



2008

Does Congress Find Facts or Construct Them - The Ascendance of Politics over Reliability, Perfected in *Gonzales v. Carhart*

Elizabeth De Coux
Florida Coastal School of Law

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/clevstrev>

 Part of the [Law and Politics Commons](#), and the [Legislation Commons](#)

How does access to this work benefit you? Let us know!

Recommended Citation

Elizabeth De Coux, *Does Congress Find Facts or Construct Them - The Ascendance of Politics over Reliability, Perfected in Gonzales v. Carhart*, 56 Clev. St. L. Rev. 319 (2008)
available at <https://engagedscholarship.csuohio.edu/clevstrev/vol56/iss2/5>

This Article is brought to you for free and open access by the Law Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Cleveland State Law Review by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

DOES CONGRESS FIND FACTS OR CONSTRUCT THEM? THE
ASCENDANCE OF POLITICS OVER RELIABILITY, PERFECTED
IN *GONZALES V. CARHART*

ELIZABETH DECoux*

I. CONGRESSIONAL COMMITTEES AND THEIR HEARINGS AS TOOLS USED IN THE LEGISLATIVE PROCESS	326
A. <i>The Early Development of the Congressional Committee</i>	326
B. <i>Congress's Authority with Regard to Committees</i>	328
C. <i>A Hearing in the Aftermath of the Lincoln Assassination as an Early Indication, in a High-Profile Matter, of Congress's Concern with the Reliability of Evidence</i>	332
II. MODERN CONGRESSIONAL HEARINGS AS INDICATORS OF THE DEGREE TO WHICH CONGRESS VALUES RELIABILITY	336
A. <i>Evidence Rulings in the Age of Televised Hearings</i>	336
B. <i>The Rules of Congress Say Little About Evidence</i>	337
C. <i>What Impeachment Trials in the Senate Reveal about Legislators' Emphasis on Reliable Evidence</i>	338
1. Reliability in the First Impeachment Trial Hearing in More than Half a Century: The Claiborne Impeachment	340
2. Reliability in an Impeachment in Which Senators Vote Without Being Present When the Evidence Is Received: The Case of Walter Nixon	341
3. Reliability in an Impeachment Where the Senate Convicts After a Jury Acquits: The Hastings Impeachment	344

*Assistant Professor of Law, Florida Coastal School of Law, J.D., Mississippi College
School of Law

4.	Reliability in an Impeachment in Which the Senate as a Whole Makes the Decision, but Does Not Hear Any Witnesses in Person: The Clinton Impeachment	344
D.	<i>High Stakes and Low Blows: The Senate Judiciary Committee's Hearing on Sexual Harassment Charges Against United States Supreme Court Nominee Clarence Thomas</i>	348
E.	<i>Oversight and Investigation by a House Subcommittee: Responding to Hurricane Katrina</i>	361
III.	THE PARTIAL-BIRTH ABORTION PROHIBITION ACT OF 2003: CONGRESS MAKES FINDINGS BEFORE HEARING EVIDENCE; THE COURT EMPLOYS THOSE FINDINGS, THOUGH ACKNOWLEDGING THEY ARE INCORRECT.....	362
A.	<i>Erroneous Legislative Findings Underlying the Partial-Birth Abortion Prohibition Act of 2003</i>	362
B.	<i>Judicial Review of Congressional Findings, Erroneous and Otherwise</i>	364
C.	<i>The Court Incorporates Congress's Erroneous Findings into Its Analysis in Gonzales v. Carhart</i>	370
IV.	CARHART II: A RULING IN SEARCH OF A RATIONALE?	374
A.	<i>Searching for Answers in the Text of the Court's Opinion</i>	374
B.	<i>Searching for Answers in the Subtext</i>	377
V.	CONGRESS SHOULD EMPLOY NEUTRAL FACT-FINDERS OR ADOPT AT LEAST RUDIMENTARY EVIDENCE STANDARDS	379
A.	<i>Evidentiary Rigor as Institutional Competency</i>	379
B.	<i>Models of Non-Partisan Fact-Finding</i>	381
VI.	CONCLUSION.....	385

On July 7, 1988, Marine Lieutenant Colonel Oliver North,¹ his uniform crisp and

¹North's "spit and polish" image had a positive influence on the public's perception of him. LAWRENCE E. WALSH, FIREWALL: THE IRAN-CONTRA CONSPIRACY AND COVER-UP 133 (1997) (referring to a tidal wave of public support for North). Otto Friedrich, "The Roughest Year" *Scandal, War, Crash, Plague . . . and Who's in Charge*, TIME MAG., January 4, 1988, at 32 (referring to the public support for North). A native of San Antonio, Texas, an altar boy, and a graduate of the U.S. Naval Academy, North saw combat in Vietnam, service for which he was awarded two Purple Hearts, the Bronze Medal and the Silver Star. Richard Stengel et

his medals gleaming, stood ramrod straight before a panel of lawmakers and a bank of television cameras.² Raising his right hand with the sharpness usually reserved for a salute,³ he swore to tell the truth. North was testifying before the congressional committee⁴ investigating a matter popularly referred to as the Iran-Contra Affair: the U.S. government's covert sale of arms to Iran and diversion of the monetary proceeds to Nicaraguan rebels known as Contras.⁵ North, a National Security

al., *True Belief Unhampered by Doubt, From Small-town Boy to Shadow Secretary of State, Oliver North Did Not Know When to Stop*, TIME MAG., July 13, 1987, at 28. When Marine Pvt. Randy Herrod, who had served under North, was accused of participating in the massacre of sixteen women and children during a search-and-destroy mission in the Vietnamese village Son Thang, North testified in his defense, crediting Herrod with saving his life in battle; Herrod was acquitted. Michael D. Sallah & Mitch Weiss, *Experts: Earlier Tiger Force Probe Could Have Averted My Lai Carnage*, TOLEDO BLADE, Oct. 19, 2003, at 1, available at <http://www.toledoblade.com/apps/pbcs.dll/article?AID=/99999999/SRTIGERFORCE/110190166>. After North's Congressional testimony, North faced a criminal trial on three charges: accepting an illegal gratuity; aiding and abetting in the obstruction of a congressional inquiry; and destruction of documents. *United States v. North*, 920 F.2d 940, 942 (D.C. Cir. 1990). He was convicted on all charges, but the convictions were later overturned because of the likelihood that North's widely publicized, immunized testimony before Congress had influenced the testimony of witnesses at his criminal trial. *Id.* On remand, the independent counsel who had prosecuted North moved to dismiss all charges because he believed it was impossible to establish that witnesses had not been influenced by North's congressional testimony; the trial court granted the motion. John W. Mashek, *Charges on North Dismissed, Prosecutor Can't Meet Requirement*, BOSTON GLOBE, Sept. 17, 1991, at 1. In 1994, North ran unsuccessfully for the U.S. Senate. Nancy Mathis, *Election '94: Nation/Republicans gain Senate control/But Democrat Robb holds off Oliver North in Virginia*, HOUSTON CHRON., Nov. 9, 1994, at A42.

