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Excerpts From Judiciary Committee Debate

Following are excerpts from yesterday's Judiciary Committee impeachment debate, beginning with Rep. Robert McClory's proposed Article III on President Nixon's refusal to comply with committee subpoenas:

McClory. In presenting this article, Article III, it seems to me we are getting at something very basic and very fundamental insofar as our entire impeachment proceeding and inquiry is concerned. I think it is well for us to recall that the Constitution rests in us, the House of Representatives, and us, the House Judiciary Committee which has been designated by the House of Representatives to conduct this inquiry, with the sole purpose of impeachment. Now, implicit in that sole power of impeachment is the authority to make this inquiry, to investigate the office which is under investigation. In this case it happens to be the President of the United States. There have been a total, I believe, of 13 impeachment inquiries, impeachments in the House of Representatives, and a total of 69 cases which have been referred and where there has been some action taken of one kind or another with regard to the subject of impeachment.

Now, implicit in this authority to conduct an impeachment inquiry is the authority it investigate the action that take place in that office. If we were—if we are without that authority, or if the respondent has the right to determine for himself or herself to what extent the investigation shall be carried on, of course, we do not have the sole power of authority. Someone else is impinging upon our authority. So it seems to me implicit in this authority that we have a broad authority to conduct an investigative inquiry.

This has been recognized in our proceeding, as a matter of fact, in that the House of Representatives delegated to us the authority to issue subpoenas relevant and necessary to our inquiry, and the result of that, we have issued, four, I believe, subpoenas to the President requesting information.

Now, prior to the time that we issued these subpoenas we directed letters to the President requesting information and these letters requesting information were sent by the chairman after consultation with the ranking minority member. In other words, we have the joint authority and the joint expression of Republicans and Democrats with respect to the information that we have requested.

Now, the President, of course, did not respond to the requests that we directed to him in the course of our letters, and so what we did, we exercised the authority which was granted to us, by the House resolution to issue subpoenas.

Now, with respect to three of the subpoenas the vote was 37 to 3, I believe. 37 to 1. No. The vote was 33 to 3 on one, 37 to 1 on two and 34 to 4 on the fourth one.

In other words, the action of the committee was bipartisan and it was overwhelming that we wanted this material, that we wanted this response to the requests for information which we felt were necessary and relevant to our inquiry.

I recall when the President came before the joint session of the Congress in January he said words to the effect that he wanted to provide full cooperation with the Judiciary Committee consistent only with the operation of his office. Now, I suppose that qualification was more significant than it seemed to be at that time because the words that came across to us were full cooperation with the House Judiciary Commiteee.

Now, where is that full cooperation with the House Judiciary Committee? Well, we have had some tapes and we have had some transcripts. The transcripts we got, of course, were transcripts that were issued to the public, not issued in response to this committee, but publicized, the edited transcripts as they are called, or the White House transcripts. And the tapes, where did they come from? Well, they did not come from the White House, they came from the grand jury and they came from the special prosecutor's office. As a matter of fact, of the 147 tapes that we requested, we did not receive a single one from the White House.

Now, if you ever saw an example of stonewalling, the prime example of stonewalling is right there, and now that is an expression that comes out of the White House, but where is the stonewalling occurring? It is occurring with regard to the Congress of the United States and with regard to this committee.

Now, if we do have the sole power of Impeachment, and if we do have the authority to investigate, then it is important, of course, that we do receive the kind of cooperation that I thought would be forthcoming. I have done everything I could to try to impress upon the White House the importance of this cooperation.

Now, the President has raised the question of confidentiality of the taped material, and so what we suggested was that this material would be received not only under our rules of strict confidentiality, but that the President himself, the President's counsel could participate with our counsel in screening out any sensitive or national security information. But, the President's position has been that he should be the sole arbiter of what is, or what he should turn over, and what he should not turn over.

Well, if he is the sole arbiter, then how in the world could we conduct a thorough and a complete and fair investigation? Well, we just could not.

Now, since we began this inquiry, of course, the President has been involved in litigation, and the case went to the Supreme Court. And he made the same kind of a plea to the special proescutor in the District Court that he has made to us, that he should have the sole right, that there was an absolute executive privilege which prevailed, and that he had the absolute right to determine what he would turn over and what he would not turn over.

Now, that doctrine was knocked down. That was knocked down effectively insofar as the court was concerned.

Now, it is true that we were not involved in that proceeding. Some people thought we should have been, and perhaps we should have been. But, anyway, the doctrine was knocked down and the doctrine of executive privilege or absolute executive privilege has fallen. As a matter of fact, I have felt, and a number of my colleagues here on the committee have felt that the doctrine of executive privilege has no application whatsoever in an impeachment inquiry, because it would be impossible for the President or any other person being investigated to have the right and privilege to determine what was to be submitted in the course of the investigation and what was not to be submitted. In other words, we would be falling foul of the maxim enunciated by Lord Coke that a person cannot be the judge of his own cause, and consequently, that doctrine cannot possibly prevail. Otherwise our case would be or our authority would be frustrated completely.

