable doubt standard if the case against President Nixon came before the Senate. Representative Kastenmeier responded for the House repeating the arguments contained in the memorandum in response summarized above and stressing 1) that the Senate had never adopted such a standard of proof; 2) that the statements quoted were expressions of individual intent only and not binding on the Senate as a body; 3) that the proceeding was not a criminal trial and use of the criminal standard was inappropriate where the public interest in removing corrupt officials was a significant factor; and 4) that historically, the Senate had allowed each member to exercise personal judgment in these cases.[9]

During the consideration of the motion by Judge Claiborne to designate beyond a reasonable doubt as the standard of proof, the question was posed as to the consequences of voting the motion down. Senator Humphrey asked what the standard would be if the motion was rejected, Senator Metzenbaum asked whether rejection left an inference that the reasonable doubt standard was not applicable, and Senator Heflin questioned whether rejection would prevent an individual Senator from applying the reasonable doubt standard. The response of the Presiding Officer was that rejection of the motion left individual members free to apply a standard of their choice, including, but not limited to the reasonable doubt standard. Judge Claiborne's motion was rejected by the Presiding Officer, holding that the standard to apply was up to each Senator to decide individually. Senator Hatch requested the yeas and nays and the motion was rejected by a vote of 17 yeas and 75 nays.[10]

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[8] Gray & Reams, Volume 5, Document 41, X (House Manager's opposition to Motion to Designate "Beyond a Reasonable Doubt" as the Standard of Proof). In essence, their argument was that since criminal sanctions could not be imposed, a criminal standard of proof was not required. Additionally, they contended that the criminal standard was inappropriate in an impeachment because impeachment was by its nature a proceeding where the public interest (the interests of society) weighed more heavily than the interests of the individual defendant, which were adequately protected by the constitutional requirements of separate action by both Houses of Congress and a two-thirds vote of those present for conviction in the Senate. They urged a preponderance standard. This contrasts with the view of the House Judiciary Committee minority in the case of President Nixon, where the beyond a reasonable doubt standard was urged. *See*, fn.6 and accompanying text.

[9] 132 Cong. Rec. S15489 - S15490 (daily ed. October 7, 1986).

[10] 132 Cong. Rec. S15506 - S15507 (daily ed. October 7, 1986).

While the Senate refused to impose the reasonable doubt rule as the Senate standard, individual members undoubtedly applied that standard in their own minds when weighing the sufficiency of the evidence in the Claiborne case. Presumably, at least the seventeen who voted in favor of the motion to adopt the standard, followed it in their deliberations. In explaining his vote on the articles of impeachment in the Claiborne case, Senator Hatch makes it clear that he followed that standard: "Relying as they did on the criminal conviction, the House Articles of Impeachment required the Senate to ascertain whether, beyond a reasonable doubt, Judge Claiborne intentionally filed a false return."[11]

The issue was revisited during discussions at the organizational meeting of the Senate Impeachment Trial Committee for consideration of the articles of impeachment against Judge Alcee Hastings.[12] Senator Lieberman asked help in understanding what guidance the common law of American impeachment provided as to the "threshold the evidence has to cross for us to make a judgment of guilt or innocence against this judge."[13] In response, Senator Rudman said:

> I don't think you are going to find one, Joe. I think it is going to be whatever you apply to it. We looked through that last time, and you are not going to find it. It is what is in the mind of every Senator. If you want to use clear and convincing, preponderance, if you want to use beyond a reasonable doubt—I think it is what everybody decides for themselves.[14]

Asked for his comments, Michael Davidson (Senate Legal Counsel) reviewed the history of the Claiborne impeachment and the debate and vote on the standard of evidence in that case. Noting that the Senate had overwhelmingly rejected the motion to establish beyond a reasonable doubt as the Senate standard, leaving that determination to each individual member, he suggested that historical records and commentary might provide insight for an individual making these judgments, but do not provide any single definitive answer.[15]

Some commentators have urged a middle ground between the usual civil standard and the criminal standard of proof. Noting that impeachment is serious business but that the usual criminal sanctions of fines and imprisonment are denied the Senate, Professor Rotunda suggests that the appropriate standard of proof should be "clear and convincing evidence." This is an intermediate standard used in some important civil cases, more than a preponderance and less than a reasonable doubt. "Clear and convincing evidence is

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[11] 132 Cong. Rec. S15763 (daily ed. October 9, 1986); Senator Bingaman also applied the criminal standard, *id*.

[12] *Report of the Senate Impeachment Trial Committee on the Articles Against Judge Alcee Hastings: Hearings before the Senate Impeachment Trial Committee* (hereinafter *Hastings Report)* (Part 1 of 3) 101st Cong., 1st Sess. 73-75, discussion involving Senator Lieberman, Senator Rudman, and Mr. Davidson.

[13] *Id.* at 74.