²Sally Jacobs, *North the Family Man Faces BC Crowds, Pro and Con*, BOSTON GLOBE, Nov. 3, 1988, at 31.

³Associated Press, Photo: Lt. Col. Oliver North shown taking the oath before the Iran-Contra committee in Washington on July 7, 1987, reprinted in Dawn Ceol, *High Court Gives North Big Victory*, WASHINGTON TIMES, May 29, 1991, at A1; also available at http://images.google.com/imgres?imgurl=http://www.washingtonpost.com/wp-srv/politics/images/daily/north_070787ap.jpg&imgrefurl=http://www.washingtonpost.com/wp-srv/politics/special/clinton/frenzy/iran.htm&h=152&w=200&sz=16&hl=en&start=11&um=1&tbnid=VETILNOIGGp5pM:&tbnh=79&tbnw=104&prev=/images%3Fq%3Doliver%2Bnorth%2Bap%26svnum%3D10%26um%3D1%26hl%3Den%26rls%3DTSHA,TSHA:2005-52,TSHA:en.

⁴The Senate and the House each had a committee investigating the matter, so the title of the proceeding is *Iran-Contra Investigation: Joint Hearings Before the S. Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition and the H. Select Comm. to Investigate Covert Arms Transactions with Iran*, 100th Cong. pt. I (1987) [hereinafter *Hearings Iran*] (testimony of Oliver L. North).

⁵*United States v. North*, 698 F. Supp. 322, 324 (D.D.C. 1998) (recounting North's statements that the money raised by the sale of missiles to Iran was used to support the contras); *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990) (vacating some of North's convictions and reversing other); Abraham D. Sofaer, *Iran-Contra: Ethical Conduct and Public Policy*, 40 HOUS. L. REV. 1081, 1084 (2003) ("The first sale of arms to Iran during the Reagan Administration took place on August 20, 1985 . . .").

Council aide in the administration of President Ronald Reagan,⁶ was accused of coordinating this secret government operation.⁷

Democratic Senator Daniel Inouye of Hawaii, who had sat on the Senate committee investigating the Watergate scandal fourteen years earlier,⁸ presided over the hearing.⁹ Representing North was Washington, D.C., lawyer Brendan Sullivan, Jr.,¹⁰ who proved to be an aggressive advocate, raising a number of objections as North was questioned.¹¹ Inouye, as Chair, consistently overruled Sullivan's objections with little comment.¹² Eventually, however, Inouye appeared to tire of Sullivan's zeal. When Counsel to the Committee asked North about documents he had shredded,¹³ Sullivan objected.¹⁴ Instead of ruling on the objection, Inouye moved to silence Sullivan with this mandate: "Let the witness object if he wishes to."¹⁵ That instruction prompted Sullivan's famous retort: "I am not a potted plant. I'm here as a lawyer. That's my job."¹⁶ Inouye did not respond to Sullivan's "potted

⁶Hasenfus v. Secord, 962 F.2d 1556, 1558 (11th Cir. 1992).

⁷*Id.*

⁸Miami Herald Staff, *A Guide to the Investigation*, MIAMI HERALD, May 3, 1987, at 28A ; Tom Farmer, *Guardians of Liberty; Battle for 442nd Went Beyond War—Heroes Faced Racism at Home*, BOSTON HERALD at M 20. Like North, Inouye was a combat veteran. He received the highest award given by the U.S. military, the Medal of Honor, for his valor in attacking a ridge during a World War II battle; he was struck by a grenade, resulting in amputation of his right arm; although these severe injuries would ordinarily result in evacuation, Inouye refused to leave until those in his command were safely behind the lines.

⁹*See generally Hearings Iran, supra* note 4.

¹⁰Miriam Rozen, Edward Bennett Williams, *Because He Reasserted—Within the Context of a Prestigious 1980s Law Firm—The Age-old Notion that Lawyers Can and Should be Advocates for Even the Most Unpopular Clients and Causes*, 11 AM. LAW. 123 (March, 1989). Sullivan had also served in the military, as a Captain in the United States Army. *Id.*

¹¹For example, Sullivan objected to the fact that Counsel to the Committee, during his questioning, was reading from a transcript North had not seen; Inouye overruled the objection. *Hearings Iran, supra* note 4, at 8. Sullivan later objected that a question asked by Committee Counsel assumed facts not in evidence; Inouye overruled the objection. *Id.* at 17. Sullivan also objected that North was being asked a question he had already answered; Inouye overruled Sullivan's objection. *Id.* at 20. Subsequently, Sullivan objected because Counsel to the Committee was being asked a question based on someone else's notes; Inouye ruled, "For the purpose of a congressional inquiry, the question is proper. Objection is overruled." *Id.* at 24.

¹²*See generally Hearings Iran, supra* note 4.

¹³*Id.* at 262 (North acknowledging he shredded documents in his position with the National Security Council).

¹⁴*Id.*

¹⁵*Id.* at 263.

¹⁶*Id.*

plant” argument.¹⁷ Instead, Inouye ignored the objection and directed Counsel for the Committee to continue questioning the witness.¹⁸

Inouye’s notion that the responsibility for making objections should rest with the witness instead of his lawyer did not arise from any failure to understand courtroom rules and procedure. Inouye graduated from George Washington School of Law.¹⁹ He was admitted to the bar in Hawaii,²⁰ where he served as a prosecutor for two years.²¹ Instead, the dispute as to Sullivan’s role resulted from a fundamental disagreement between the two men regarding the nature of a congressional hearing. A career litigator,²² Sullivan saw the proceeding as a type of trial. While he had little choice but to agree with Inouye that the hearing room was not a court of law²³ governed by the rules of evidence,²⁴—it clearly was not—Sullivan’s objections were plainly evidentiary in nature.²⁵ Sullivan objected, for example, that one question assumed facts that had not been established,²⁶ that another question had already been asked and answered,²⁷ and that a third was an improper effort to impeach North with a document he did not author.²⁸ Inouye’s effort to silence Sullivan, on the other hand, arose from Inouye’s view of the hearing: that it was his prerogative, as Chair, to conduct the proceeding in whatever manner he chose.²⁹ The starkest statement of Inouye’s perspective was his response to one of Sullivan’s objections: “We will proceed in the fashion we wish to.”³⁰ Neither man could cite to a set of rules that

¹⁷*Id.*

¹⁸*Id.*

¹⁹John Jae-Nam Han, *Daniel K. Inouye (1942-)*, in *ASIAN AMERICAN AUTOBIOGRAPHERS: A BIO-BIBLIOGRAPHICAL CRITICAL SOURCEBOOK* 142-43 (Guiyou Huang ed., 2001).