Now, I say this is fundamental and basic to our inquiry and I mean precisely that. I mean that if we are going to set a standard and a guide for future Congresses, for future impeachment inquiries, there is no more important standard and guide than the one that we will determine with respect to Article III, because if we refuse to recommend impeachment of the President on the basis of this Article II, if we refuse to recommend that the President should be impeached because of his defiance of the Congress with respect to the subpoenas that we have issued, then future Congresses, future respondents will be in the position where they can determine themselves what they are going to provide in an impeachment inquiry and what they are not going to provide, and this would be particularly so in the case of an inquiry directed towards the President of the United States.

So, it not only affects this President but future Presidents. And it might be that a Republican Congress would be investigating in an impeachment inquiry a Democratic President in a future instance. I hope we do not have any more impeachments, but in the case we did, why the precedent that we might establish here would be effective then.

So, it seems to me that there is no greater responsibility which befalls us at this time than that to determine this question of the President's responsibility with respect to our subpoenas.

Now, earlier I had the thought and I set it forth publicly that I felt that when the President did not respond to our subpoenas that we should take action to hold the President in contempt, or that we should censure the President, or we should have a resolution of inquiry, as it's called, to get some action on the part of the House. I was discouraged in that respect. I was discouraged from leaders on both sides of the aisle, I might say, and I emphasized at that time that while I was

withholding the aciton that I intended to take then, that I would face a very serious dilemma at this stage, and so while we did not take action under the contempt authority that we had, which in a sense is quite difficult to enforce and to apply, nevertheless we are now faced with this decision at this hour of decision, with determining whether or not the President is or is not contemptuous, or if he is not, he has not denied the Congress to the extent that we should recommend his impeachment. I think that this is an important Article. It is a case where the Congress itself is pitted against the Executive. We have this challenge on the part of the Executive with respect to our authority, and if we think of the whole process of impeachment, let us recognize that this is a power which is pre-eminent, which makes the Congress of the United States dominant with respect to the three separate and co-equal branches of government. It bridges the separation of powers and gives us and reposes in us the responsibility to fulfill this mission. And the only way we can do it is through acting favorably on Article III.

At this point Rep. Ray Thornton offered a perfecting amendment.

Thornton . . . The matters which have been raised by the proposed article by the gentleman from Illinois deserve our very serious reflection and thought. I have previously expressed my own views that the failure to comply with subpoenas does constitute a grave offense, and I have also expressed that in my view that offense should have been included within one of the substantive articles which has been previously presented and adopted by this committee.

I think it could have been considered as an abuse of power, or even more logically as an obstruction of justice in interfering with this committee's exercise of its constitutional duty.

However, that did not occur during the course of the adoption of the articles which have been presented, and I do not see Mr. Doar at the table, but I would like to direct the attention of Mr. Jenner, if I may, to paragraph (4) of Article I, as amended by the gentleman from California, Mr. Danielson, to include within that article a failure to produce materials required by congressional committees . . . In your view, would that article permit the introduction of evidence with respect to the subpoenas which have been issued by this committee?

Jenner. I think that provision of Article I would not prevent the introduction of evidence in the area. But the problem presented is whether that it is sufficiently specific in a charging sense to be able to assert that the failure to respond to the subpoena is itself an impeachable offense.

Thornton. Well, based on that answer then, it seems that we are faced with the very real issue of giving a proper consideration to the failure of the President to comply with our subpoenas.

I think that it is important that in approaching this we should be aware that here we are dealing with directly and intimately a matter which can have a bearing upon the constitutional basis of power between the three departments of government, and that what we may do with regard to the adoption of this article is going to in one way or another possibly affect the future of those balances.

If we do nothing, we may indeed limit the authority of the Legislative Branch to make a proper inquiry as to the misconduct under the impeachment provision of individuals in either the Executive or Judicial Branches of government. If, on the other hand we draw too broadly upon our power and authority, we might distort the balance of power to give the Legislative Branch under its impeachment clause the authority to constitutionally investigate and determine the actions of members of the Executive or Judicial Branches of government.

By James K. W. Atherton—The Washington Post

Rep. Ray Thornton's amendment of Article III was adopted 22 to 14.

For this reason it seems to me that if this article is to be given consideration, it must be sharply limited and defined to the presence of offenses established by the other evidence which might rise to the level of impeachable

offenses. And that is the purpose and effect of the perfecting amendment which I have offered and which I ask the members to adopt, because it seems to me that we are confronted with the very serious problem in presidential noncompliance with our subpoenas, but that we must draw carefully limiting language to prevent a distortion of the balance of power between the Executive and the Legislative Branch.