[14] *Id.*

[15] indicated a preference for a middle level of proof. (135 Cong. Rec. 25337) Senator Specter indicated that in this case, where the Judge had been acquitted in a criminal trial, he would apply the reasonable doubt standard of criminal law. (135 Cong. Rec. 25347)

typically defined as that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegation sought to be established."[16]

The National Commission on Judicial Discipline and Removal decided not to recommend the adoption of a standard of proof. Nevertheless, its report provides an illuminating discussion of the issue.

> **Standards of Proof.** The Question remains: what is the appropriate standard of proof for Senate impeachment proceedings? The Senate has declined to establish a standard, leaving it a matter for the conscience of each Senator. The disadvantage of this practice is that the respondent judge, the House Managers, and, indeed the Senators themselves cannot know in advance what standard the Senate will apply.
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> The Commission considered whether it would be desirable, as a matter of policy, for the Senate to prescribe a standard to guide participants in their preparation for impeachment trials. The Senate could choose from among three established standards: beyond a reasonable doubt, clear and convincing, and preponderance of evidence.
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> Some Senators favor the beyond a reasonable doubt standard because of their concerns about the separation of powers and because impeachment proceedings parallel criminal trials. If the Senate is impeaching based on a prior felony conviction (which requires the jury to find commission of an offense beyond a reasonable doubt) then the Senate should use the same standard, some argue.
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> Others claim that the beyond a reasonable doubt standard is too deferential to the convicted judge and fails sufficiently to recognize the purpose of impeachment — namely, to defend the community against abuse of power by judges. The purpose of an impeachment proceeding is different from the purpose of a criminal trial, they argue. In a criminal proceeding, a court may take a defendant's life, liberty, or property, whereas an impeachment proceeding involves a respondent's office. Impeachment is a political proceeding, and in their view the lower standard of "preponderance of the evidence" is therefore the appropriate one.
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> Still others have argued that the appropriate standard of proof is clear and convincing evidence that the respondent has committed an impeachable offense. It gives force to the purpose of remedying judicial abuse of power, while recognizing the competing interests of avoiding unjustified removals and protecting judicial independence.
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> In the final analysis, the Commission recognizes that each Senator is both judge and juror. As observed by Senate Legal Counsel Michael Davidson, it is the sum of Senators' separate judgments that amounts to either conviction or acquittal: "any member is entitled to establish the highest, the medium, [or] a lower standard to govern his or her analysis of the evidence."[17]

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[16] Rotunda, *An Essay on the Constitutional Parameters of Federal Impeachment*, 76 Ky. L.J. 707, 719-20 (1988).

[17] Report of the National Commission on Judicial Discipline & Removal at 59-60 (August 1993).

While the report focuses on the impeachment of judges, similar competing considerations may come into play when executive branch officials are the subjects of an impeachment proceeding. In 1974, with a possible presidential impeachment as an impetus, Professor Charles L. Black, Jr. published his IMPEACHMENT: A HANDBOOK. In it he discusses the conflicting policy considerations of an impeachment in the context of the trial of a President. In response to a rhetorical question as to the "right standard for judging guilt in an impeachment proceeding," he replies:

> Of course we don't know the answer with any sureness; we have to work it out for ourselves. As with so many constitutional questions, we have to ask what is reasonable, and the reply here is far from obvious. Removal by conviction on impeachment is a stunning penalty, the ruin of a life. Even more important, it unseats the person the people have deliberately chosen for the office. The adoption of a lenient standard of proof could mean that this punishment and this frustration of popular will, could occur even though substantial doubt of guilt remained. On the other hand, the high "criminal" standard of proof could mean, in practice, that a man could remain president whom every member of the Senate believed guilty of corruption, just because guilt was not shown "beyond a reasonable doubt." Neither result is good; law is often like that.
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> Of course each Senator must find his own standard in his own conscience, as advised by reflection. The essential thing is that no part whatever be played by the natural human tendency to think the worst of a person of whom one generally disapproves, and the verbalization of a high standard may serve as a constant reminder of this. Weighing the factors, I would be sure that one ought not to be satisfied, or anything near satisfied, with the mere "preponderance" of an ordinary civil trial, but perhaps must be satisfied with something less than the "beyond a reasonable doubt" standard of the ordinary criminal trial, in the full literal meaning of that standard. "Overwhelming preponderance of the evidence" comes perhaps as close as can to denoting the desired standard. A unique rule, not yet named by law, may find itself, in the terrible seriousness of a great case. Senators have no plainly authoritative guide in this matter, and ought not be censured for the rule they conscientiously choose to act upon, after thought and counsel, and above all in total awareness of the dangers of partisanship or feelings of distaste.[18]

In sum, the Senate has traditionally left the choice of the applicable standard of proof to each individual Senator. While rejecting a motion to make the criminal standard the standard in the Claiborne impeachment, the discussion made clear that it was simply a decision to allow each member to make that choice and not a repudiation of the standard itself. Individuals might apply that or any other standard of their choice. A walk through history and an examination of the discussions of legal commentators may aid individuals in weighing their choices, but provides no definitive answers. Indeed, such an exercise is perhaps most useful in highlighting basic questions that members will want to ask themselves when searching for the appropriate standard.

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[18] C. Black, Impeachment: A Handbook, at 17-18 (1974).