²⁰*Id.*

²¹*Id.*

²²WALSH, *supra* note 1, at 164.

²³Sullivan agreed with Inouye that the hearing room was not a courtroom and that the rules of evidence did not apply, but he insisted that fairness was required in the hearing, and that what he sought to accomplish with his objections was fairness. *Hearings Iran, supra* note 4, at 262-63.

²⁴*Id.*

²⁵*See supra* note 11.

²⁶*Hearings Iran, supra* note 4, at 17; *cf.* *United States v. Smith*, 354 F.3d 390, 396 n.5 (5th Cir. 2003) (ruling that question assuming facts not in evidence was improper) (quoting MCCORMICK ON EVIDENCE §7 (John W. Strong et al. eds., 5th ed. 1999)).

²⁷*Hearings Iran, supra* note 4, at 20; *cf.* *United States v. Blackwell*, 459 F.3d 739, 756 (6th Cir. 2006) (holding that trial court’s sustaining of objection that question had already been asked was a “correct legal application of standard, justifiable rules of evidence”).

²⁸*Hearings Iran, supra* note 4, at 24; *cf.* FED. R. EVID. 801 & 802 (defining and generally prohibiting hearsay).

²⁹*See Hearings Iran, supra* note 4, at 134.

³⁰*Id.*

supported his position, because there essentially were no rules.³¹ Inouye attempted to create a rule that the witness in a congressional hearing must raise any objections, while his lawyer sits silent. Inouye could make that effort because there was, after all, no rule allowing attorney objections. Sullivan could object when he thought it appropriate because there was no rule *prohibiting* attorney objections. In the void created by the absence of standards, Sullivan and Inouye struggled, each trying to create the rules that suited his purpose by conducting himself as if those rules were already in place.

At three points in the hearing, Inouye and Sullivan spoke somewhat openly about their opposing perspectives and their battle to define the rules of the proceeding. First, during an early skirmish about documents, Sullivan said, “I don’t come up here to the Congress. My life is spent a few blocks away in the courthouse where we as defense lawyers focus on individual rights.”³² Second, in response to one of Sullivan’s objections,³³ Inouye asserted his prerogative as Chair to preside in whatever way he chose, in his words, to “proceed in the fashion we wish to.”³⁴ Third, immediately before the “potted plant”³⁵ exchange, Sullivan invoked the one limit on Inouye’s power that the senator would be hard-pressed to deny, particularly in a televised hearing: “Come on, let’s have, Mr. Chairman, plain fairness. Plain fairness, that’s all we’re asking for.”³⁶ Inouye responded, “I’m certain counsel realizes this is not a court of law.”³⁷ Sullivan’s reply was heavy with irony: “Believe me, I know that.”³⁸ Inouye continued, “I’m certain you realize the rules of

³¹Rule XXVI of the Standing Rules of the Senate, regarding committee procedure, makes reference to a committee’s authority to subpoena documents and witnesses, along with the requirement that each witness provide the committee with a written version of his testimony a day in advance of giving it. The rule makes no reference to any attorney or lawyer for the witness, or any objections to be raised on behalf of the witness, or any rules regarding hearsay, e.g., or of evidence the probative value of which is substantially outweighed by the danger of unfair prejudice. See United States Senate Committee on Rules and Administration, *Standing Rules of the Senate* (2000), Rule XXVI Committee Procedure, available at <http://rules.senate.gov/senaterules/rule26.php>. The House of Representatives does not appear to have any standing rules that relate to witnesses at hearings, lawyers, objections, hearsay, prejudice, or any related topic. See Home Page of House of Representatives Committee on Rules, <http://www.rules.house.gov>. Almost a century ago, the House of Representatives did prohibit leading questions in the impeachment trial of Judge Robert W. Archbald. Canon’s Precedents, Volume VI, Chapter CXCIX, Rules of Evidence in an Impeachment Trial, § 493, available at http://bulk.resource.org/gpo.gov/rules/cannon/cannon_cxcix.pdf. The President Pro Tempore of the House also ruled, in the Archbald impeachment trial, that character witnesses could testify as to the judge’s judicial integrity, but not as to his industry. *Id.* at § 495. The President Pro Tempore also ruled that character witnesses could not testify based exclusively on their opinions. *Id.*

³²*Hearings Iran*, *supra* note 4, at 4.

³³*Id.* at 20.

³⁴*Id.* at 134.

³⁵*Id.* at 263.

³⁶*Id.*

³⁷*Id.*

³⁸*Id.*

evidence do not apply in this inquiry.”³⁹ Sullivan responded, “That I know as well. I’m just asking for fairness.”⁴⁰ Although Inouye affirmed his commitment to “fairness,”⁴¹ that concept was of little use in the hearing. It was so vague that it encompassed both Inouye’s instruction that Sullivan could not object⁴² and Sullivan’s insistence that it was his job to object.⁴³

The dispute also revealed each man’s view of the Senate as an institution. Inouye saw the hearing simply as a tool of the legislative body to which he had belonged for so many years.⁴⁴ He treated the testimony of witnesses as one of several implements he and his colleagues had at their disposal to carry out their work as legislators—work which they conducted as they saw fit, *regardless* of the tool they used.⁴⁵ In questioning a witness, Inouye did not consider himself bound by the rules of evidence,⁴⁶ any more than he would consider himself bound by those rules when he argued on the floor of the Senate. Sullivan’s focus was instead on his client. He had no concern for the Senate as an institution; his one intention was to make sure that North was as protected as he would be in a court of law.⁴⁷

The compelling lesson of the hearing is this: Inouye and Sullivan were correct when they agreed⁴⁸ that no evidentiary rules governed the hearing; except in cases of impeachment, there are scarcely any truth-promoting rules applicable to congressional hearings. This void is particularly significant in light of the deference that courts often afford to Congress’s findings⁴⁹—courts whose own fact-finding process, by contrast, is governed by specific, detailed rules intended “to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”⁵⁰ The disparity between the rules of courts and the rules of Congress gives rise to this question: is the rigor—or

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.* at 262-65.