Froehlich. . . . No matter how sharply limited and defined you try to draw this article, this is clearly an indication of alleged absolute power of the President versus the alleged absolute power of the Congress, a classic case in separation of powers.

The President claims constitutional and historic tradition of executive privilege and the Congress claims executive—exclusive power of impeachment. What reasonable men would not properly place this impasse before the third branch, the courts, for final arbitration and decision in both in the interests of obtaining information or substantiating the President's compliance or non-compliance under the Constitution.

Clearly, the President has asserted his consititutional responsibility vested in him in Article II to protect the office of the presidency against the infringements of other branches. This argument was also advanced by the President in responding to supoenas sought by the special prosecutor. In fact, the President used the courts all the way up to and including the Supreme Court to advance his position. What the Supreme Court said in the United States vs. Nixon in response to the President's argument is vitally important for this committee to understand. It said that in the performance of assigned constitutional duties, each branch of the government must initially interpret the Constitution and the interpretation of its powers by any branch is due respect from the other.

It further stated that in the last analysis it is emphatically the province and duty of the Judicial Department to say what the law is. Thus, the court said in essence that the President was absolutely correct in defending his interpretation of the Constitution but that the Supreme Court's decision with respect to claim of executive privilege was dispositive in the last analysis. It then held that although the courts will afford the utmost deference in the presidential need for confidentiality when the claim of privilege is based merely on generalized interest in confidentiality the assertion of the privilege must yield to a demonstrated specific need for evidence in a pending criminal trial, that is, the tapes must be given to the District Court for in camera inspection.

The decision of Supreme Court did not say that executive privilege was not a viable doctrine. On the contrary, it said that certain powers and privileges flow from the nature of enumerated powers, the protection of confidentiality of presidential communication has similar constitutional underpinnings. It also said the privilege is fundamental to the operation of government and rooted in the separation of powers under the Constitution. Thus, the Supreme Court has stated emphatically that executive privilege is a constitutional privilege available to the President.

Now, whenever a sutuation where members of this committee, like Mr. Jaworski, are asserting the right to have certain information because under Article I the House shall have the sole power of impeachment, but that clause says nothing about a President being powerless to assert what he understands to be his constitutional responsibility to protect his office.

Therefore, at best we have two great branches of government involved in a stalemate, both arguing the Constitution. As the Supreme Court said, it is emphatically the province and duty of the Supreme Court to say what the law is. So if the members of this committee believe their position, they should have gone to court and asked the court to say what the law is.

The committee has every right to assert its understanding of the Constitution but it is not the final arbitrator. It is not the judge and jury. Our Constitution gives the courts the responsibility to interpret the law and I would remind the committee that the President has responded to have Judicial subpoena served upon him and has recently stated he intends to fully comply with the Supreme Court rulings. So there is a remedy available to test these theories of constitutional authority to get information and that is to use the courts, not to attempt to impeach a President for defending what he believes to be his duty under the Constitution.

Seiberling. I support the Thornton subsitute. I also support the McClory original article, though I think the substitute is an improvement. And the reason it is an improvement is because it makes it even more clear that we are not stating a broad power to obtain presidential documents in any type of congressional proceeding but we are limiting it to an impeachment proceeding which is what we have before us.

Now, it seems to me that the impeachment power—that no one can dispute that without the power to investigate, the impeachment power is meaningless. It is inconceivable that the Founding Fathers believed that a subject of an impeachment inquiry should be able to withhold relevant evidence from impeachment proceeding. Certain privileges founded in our concept of due process I believe are applicable even in impeachment proceedings, but certainly so-called executive privilege is not one of them.

Impeachment is the express exception in the Constitution to the so-called separation of powers doctrine. The very purpose of the impeachment power is to discover and remove those civil officers who have committed certain serious offenses against the state. Stonewalling tactics have no legitimate place in procedures which are designed to find the truth as rapidly and as completely as possible.

Now, if this were a court case the question of privilege would be one for the judge of the court to decide but here in the first instance at least the committee is the judge, acting for the full House, and the House thereafter, and if the House votes Articles of Impeachment, then the Senate is the ultimate court of appeal in this matter. And it is the Senate that can decide what the issues of law and fact are . . .

Wiggins. I rise in opposition to the amendment. The maker of the main position, you see, has dug himself a hole and the purpose of the amendment is to help extricate himself from that illogical position. The situation is this. This committee yesterday and the day before viewed the evidence and found it, I am told, overwhelming. I believe our good counsel called it a surfeit of evidence. I take that to be a good bit, Mr. Doar. And voted to impeach and remove the President based thereon, found it to be clear and convincing.

