What a 1989 Case Can Teach the Senate

By David O. Stewart

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After the rancorous impeachment proceedings in the House of Representatives, the Senate must take care to avoid a replay, or worse. To do so, the Senate should make plain its commitment to conduct a trial that is truly fair to the President.

Although impeachment precedents are few, an important one occurred nine years ago, when the Senate heard charges that a high official had lied to a grand jury. The defendant (and my client), Judge Walter L. Nixon Jr. of Federal District Court in Mississippi, had been convicted on two perjury counts in a Federal prosecution relating to an investment made with a businessman whose son had been arrested for smuggling marijuana. At the time of the trial, he was serving a prison sentence.

Despite these decidedly unfavorable circumstances, Judge Nixon insisted on his innocence and on his right to challenge the accusations against him in a Senate trial. Several precedents established in our case could be central in the proceeding against President Clinton.

First, the Senate should refuse to consider any impeachment article that lumps together multiple instances of alleged misconduct.

An article that combines different allegations may draw support from those senators who agree with the first subpart, and from other senators who agree with the second subpart, and so on.

> No vague charges. And the defendant has rights.

Prosecutorial logrolling of this kind unfairly lowers the bar for impeachment and removal. If Mr. Clinton faces removal for having committed a "high crime or misdemeanor," a specific offense should be clearly framed, and the vote of each senator should be plainly understood, not shrouded in ambiguity.

One of the articles brought against Judge Nixon presented an agglomeration of charges of perjury and obstruction of justice. We challenged that article as unfair, and the Senate voted not to convict on it, even though Judge Nixon had already been convicted of perjury in court.

By that precedent, both the impeachment articles brought against Mr. Clinton should be dismissed, since they are simultaneously vague and compound.

The first article describes four generic types of false grand jury testimony, but does not specify any single false statement. The second article lists seven supposed obstructions of justice between Dec. 17, 1997, and Jan. 26, 1998, permitting a senator to vote to convict based on any one of the seven.

A further concern is that in any perjury case, jurors must evaluate the credibility of the central witnesses. We demanded that Judge Nixon have that opportunity even though the witnesses — unlike those in the Clinton case — had already testified and been cross-examined at a criminal trial and before a House subcommittee.

For four days, all of the central witnesses testified and were cross-examined again. The President is entitled to no less.

He is entitled, as well, to see the independent counsel's investigative files. Whenever an investigative target is prosecuted for denying he engaged in conduct that was legal if it occurred, there is a significant risk that prosecutors have set a perjury trap to contrive a crime. We needed to explore that issue. In response to a request from Senators Orrin Hatch and Wyche Fowler Jr., the Justice Department opened its files to us. Mr. Clinton's team deserves similar access.

In addition, the Senate should not consider shortcuts that have been adopted in earlier impeachments, particularly the rule allowing a committee of 12 senators to hear all evidence.

Trial by committee is an insult to the judicial and executive branches because it excuses all but a handful of senators from learning the facts in an impeachment case.

Until 1986, impeachment trials were conducted before the entire Senate, as the Constitution requires, and the Senate should return to that practice.

The Senate should also prescribe a single standard of proof for impeachment charges. That standard should be one, at least, of clear and convincing evidence.

In 1989, the Senate reaffirmed that each senator may apply whatever standard of proof he or she deems appropriate in impeachment trials, an approach that contradicts the spirit of the impeachment clause. By limiting impeachment to "treason, bribery and other high crimes or misdemeanors," the Constitution permits removal only for specific acts. Whether those acts occurred should be judged by a single standard, not left to the whim of each Senator.

Finally, the Senate has never adopted rules of evidence for such core issues as relevance, materiality and hearsay. To insure a regular trial, the Senate should adopt Federal rules regarding the admission of evidence.

If the second Presidential impeachment trial in our history becomes necessary, the Senate's paramount concern should be to guarantee its fairness. □

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