⁴²*Id.* at 263.

⁴³*Id.*

⁴⁴Dorothy Collin, *Watergate Veteran Inouye Chosen to Lead Senate Iran Probe*, CHICAGO TRIBUNE, December 17, 1986, at News Section 1 (Inouye had served in Senate 24 years at time of Iran-Contra hearings).

⁴⁵United States Senate, Committee on Rules and Administration, Standing Rules of the Senate, Rule XXV Standing Committees, (2000), available at <http://rules.senate.gov/senate/rules/rule25.php> (general provisions regarding committees).

⁴⁶*See supra* notes 31 and 11 and accompanying text.

⁴⁷*See supra* note 11.

⁴⁸*Hearings Iran, supra* note 4, at 263.

⁴⁹*See infra* text accompanying notes 342-49.

⁵⁰FED. R. EVID. 102. The Federal Rules of Evidence were adopted in 1975, during Inouye’s tenure in the Senate. Federal Rules of Evidence, Pub. L. No. 93-595, 88 stat. 1926, 1926 (1975).

lack of it—with which Congress evaluates the reliability of evidence an appropriate factor for courts to consider in deciding whether to defer to a congressional finding?

In this Article, I consider whether Congress should adopt rules to fill the void in which Inouye and Sullivan struggled for control. In Part I, I give a brief summary of the development and use of Congressional Committees. In Part II, I analyze several modern-day congressional hearings in an effort to examine the degree to which Congress and its committees require that the evidence on which they base their findings be reliable. I focus primarily, though not exclusively, on the modern-day impeachment trials and other high-profile proceedings such as the Clarence Thomas confirmation hearings. The usefulness of these more famous—sometimes infamous—proceedings arises from the fact that they place legislators and their evidentiary rulings in the limelight of public attention, thus heightening the visibility of Congress's decisions to value trustworthiness or to sacrifice it to partisanship. I suggest that political considerations have infected fact-finding to an increasing extent, to the point that almost all fact-finding in modern hearings is deliberately shaped so as to accomplish a political goal. In Part III, I employ the United States Supreme Court's decision in *Gonzales v. Carhart*,⁵¹ along with the legislative findings which were significant to that decision, as a lens through which to view the relationship between the reliability of Congress's evidence and the propriety of judicial deference to the findings based on that evidence. In Part IV, I narrow the focus to examine the Court's rationale for the decision in *Gonzales v. Carhart*,⁵² and I suggest that the rationale offered in the decision does not fully explain the ruling and that the subtext must be taken into account in order for the decision to be understood. In Part V, I recommend that Congress either employ neutral fact-finding bodies or adopt rules of evidence to promote reliability in its hearings, and I suggest that deference to legislative findings should depend on the presence of such limits to check unbridled discretion in fact-finding.

I. CONGRESSIONAL COMMITTEES AND THEIR HEARINGS AS TOOLS USED IN THE LEGISLATIVE PROCESS

A. *The Early Development of the Congressional Committee*

Since its earliest days, Congress has conducted much of its work through committees, each responsible for a specific area of concern.⁵³ There are two basic types of committees within each house of Congress: (1) select committees, which exist as long as necessary to complete the work on a particular issue;⁵⁴ and (2) the

⁵¹*Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

⁵²*Id.*

⁵³See *infra* notes 54-55 and accompanying text.

⁵⁴United States Senate Committee on Rules and Administration, Standing Rules of the Senate, Rule XXVI Committee Procedure § 2, (2000), available at <http://rules.senate.gov/senaterules/rule26.php> (providing that, unless otherwise specified, the phrase “each committee,” as used in the Standing Rules of the Senate, includes standing, as well as select committees, also known as special committees). Some select committees are sufficiently permanent in nature that the Standing Rules of the Senate include provisions expressly specific to those committees. See, e.g. Standing Rules of the Senate, Rule XXXIV Public Financial Disclosure; Rule XXXV Gifts; Rule XXXVII Conflict of Interest (Senate

standing committees specified in Rule XXV of the Standing Rules of the Senate. In its early years, Congress had no standing committees—only select committees. During the First Congress, for example, the Senate appointed select committees to address such diverse issues as: protecting the nation’s trade ships from Barbary pirates in the Mediterranean;⁵⁵ ensuring that the United States paid its debts to certain foreign officers, in spite of the difficulty posed by the poor bookkeeping of the officers’ Paris banker;⁵⁶ and resolving questions as to the boundary between the United States and Canada.⁵⁷ The committee taking up the matter of repaying the foreign officers received testimony from two witnesses: one of the earliest, perhaps *the* earliest, occasion on which a committee of Congress considered the testimony of witnesses.⁵⁸ Like the Senate, the House of Representatives appointed select committees in the First Congress to address such matters as: providing land as a bounty for Virginia officers and soldiers;⁵⁹ monitoring commerce between the United States and Great Britain;⁶⁰ determining whether Congress should make a loan to a glassmaker in dire financial straits;⁶¹ identifying the boundaries of New York, Massachusetts and Pennsylvania;⁶² and resolving four election disputes.⁶³

It was also during the First Congress that the Senate had occasion to exercise its constitutional⁶⁴ prerogative in deciding whether to ratify a treaty. President Washington had entered into an agreement referred to in the ratification hearings as “A Treaty Recently Made with the Cherokee Indians”⁶⁵ In a practice that would become a defining characteristic of the congressional process, the question of

Select Committee on Ethics); and Rule XXVII Committee Staff (Senate Select Committee on Intelligence). United States Senate Committee on Rules and Administration, Standing Rules of the Senate, (2000), *available at* <http://rules.senate.gov/senaterules/>.

⁵⁵REP. OF A COMM. ON THE TRADE OF THE MEDITERRANEAN, S. FOREIGN RELATIONS DOC. NO. 1-45, at 108 (3d Sess. 1791).

⁵⁶SENATE SELECT COMMITTEE ON BILL AUTHORIZING THE PRESIDENT TO PAY DEBTS DUE TO FOREIGN OFFICERS, AMERICAN STATE PAPERS, Library of Congress, Senate, 1st Congress, 3rd Session, Finance, Volume 1, at 27, February 22, 1791.

⁵⁷EASTERN BOUNDARY, REP. OF A COMM., S. FOREIGN RELATIONS DOC. NO. 1-42, at 100 (2d Sess. 1790).

⁵⁸*See supra* note 56.

⁵⁹VIRGINIA MILITARY BOUNTY LANDS, H.R. DOC. NO. 1-1, at 5 (1st Sess. 1789).