And now we seek to impeach him because he did not give us enough evidence to do the job.

Now, I would think that you have an option here, if you wish. You can frankly acknowledge the inadequacy of the evidence to impeach the President and perhaps impeach him for failing to provide that evidence, or on the other hand, you can vote that the evidence is sufficient to impeach the President as you have done and to recognize that the matters subpoenaed were not in fact necessary to the proper conduct of this committee's inquiry.

That word "necessary" is important, you understand, because that word is found in the authorizing resolution which gives us the power to issue subpoenas at all. We made a tentative judgment as to necessity when we authorized the subpoenas, but by your vote yesterday and the day before, you conclusively demonstrated that it was not necessary. . . . Now, look at the Thornton amendment in terms of what it does to Mr. McClory's amendment. McClory's amendment says that the matters were necessary, deemed necessary, to determine whether sufficient grounds exist to impeach Richard Nixon. Well, manifestly that is not so or your votes were improper. Recognizing that, I suspect my friend from Arkansas has proposed a perfecting amendment in which he says there were conflicts in the evidence and the subpoenaed material was desirable, perhaps not necessary, but desirable, to resolve the conflicts.

Well, that may be so, but you understand your vote yesterday and the day before indicated a positive resolution of those conflicts. They no longer are unresolved.

Now, if logic and common sense still has any place to play in these proceedings, I would think that we had an election. We elect to impeach on the basis of the evidence before us or we elect to impeach him for failing to provide that evidence. Those who voted for the first two articles cannot have their cake and eat it, too and maintain logical consistency by voting for the third, in my opinion. In my opinion, this article is inconsistent with the prior two.

McClory . . . I want to point out I voted against Article I which would involve criminal charge, conspiracy charge, obstruction of justice, again the President on the fact that there was insufficient evidence and the amendment which is offered by the gentleman from Arkansas which I propose to accept would make reference to the facts of evidence which is the subject which was—the evidence, the kind of evidence that was lacking with respect to the first article. I did not say that there was sufficient evidence to impeach the President on Article I. I said there was insufficient evidence.

Wiggins. Well, I cannot yield further,. And I—

McClory. That is what our need is.

Wiggins. Unless my memory failed me the gentleman found by clear and convincing evidence just on yesterday that the President should be impeached and removed from office. . . .

Waldie. I appreciate the gentleman yielding and I think what we are doing in this article as in every article of impeachment is attempting to define by the legislative process, by the impeachment process, if you will, the extent of powers that we will permit Presidents to exercise in the future. It is, if you will accept it, a constitutional redefinition of those powers and I think what the author of the resolution and the author of the amendment is saying in this instance, that future Presidents, if subjected to an impeachment inquiry, will not be permitted to make the determination that this President has sought to make, that he will determine what is relevant to that inquiry.

Wiggins. I appreciate the point the gentleman is making. It is a good point. The way to do it is by legislation, not by a bill of attainment. . . .

Danielson. Thank you, Mr. Chairman. I support the article offered by the gentleman from Illinois, Mr. McClory, and also the amendment offered by the gentleman from Arkansas, Mr. Thornton. I feel, Mr. Chairman, that it is essential that we resolve this issue of the subpoenas. The issue has been joined. This committee has issued a number of subpoenas. The President has directly stated that he refuses to

obey them and reserves the right to decide what evidence will be presented before us from his office.