⁶⁰REP. OF A COMM. ON THE SUBJECT OF OUR COMMERCIAL RELATIONS WITH GREAT BRITAIN, H.R. FOREIGN RELATIONS DOC. NO. 1-52, at 128 (3d Sess. 1791).

⁶¹LOAN TO JOHN F. AMELUNG, H.R. FINANCE DOC. NO. 1-14, at 61 (2d Sess. 1790).

⁶²CESSIONS FROM NEW YORK AND MASSACHUSETTS, H.R. DOC. NO. 1-2, at 7 (1st Sess. 1789).

⁶³ILLEGALITY OF THE ELECTIONS OF THE REPRESENTATIVES FROM NEW JERSEY, H.R. MISCELLANEOUS DOC. NO. 1-9, at 9 (1st Sess. 1789).

⁶⁴U.S. CONST. art. II, §2, cl. 2.

⁶⁵THE CHEROKEES, S. DOC. NO. 2-1, at 135 (1st Sess. 1791); *see also* THE CHEROKEES, S. DOC. NO. 1-13, at 33 (2d Sess. 1790) (setting forth President Washington’s communication to the Senate regarding a treaty with the Cherokees).

ratifying the treaty—a decision ultimately the responsibility of the Senate—was considered first by a committee, in this case the Senate Select Committee on Presidents [sic] Transmitting a Treaty Recently Made with the Cherokee Indians.⁶⁶ Although the committee expressed concern that the treaty included stipulations similar to those “gratuitously promised to the Creeks; and although, [the committee found that the provisions] form[ed] an excess to the sum limited in [an earlier Congressional resolution regarding the terms to be included in the treaty, the committee determined that], . . . from the beneficial effects likely to be produced thereby, [the treaty could not] . . . be objectionable.”⁶⁷ The committee therefore recommended ratification,⁶⁸ and the Senate followed that recommendation.⁶⁹

Even though Congress initially employed only select, rather than standing, committees,⁷⁰ the need for more continuity soon became apparent. Some of the select committees, such as the House Committee of Elections⁷¹ and the Senate Committee of Elections,⁷² were called into service repeatedly, presaging the formation of the more permanent, standing committees. In 1816, the Senate appointed its first standing committees, which were the Committees on: Claims; Commerce and Manufactures; Finance; Foreign Relations; the Judiciary; Military Affairs; the Militia; Naval Affairs; Post Offices and Post Roads; and Public Lands.⁷³ The House appointed its first standing committee, Ways and Means, during the Fourth Congress.⁷⁴ As of 2007, the Senate has seventeen standing committees,⁷⁵ while the House of Representatives has twenty.⁷⁶

B. Congress’s Authority with Regard to Committees

Although the Constitution does not expressly confer on Congress the authority to conduct hearings, the existence of that power, and the broad limits within which it may be exercised, are now beyond dispute.⁷⁷ Congress’s power to investigate arises

⁶⁶*Id.*

⁶⁷*Id.*

⁶⁸*Id.*

⁶⁹*Id.*

⁷⁰See *supra* notes 55-60 and accompanying text.

⁷¹See *supra* note 63.

⁷²CONTESTED ELECTION OF ALBERT GALLATIN, A SENATOR FROM PENNSYLVANIA, S. MISCELLANEOUS DOC. NO. 2-42, at 73 (1st Sess. 1794).

⁷³United States Senate, Senate Committees, <http://www.senate.gov/artandhistory/history/common/briefing/Committees.htm>. (last visited Oct. 23, 2007).

⁷⁴Office of the Clerk, U.S. House of Representatives, http://clerk.house.gov/art_history/house_history/committee_firsts.html. (last visited Oct. 23, 2007).

⁷⁵United States Senate, http://www.senate.gov/pagelayout/committees/d_three_sections_with_tasers/committees_home.htm. (last visited Oct. 23, 2007).

⁷⁶United States House of Representatives, <http://www.house.gov/house/CommitteeWWW.shtml>. (last visited Oct. 23, 2007).

⁷⁷Watkins v. United States, 354 U.S. 178, 193 n.21 (1957) (citing 4. Cong. Deb. 889).

from its power to legislate. The United States Supreme Court has recognized that this power is “deeply rooted in American and English institutions”⁷⁸ Without that authority, Congress would be hampered to such an extent that it could not be expected to carry out its work.⁷⁹

Congress’s power to conduct hearings extends even to fact-finding that is not related to specific, pending matters to be decided by a vote. In the early- to mid-nineteenth century, Congress began to use a particular type of congressional hearing, known as the investigative hearing, to inquire into matters that warranted the attention of Congress. These hearings were not intended to result in a specific legislative action, such as ratification of a treaty, passage of legislation, confirmation of a presidential appointee, or impeachment of an official. Instead, their purpose was to determine the facts—to learn what happened in a particular transaction or event so Congress or one of its constituent bodies could take action, including legislative action, if necessary. Among the earliest congressional investigative hearings were two proceedings, each related to the Civil War—one investigating an economic measure that arguably contributed to that conflict and the other investigating a deadly uprising against slavery. In 1827, the Committee on Manufacturers of the House of Representatives conducted a hearing into the effect a revision in tariff laws would have on domestic manufacturers.⁸⁰ Although the hearing related to legislation, it was investigative in character because the potential consequences for manufacturers caused a sense of urgency that required a prompt and thorough inquiry. The tariff in fact became law and was viewed, particularly in the South, as harmful, to such an extent that it was referred to as the “Tariff of Abominations.”⁸¹ Thirty-two years later, in 1859, a Senate committee employed the same tool used in the House—the congressional hearing—in its investigation of John Brown’s raid at Harper’s Ferry.⁸² As was the case with the House Committee on Manufacturers, the hearing was investigative in nature because it involved significant fact-finding—

⁷⁸Quinn v. United States, 349 U.S. 155, 160 (1955).

⁷⁹Watkins, 354 U.S. at 194-95.

⁸⁰*Id.* at 193 n.21.

⁸¹WALTER A. MCDUGALL, FREEDOM JUST AROUND THE CORNER: A NEW AMERICAN HISTORY, 1585-1828 494 (2004).