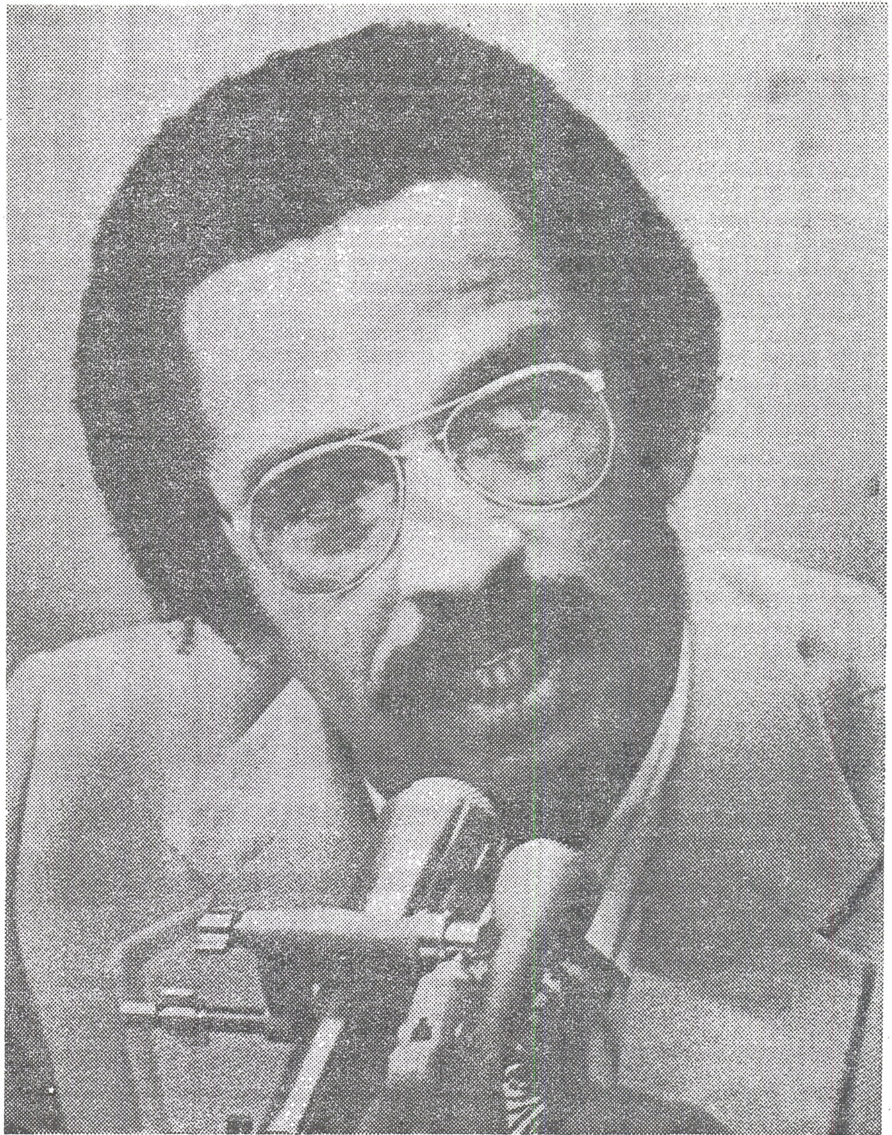
The question we have here is very delicate and very finely drawn, but it is critical to the separation and allocation of powers under the Constitution.

The Thornton amendment brings into this article a type of responsible restraint that we need. It limits the impact of this article solely to the function of the Congress under the impeachment clause, our sole power to impeach. This is a basic issue of constitutional separation and allocation of powers. I submit that in resolving this question this committee and the Congress must remember that we have no more right to refuse a jurisdiction which is ours than we have to assume a jurisdiction which is not ours. Nor does the Judicial Department nor does the Executive Department. It is for us to make a judgment here and on the floor of the House as to whether we are going to exercise our responsibility and our jurisdiction under the sole power of impeachment.

Finely drawn in the Thornton amendment to the McClory resolution, I submit that we will have met that issue, and I urge that both the amendment and the article be adopted.

Holtzman. I thank the gentleman for yielding and I would just like to add a few points to his very eloquent statement.

There has been some talk that the failure of the President to comply with the subpoenas wrought no harm, and I would just like to point to the area of the milk inquiry in which we did seek a number of subpoenas and in which the committee in general has come to the conclusion that the evidence has



By James K. W. Atherton—The Washington Post

Rep. John Conyers Cambodia article was defeated 26 to 12.

not been sufficient, even though there have been any number of indictments hand down, and some of the conversationsthat we subpoenaed had to do with these indicted persons.

Secondly, the argument is the same as was raised yesterday with respect to IRS. That is, an illegal act which does not succeed is somehow less illegal That reminds me of the fact of attempted murder. Do we allow somebody to go free because the victim survives? That is really a doctrine I think we cannot countenance.

And I would like to add one other point, and that has to do with seeking the rule of the courts. You know, the Founding Fathers placed the impeachment power solely in the hands of the Congress, and they explicitly rejected having the Supreme Court sit as the trier on a conviction, and if we were to allow the Supreme Court to decide on the relevance of the evidence on an impeachment inquiry, and if we were to allow the Supreme Court to decide basically what an impeachment inquiry would have, I feel we would be violating the decisions of the Founding Fathers to place the right to inquire for the purposes of impeachment solely in the hands of the Congress. And I very strongly support this resolution and yield back.

Danielson. "I point out that since the issue has been joined and is before us, we must not retreat from our responsibility, for this action will establish a precedent which could bind the Congress on this very delicate point for centuries to come.