⁸²Watkins, 354 U.S. at 193 n.22 (citing Cong. Globe, 36th Cong., 1st Sess. 141 (1859)). John Brown was vehemently opposed to slavery. See generally BENJAMIN QUARLES, ALLIES FOR FREEDOM: BLACKS AND JOHN BROWN (1974). On the night of October 16, 1859, he led a party in a raid on Harper’s Ferry, Virginia. *Id.* at 90-91. He and his men captured the federal arsenal there, planning to use the weapons obtained from that arsenal to arm slaves for a rebellion. *Id.* at 93. Brown was quickly captured by a force led by Robert E. Lee, who would later lead the Army of Northern Virginia during the Civil War. *Id.* at 51. Brown was convicted of treason, and was hanged on December 2, 1859. *Id.* at 109-11, 120. After the Civil War broke out two years after his death, the Union Army used a marching song that began with the lyric, ‘John Brown’s body lies a-mouldering in the grave.’ *Id.* at 4. Abolitionist Frederick Douglas, upon meeting Brown for the first time in 1848, said of Brown: “[t]hrough a white gentleman, [he] is in sympathy a black man, and is as deeply interested in our cause, as though his own soul had been pierced with the iron of slavery. . . .” LOUIS A. DECARO, JR., FIRE FROM THE MIDST OF YOU: A RELIGIOUS LIFE OF JOHN BROWN 41 (2002) (alterations in original).

determining what happened. The character of the hearing as investigative did not alter the fact that legislation might result from it. In fact, the committee's purpose in the hearing was to obtain information necessary to recommend any legislation the committee found to be necessary to protect public property and preserve the peace.⁸³

Another type of hearing within Congress's power is the legislative hearing, conducted in order to determine whether legislation should be enacted and what should be its provisions. Congress's authority to base legislation on such hearings is a prominent feature of a Prohibition-era court decision. Congress became concerned that an exception allowing the prescription of alcohol for medicinal purposes might actually be used to obtain alcohol for use as a beverage, thus circumventing the law. To reduce the possibility of such abuses, Congress adopted the Volstead Act,⁸⁴ and the Willis-Campbell Act,⁸⁵ which prohibited any doctor from prescribing to any one person within a ten-day period more than the amount of alcohol set by those statutes.⁸⁶ A physician challenged the statute, seeking a restraining order prohibiting the authorities from interfering with his prescription of "vinous or spirituous liquors" to patients in excess of the limits allowed by the statutes.⁸⁷ Using arguments with some parallels to those raised by physicians in *Gonzales v. Carhart*,⁸⁸ the suit challenging the Partial Birth Abortion Prohibition Act of 2003,⁸⁹ the physician asserted that he had the right and duty to treat his patients' diseases and "promote their physical well-being according to the untrammelled exercise of his best skill and scientifically trained judgment, and . . . to advise the use of such medicines . . . as in his opinion are best calculated to effect their cure and establish their health."⁹⁰ He further asserted that the use of liquor as medicine in greater amounts than the statutes allow "is, in certain cases, necessary for the proper treatment of patients in order to afford relief from known ailments."⁹¹ In upholding the statutes, the court referred to the hearings conducted when Congress considered the adoption of the statutes limiting the amount physicians could prescribe. In enacting the statutes, Congress relied on the following information presented in committee hearings: (1) the fact that alcohol had never been recognized as a medicine in the authoritative publication on medicines; (2) that 104 leading scientists and physicians signed a statement that such beverages "serve no medical purpose which cannot be satisfactorily met in other ways, and that without the danger of cultivating the beverage use of an

⁸³*Watkins*, 354 U.S. at 193 n.22 (citing Cong. Globe, 36th Cong., 1st Sess. 141 (1859)).

⁸⁴Volstead Act, 66 Cong. Ch. 85, 41 Stat. 305 (1919).

⁸⁵Willis-Campbell Act, 67 Cong. Ch. 134, 42 Stat. 222 (1921)

⁸⁶*Lambert v. Yellowley*, 4 F.2d 915, 917 (2d Cir. 1924).

⁸⁷*See generally id.*

⁸⁸Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 481-82 (S.D.N.Y. 2004), *reversed by but cited for some propositions in* *Gonzales v. Carhart*, 127 S. Ct. 1610, 1637-38 (2007).

⁸⁹*See infra* test at notes 343-56 and accompanying text.

⁹⁰*Lambert*, 4 F.2d at 916.

⁹¹*Id.*

alcoholic liquor”;⁹² (3) that several thousand physicians signed a document with essentially the same content; and (4) that only one physician testified that beer was a medicine.⁹³ The specificity of the findings influenced the court in upholding the law.⁹⁴

While Congress’s power to conduct hearings is broad, it is not without limits. The United States Supreme Court gave some definition to the extent of that power in a case arising from hearings before the United States House of Representatives Committee on Un-American Activities. The purported purpose of that committee was to root out Communism in the nation. The case before the Supreme Court involved the conviction of a witness for contempt of Congress as a result of his refusal to answer questions before the Committee.⁹⁵ The Court held that Congress possesses the broad power, inherent in the legislative process, to conduct hearings.⁹⁶ This power of Congress does not relate exclusively to existing laws, but also to statutes that are proposed or, if not proposed, just possibly needed. Despite the reach of Congress’s power, the Court held that neither Congress nor its committees have the power to pry into a person’s private affairs when the inquiry: (1) is not related to the functions of Congress; (2) is conducted exclusively for the aggrandizement of a legislator;⁹⁷ or (3) is used to punish the person being investigated.⁹⁸ Because the Committee transgressed those limits in questioning the witness, the Court held that a judgment in favor of the witness on his contempt conviction should be entered. The Court affirmed the existence of other limits on the power to conduct hearings when it affirmed that the Bill of Rights applies to congressional hearings.⁹⁹ Alluding to, but not declaring, other potential limits on a governmental body’s power to conduct hearings, the Court described the evolution of the hearing power from British law.¹⁰⁰ Hearings to gather and evaluate facts to be used by the British Parliament are conducted, not by Parliament or any of its constituent bodies, but by Royal Commissions of Inquiry.¹⁰¹ Such Commissions are “comprised of experts in the problem to be studied . . . [and] removed from the turbulent forces of politics and partisan considerations.”¹⁰² The juxtaposition of these two types of fact-finders—self-aggrandizing legislators in the McCarthy hearings and non-partisan experts relied on by the British Parliament—demonstrates the Court’s concern that politicians engaged in fact-finding may be engaged less in a search for truth and more in a quest for political gain.

⁹²*Id.* at 921 n.2.

⁹³*Id.*

⁹⁴*Id.* at 923.

⁹⁵*Watkins v. United States*, 354 U.S. 178, 186 (1957).

⁹⁶*Id.* at 187.

⁹⁷*Id.* at 187.

⁹⁸*Id.*

⁹⁹*Id.* at 188.

¹⁰⁰*Id.*

¹⁰¹*Id.* at 191-92.

¹⁰²*Id.* at 192.