Seiberling. I am a little bit surprised

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by the argument of the gentleman from California, Mr. Wiggins. Mr. Wiggins is a very, very able lawyer, and he knows in a court trial you are entitled, the parties are entitled to all of the relevant evidence, not enough or barely sufficient to support a particular point of view, but all of the evidence because the more evidence you can get the stronger your case is and the better your chance you have of prevailing. That is an argument which I think is so easily disposed of by any lawyer practicing in the courts that I am surprised that he would even make

Hogan I think this is perhaps the most important thing that we have been debating since these current deliberations began. What is at issue here is executive privilege. We know that throughout the Constitution there is the running theme of separation|of powers and checks and balances. There are three areas where the President has challenged executive privilege. One is against Congress where there is a legislative purpose, and clearly he has a valid claim to executive privilege in that instance. He claimed it in the instance of the criminal prosecutions and the Supreme Court has by a unanimous eight to nothing decision rejected his claim.

If the Supreme Court rejected it in that instance certainly the Supreme Court would reject his claim vis-a-vis the impeachment inquiry by this committee.

I would not have supported this article prior to the Supreme Court decision but now that we have it, there is no valid claim on the part of the President to ignore our subpoenas.

Now, heretofore I have had many discussions with my colleagues, Mr. Conyers of Michigan notably, who felt so very strongly about this, and at that time the question of executive privilege was a debatable one. It no longer is. The historical precedent we are setting here is so great because in every future impeachment of a President, it is inconceivable that the evidence relating to that impeachment will not be in the hands of the Executive Branch which is under his controls. So I agree with the gentleman from Ohio, Mr. Seiberlihg, if we do not pass this article today, the| whole impeachment power becomes meaningless.

Now, my friend from Wisconsin, Mr. Froehlich, says that we should have gone to court to enforce our subpoenas. Perhaps he is correct. Perhaps we should have. But in our system of justice, the individual who is mandated by the subpoena has the right and the opportunity and the obligation, if he challenges that subpoena, to move to quash the subpoena.

The President did not do that. He merely ignored it and having ignored it, the compulsion of our|lawfully offered subpoenas still lies and he has ignored them.

I would have hoped that when the Supreme Court decision was handed down a few days ago he would have immediately delivered that material to the House Judiciary Committee. He did not. So I urge that my colleagues support this article offered by Mr. McClory because if we do not, we will be for all time weakening the House of Representatives' power of impeachment.

Fish. I|would like at the outset to say that I as one who had not made up his mind had no option when the question was put for speakingeither in favor of it or against this article. And to help me come to a conclusion, I would like to ask a couple of questions, first of all, of counsel, and that is, if this—if there were no Article III, what would be the effect in a trial of the Senate, of the Senate's ability to obtain the material that we have heretofore subpoenaed?

Jenner. Congressman Fish, the subpoena facts discussed would be admissible under Article I, Watergate and Coverup, as part of the issue of continued cover-up. However, since Article I is Watergate and cover-up, it does not afford an affirmative charge with respect to a—that the failure to respond to subpoenas is an impeachable offense. In my judgment, if included under Article I that would have made that article duplicitous. So that if the committee is to recommend to the House an impeachment with respect to the President's refusal to respond to the subpoena, it is necessary that the committee state that in terms of a separate article.

Fish . . . Mr. McClory, is it your view that if in the course of a trial in the Senate the—or before that, the President should voluntarily come forward ward and even at that late stage if he all kinds of opportunities to come forwith the material that we have heretofore subpoenaed, that it would be possible for the managers on the part of the House to drop this article?

McClory. If the gentleman will yield, I will respond by saying emphatically yes, that the President has been given came forward with the evidence there is no reason why we could not drop the Article III entirely.

Fish. Mr. Thornton, if I could address a question to you, where in your amendment to the article offered by Mr. McClory you use the language that you discussed a few minutes ago with Mr. Butler, "demonstrated by other evidence to be substantial grounds," are you referring there to the substantiation for the subpoenaed materials that we received in each instance when|a subpoena was before us prepared by Counsel showing the direct need that the—the necessity for the subpoenaed material by this committee in the course of its inquiry?

Thornton. If the gentleman will yield, I am referring to the evidentiary material which had ben collected and presented to us in support of the subpoenas which were then issued.

Fish. Finally, Mr. Chairman, just an observation, and I will be glad to be challenged by anybody about this. The matter of going to the court for determination between the Executive and the Legislative Branch, it seems to me that the decision was made by the President himself that it was equally irrelevant to him whether to go to the court or to the Congress, but rather, he made the determination himself as to what was relevant and necessary.

Smith. Mr. Chairman, this committee subpoenaed tapes, memoranda and other records of the President. I voted to issue most of those subpoenaes. The President has furnished some of the material and he has furnished transcripts of many of the tapes and he has declined to furnish the balance, asserting his constitutional right of executive privilege, and the constitutional doctrine of the separation|of power among the three co-equal branches of this government as reasons for his declination to furnish.

The committee asserts its constitutional right to reach and have this evidential material under the sole power of the House to impeach civil officers of the United States.

As was set forth by Mr. Froehlich, here we have a constitutional confrontation between two co-equal branches of our government.