In spite of the differences in the two types of proceedings, congressional hearings do share some features with court hearings: Congress and its committees, like the courts of the United States, are governed by the Bill of Rights;¹⁰³ they have the power to compel the attendance of a witness by use of a subpoena,¹⁰⁴ and receive testimony from witnesses subject to penalty of perjury;¹⁰⁵ finally, both have the power to punish contempt.¹⁰⁶ Overshadowing these similarities between court hearings and congressional hearings is a stark difference between the two: the absence of evidentiary rules in congressional hearings. Nothing in the Constitution, or in any statute, regulation, or court decision requires Congress or its committees to conduct their hearings according to the Federal Rules of Evidence or any other set of evidentiary rules.¹⁰⁷ As a result of this dearth of evidentiary standards, some congressional hearings may be seen as operating on the whim, caprice, and the personal agenda of the legislators involved. Even worse, the absence of meaningful evidentiary rules leaves open the possibility that the hearings could, in fact, be influenced by such improper factors.

C. A Hearing in the Aftermath of the Lincoln Assassination as an Early Indication, in a High-Profile Matter, of Congress's Concern with the Reliability of Evidence

A hearing giving some indications of Congress's attitude toward reliability occurred in the mid-nineteenth century, roughly a year after the assassination of President Abraham Lincoln. Congress directed the Judiciary Committee to conduct an inquiry into "the nature of the evidence implicating Jefferson Davis",¹⁰⁸ *inter alia*,

¹⁰³Bennett v. Kline, 486 F. Supp. 36, 39 (E.D. Pa. 1980) (stating that the First Amendment "restrains Congress"); Slochower v. Bd. of Higher Educ., 350 U.S. 551 (1956) (firing improper when based on tenured professor's invocation of Fifth Amendment rights at congressional hearing).

¹⁰⁴2 U.S.C. § 195a (2000).

¹⁰⁵Hoston v. Silbert, 681 F.2d 876, 885 (D.C. Cir. 1982) ("[S]uborning perjury to congressional committees . . .").

¹⁰⁶United States v. Dixon, 509 U.S. 688, 699 (1993) (citing prior cases as authority that Congress can punish contempt, but noting that the cases do not support the argument that a court can punish a contempt which Congress has already punished).

¹⁰⁷The Due Process Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment do apply to Congressional hearings, because the Bill of Rights governs. Yellin v. United States, 374 U.S. 109, 123 n.8 (1963) (explaining that a witness is entitled to explanation of a question's pertinence, if a timely request is made).

¹⁰⁸H.R. REP. NO. 39-104, at 1 (1st Sess. 1866). After the assassination of Abraham Lincoln, Andrew Johnson, who succeeded Lincoln as President and was widely viewed as being too lenient toward the South during Reconstruction, accused Davis of complicity in the crime, called for his arrest, and offered a reward of \$100,000 in gold. WILLIAM J. COOPER, JEFFERSON DAVIS, AMERICAN 533 (2000). Davis was taken into custody. Some reports say he was wearing a woman's dress and shawl at the time of capture in an effort to prevent detection and held in a military prison for two years, until the charges against him were transferred to a civilian court, making bail possible. The group that provided that bail included wealthy industrialist Cornelius Vanderbilt, newspaper editor Horace Greeley, and abolitionist Gerrit Smith, the last of them having come to sympathize with Davis after receiving a letter from Davis's wife Varina. *Id.* at 561, 566. Although the initial charges against Davis at the time of his capture were for complicity in the Lincoln assassination, those allegations could not be

in Lincoln's assassination. One of the evidentiary questions raised by this hearing relates to proof of other crimes and bad acts. The committee was able to demonstrate, through Davis's own words,¹⁰⁹ that in retaliation for the Emancipation Proclamation, Davis ordered that every white officer leading emancipated slaves against the Confederacy be put to death if captured, unless the court found other punishment more appropriate.¹¹⁰ The committee referred not only to this order, but to other offenses committed by Davis: his treason in prosecuting the Civil War and leading the government of the rebelling states;¹¹¹ his criminal acts in ordering the destruction of northern cities and the infliction of injury and death on the people of the North;¹¹² and his participation in the mistreatment and starvation of Union soldiers held in Confederate prisons.¹¹³ The committee had evidence of these misdeeds, often in Davis's own words, appearing in documents found in a Confederate archive.¹¹⁴

Whether these bad acts were relevant to the committee's work is an example of an evidence question that now¹¹⁵ arises with some frequency: were Davis's prior crimes in prosecuting the war material evidence as to whether he was complicit in the Lincoln assassination? The general rule, as every self-respecting second-year law student knows, is that evidence of other crimes or wrongs should not be considered, because considering it involves the risk that the accused will be convicted because of his previous crimes, for which he is not on trial.¹¹⁶ That general rule appears to require that the evidence of Davis's prior crimes not be allowed, in a forum where this general rule is to be followed. The rule, however, does not control the admissibility of evidence of Davis's previous crimes. The countervailing principle, which in fact is dispositive on questions of this nature, is expressed in the committee's reference to Jefferson's prior wrongs:

But the declarations made and the acts done in pursuance of these declarations are conclusive proofs of the brutal and malignant feelings by

sustained on the available evidence, so the charge eventually brought against Davis was treason. The government ultimately decided not to pursue the treason charge. *Id.* at 572.

¹⁰⁹The committee did not address the authenticity of these documents, other than to state that they came from "rebel archives." H.R. REP. NO. 39-104, at 1.

¹¹⁰*Id.* at 3.

¹¹¹*Id.*

¹¹²*Id.* at 2.

¹¹³*Id.* at 3-4.

¹¹⁴*Id.* at 1, 3.

¹¹⁵The Federal Rules of Evidence did not exist at the time of this hearing, and so the committee members cannot be expected to have applied them, nor can the committee members be criticized for now applying them. To the extent, however, that the Federal Rules of Evidence embody principles of fairness and reliability, they are a useful tool with which to examine evidentiary decisions, to determine whether the decisions are in accord with those principles of fairness and reliability. Moreover, the Federal Rules of Evidence incorporate much of the common law of evidence as it existed at the time of their adoption in 1975.