Mr. McClory said Congress is pitted against the Executive. It seems only natural and proper to me that the third co-equal branch of|our government ought to be the umpire or arbiter of this confrontation of claimed constitutional rights and duties, particularly when that branch happens to be the ones whose moral function it is to declare the meaning and effect of the Constitution.

And so it is that I am one of the six members of this committee who voted to submit the enforcement of our subpoenas to the courts, a position for which there is impressive support from constitutional scholars such as Professor Alexander Bickell of Yale.

However, the majority of our committee felt otherwise. I think this was a mistake, particularly in view of the recent Supreme Court decision which upheld the subpoena of some of the same material from the President by the special prosecutor. Most of us on the committee feel that our case is even stronger than that of Mr. Jaworski but I think it is still a case and I am surprised at 38 lawyers who vote not to submit their case to court even if they are congressmen and asserting the power and superior and supreme power of the Congress.

I still think we should have gone to court to enforce our subpoenas.

It may have and probably would not have taken some additional time. However, even so, in a matter as important as the impeachment of the President we should have made this effort to obtain the tapes and the other materials through the courts.

If we had received them, we may have achieved some clear and convincing proof to connect the President personally and directly with the things which cannot be condoned that went on in the Committee to Re-Elect|the President and in the White House. In my judgment, we do not have that evidence today. Or the President may have refused to obey an order of the Supreme Court to deliver the materials sought and clearly in my judgment, this would be impeachable conduct.

One other aspect of court enforcement of our subpoenas ought to be mentioned. We have a long tradition in this country that the accused in a criminal case shall not be compelled to be a witness against himself. In fact, this is what Amendment 5 of the Constitution says|as part of the Bill of Rights.

Kastenmeier. I support this article of impeachment to preserve the power of impeachment which the framers placed in the Constitution. Without the power to subpoena papers, materials, things necessary, the Congress cannot meet its constitutional responsibilities. I submit that for a chief magistrate to prevent the Congress from meeting its congressional duty, its constitutional duty, is no different than when the President himself violates the Constitution. The offense is just as grave.

It is a high crime in the classic sense which the framers intended when they used that phrase in the Constitution.

Mr. Chairman, before it was indicated that the gentleman from Illinois, Mr. McClory, in presenting this article might have been inconsistent in the sense that whether or not he now feels or anyone feels that we need the mate-

rial requested by this committee and statement would find affirmatively in fact on articles of impeachment claiming that the President had not given us material which we now would by implication say is unnecessary.

In response to that I would say that this committee made a determination at the time we voted the subpoenas and we voted the subpoenas in May, in April, by votes of 37 to 1, 29 to 9, 34 to 4.

This committee said at that time we needed this material. The President at that time said he would refuse to turn the material over to us. Se we measure this particular article in the time in which it is seen, not in terms of whether subsequent to that fact we have or have not acquired sufficient evidence to make the determinations we are set upon today.

Furthermore, it has been suggested that in many areas we may not have sufficient evidence even to this date. Articles of impeachment which could lie in areas such as IT&T, dairy, and other areas, may not well be endorsed by this committee for the reason in fact that we do not have the materials which we found necessary to our inquiry but which the President has rejected.

This article is the only answer this committee can give.

Edwards . . . This power of impeachment that we have in Article II, section 4, is all we have to protect the country from a President who gravely abuses his office. We can't have a nice convenient election down the road by a majority vote of Congress. We can't, like our country to the north, Canada, or England or most European countries, call an election in a couple of months. We just have impeachment.

We do have, of course, the power of the purse but that is limited. We do have to enact appropriation bills and the president does have the right to spend the money.

So, I suggest that we would be irresponsible if we don't enact this Title II, that if we don't, we will diminish or destroy this only safety valve in our Constitution. And for this power of impeachment to operate, if it is to have any meaning at all, any vitality at all, we simply must be able to get the evidence. That seems very clear. The inquiry must be complete if it is going to be fair and we can't be fair and complete without the facts.

Our subpoenas all were carefully drawn, narrowly drawn. We weren't seeking information about national defense or any state secrets or personal information. So in voting for this very important Article III, I suggest that we can't destroy the only safeguard that we have to protect ourselves from a President who misbehaves so badly that he becomes a threat to the country and should be removed either now or in the future . . .

We were talking about whether in the background there were implications of the Fifth Amendment, that an accused shall not be required to be a witness against himself and I think the question which should be asked here is whether it is fair according to our tradition to say to the President in effect we don't yet have the clear and convincing proof we need to impeach. So we are requiring you to hand over what we hope will be your confession and if you don't, in fact, hand over the materials which we hope will be a confession, we shall pre-emptorily impeach you for failure to turn them over on the order of the Congress even though the Supreme Court might have found that you have good constitutional reasons for not handing them over.

Railsback. Mr. Chairman and members of the committee, let me say at the outset that I don't attribute any evil motives to my friends from Illinois for offering this resolution, but let's—that is what I said, I don't attribute.

Let me say, though, that I think this is a case where we, this committee, which has somehow developed a rather fragile bipartisan support of two rather substantial serious articles of impeachment, is now about to engage in what I call political overkill. There are many Republicans, I can tell you, on the House floor that have been impressed with the evidence that has been adduced in respect to the obstruction of justice charge, very serious, and also the abuse of power charge.

Now, what is this committee about to do? We are about to be asked to impeach a President for refusing to comply with some subpoenas when he has produced substantial quantities of evidence.

What other alternatives did we have available to us? Well, number one, we have been asked by our counsel, and they made a persuasive argument, that if the President should refuse to comply, and frankly I don't like the President stonewalling us or refusing to cooperate completely, I will admit that, but number one, we did not try to cite him for contempt, and number two, we have been asked to draw negative inferences by reason of his failure to produce.

Now, we are going one step further and we are saying let us impeach him for his failure to comply. What could we, what could we have done? We could have done what has been done for years, for hundreds of years, the established procedure, which has been for the witness to be given an opportunity to appear before the full House, or the Senate as the case may be, and give reasons why he should not be held in contempt. For example, he can argue that his refusal was justified, or he can agree to turn over the materials to the full House.

The Supreme Court has held that this kind of notice and opportunity for hearings are constitutionally required under the Fifth and the Fourteenth Amendments to the United States Constitution. We are bypassing that procedure because we did not think we had time to follow it. We refused to go to court when there were many of us that think a President has a right to exert executive privilege. We have two contesting political, separate but co-equal branches. What could be more natural but then to ask the third branch, which has been the traditional arbiter in disputes to arbitrate this dispute and determine once and for all whether the President's assertion of executive privilege would fail.

Now, let me just say I have no doubt in my mind but what in this case the court would have ruled in our favor. The court would have ruled in our favor, and I will tell you, it is probably the only way we ever would have been able to get the evidence so that we could determine the truth or the falsity of the allegations against the President.

I think, Mr. Chairman, that with these remaining articles, which I understand we are going to have one on Cambodia, we are going to have one or we may have one on Cambodia and we may have one on fees and emoluments, this would be a political overkill, and you watch what happens to your fragile coalition that thinks there have been two serious offenses committed under Articles I and II. . . .

McClory. In suggesting that the courts might resolve this, the President has had the right all along to move to quash the subpoenas if he wanted to inject the courts into this. The committee has decided that they were not subject to the court's jurisdiction, and I do not think there is any basis for saying that we are.

Railsback. Let me just say to the gentleman that in retrospect I think that history is going to show that Alexander Bickel, one of the top constitutional experts in the country, came out about a week and a half too late after we had decided in this committee and said that this is exactly what we should have done, because it would not determine whether there was a right to find or to ultimately review it as trying to get an enforcement of a subpoena. We made a mistake, but we certainly should not impeach the President because we made a mistake. . . .

Seiberling. Well, I believe the gentleman sat over there in the hearing before the Supreme Court when it was Mr. St. Clair and Mr. Jaworski arguing the case of U.S. versus Nixon, and I was there, and I heard Mr. St. Clair make a very strong argument that the court should not rule on behalf of the special prosecutor because to do so would inject the courts into the impeachment process, which is a constitutional process, the sole power of impeachment—

Railsback. That does not have anything whatsoever to do with us. We are in a separate status. We are the Congress. We are not the special prosecutor. We have even greater rights to get the materials. . . .

Conyers. Mr. Chairman, I would first like to indicate that the reason that I supported the McClory article in its full and undiluted form was simply because there was no reason in the face of this first historic instance of willful noncompliance on the part of a President to refuse to comply that we should have to modify in any respect the enormity of the challenge that he himself put before us.

Now, I think it is more important than to begin worrying about whether we are going to have articles that do not meet with the approval of everyone on this committee, that we continue this process as thoughtfully as we are able. To not include this article, one that is of enormous importance to the Constitution itself, would speak very poorly of the recommendations coming from the Judiciary Committee, and certainly ultimately the decision that must yet be made on the floor.

Now, too many members here are beginning to think that we are casting the final decision on impeachment in the Judiciary Committee. Well, let me remind you that there are 400 other members that are going to decide this, and I resent any implications of people on the committee suggesting what ought and what ought not to be introduced now that we have two articles of impeachment, because anyone that does not like whatever other articles, including this one that is presented to them, has their obligation to vote against them. But, I do not think that they intimidate or curtail the views of any member on this committee as to what they are supposed to do.