¹¹⁶*See, e.g.,* Estelle v. McGuire, 502 U.S. 62, 75 & n.5 (1991) (discussing the admissibility of evidence of prior bad acts).

which the leaders of the rebellion were controlled, and rendered it not only possible but probable that they would at once engage in projects for the assassination of the chief man of the republic.¹¹⁷

Prior bad acts are excluded only when they are offered to prove a person's character. Nothing in the record of the committee's proceedings involves the assertion that Davis's prior bad acts prove he was a bad man who was likely to assassinate Lincoln. Instead, the committee's use of this evidence is an example of the rule that prior bad acts are inadmissible only when offered to prove propensity, and that they are not admissible when offered for any other purpose, such as proving motive.¹¹⁸ The reason Davis mandated the execution of certain Union officers, ordered that northern cities be burned, and encouraged the starvation of Union soldiers in Confederate prisons is that he hated the Union and sought to destroy it through violence. Those same sentiments, according to the committee, would motivate him to participate in an effort to assassinate Lincoln. While the evidence might be objectionable on some other ground, it is not impermissible character evidence, because it was offered to prove motive, rather than character.

The other significant section¹¹⁹ of the hearing transcript describes more direct evidence bearing on the question of Davis's role in any assassination plot. This section of the record consists of letters, which are quoted in the text of the committee's report and delivered to the Senate.¹²⁰ Having concluded that Davis's other crimes were probative of his motive, the committee turned to these letters in an effort to determine whether Davis and his government may have had any connection with potential assassins. The letters, if authentic, established that men offering to serve as assassins contacted Davis and other Confederate officials, and that the officials sometimes made notations on letters from these men about what should be done with, or in response to, the letters.¹²¹ A potential assassin named H.C. Durham, of Savannah, Georgia, wrote a very pointed letter on August 17, 1863, but that letter is not compelling evidence of Davis's guilt. Not only does the letter predate the assassination by almost two years, but the plan Durham describes differs drastically from the events of April 14, 1865. What Durham recommended to Davis was more a military force than a conspiracy—not surprising, given that the recommendation was made as the Civil War raged. Dunham suggested that he enter the United States with three hundred to five hundred men to assassinate Seward, Lincoln, and others.¹²² The committee reported that the following notations were written by Col. J.C. Ives on Dunham's letter after Davis received it: "Asks permission to take from three to five hundred men and assassinate the leading men in the United States. Respectfully referred, by direction of the president, to the honorable secretary of war. August 24,

¹¹⁷H.R. REP. NO. 39-104, at 3.

¹¹⁸See FED. R. EVID. 404(b)(allowing proof of prior bad acts in proving motive).

¹¹⁹See generally H.R. REP. NO. 39-104.

¹²⁰*Id.*

¹²¹See *infra* notes 126-129 and accompanying text.

¹²²H.R. REP. NO. 39-104, at 23.

File.”¹²³ The report does not indicate that further action was taken with regard to the Dunham letter.

J.S. Parramore also wrote to Davis, offering to “dispose of the leading characters of the north”¹²⁴ Describing the notations on this piece of correspondence, the committee stated, “At the top of this letter, in the handwriting of Jefferson Davis, is the following note, ‘Secretary of war. J.D.’ Upon the back of this letter is this indorsement [sic], under the name and residence of the writer: ‘Has discovered mode of disposing of the leading characters at north. File.’”¹²⁵

Are the letters authentic? The committee provided no information on this point, other than emphasizing that documents used in the investigation were obtained from “rebel archives.”¹²⁶ The probative value of the documents which inculpated Davis depends on whether the committee determined that the letters were what they purported to be. Not only would the letters themselves have to be authenticated, but also the notations purporting to have been made on them by Davis and by others. While the technology available to falsify or modify documents has improved since 1866, forgeries and alterations, even if done by hand, could be accomplished at that time. The question of whether the words attributed to Davis were in fact written by him could have resolved by calling a witness familiar with his handwriting, or by comparing the entry to a known sample of his writing. The committee did not disclose its basis for identifying the handwriting as Davis’s. The broader question of the authenticity of all the documents requires information about the “rebel archive,”¹²⁷ referred to as the source of these documents, but the record of the committee’s work includes no explanation regarding who obtained that archive, when, from whom, and who had custody of it at the time of the hearing;¹²⁸ nor is there information about who recognized Davis’s handwriting and how.¹²⁹ The committee appears to have assumed the authenticity and identification of all documents.

When the most fundamental evidentiary principles—that evidence should be relevant and documents should be real—are applied to the committee’s report, what remains is proof of Davis’s motive and little more. The committee’s conclusions, although full of equivocations, still went further than the evidence warranted. The committee found:

The evidence in possession of the committee connecting Jefferson Davis with the assassination of President Lincoln justifies the committee in saying that there is probable cause to believe that he was privy to the measures which led to the commission of the deed; but the investigations which have been made by the War Department and by the committee have

¹²³*Id.*

¹²⁴*Id.* at 22.

¹²⁵*Id.* at 23.

¹²⁶*Id.* at 1.

¹²⁷*Id.*

¹²⁸*See generally* H.R. REP. NO. 39-104.

¹²⁹*Id.*

not resulted in placing the government in possession of all the facts in the case. It is probable, however, that the further prosecution of the investigation by the committee and by the officers of the government will result in a full development of the whole transaction.¹³⁰

The committee also concluded that it was the duty of the executive branch to bring any apparent wrongdoer to justice so his guilt or innocence could be determined.¹³¹ An evaluation of the committee's work, based on basic principles of evidence, leads to this conclusion: without applying any express evidentiary rules in this hearing, the committee considered evidence of motive in a way that comports with fundamental evidence law but failed to determine (or at least failed to demonstrate in its report that it had determined) the authenticity of documents.

II. MODERN CONGRESSIONAL HEARINGS AS INDICATORS OF THE DEGREE TO WHICH CONGRESS VALUES RELIABILITY

A. Evidence Rulings in the Age of Televised Hearings

Congressional hearings are one of the processes that result in legislative fact-finding. Another route through which Congress can accomplish fact-finding is simply to make such a finding based on its own judgment, without reviewing evidence.¹³² This latter process, which does not involve evidence, runs a greater risk that a court reviewing the statute may be less willing to defer to the finding.¹³³ A review of legislative hearings, with special focus on the degree to which Congress and its committees are concerned with the trustworthiness of evidence in those hearings, provides information pertinent to two questions: first, the extent to which courts faced with the question of deference should consider the rigor with which Congress insisted on trustworthy evidence; and second, the need, if any, for Congress to adopt basic rules of evidence to govern its own hearings.

Throughout the nation's history, Congress and its committees have gathered and evaluated evidence as part of their policy-making process. Gathering and evaluating evidence necessarily involves judgments as to which evidence will be considered in making a decision, and which will not. Television, including the broadcasts available on the internet, has changed Congress from a body noticeable primarily because of its results, to a mass media phenomenon, especially when Congress conducts hearings on matters in which the public is keenly interested.¹³⁴ While the activities of

¹³⁰*Id.* at 1.

¹³¹*Id.* at 29.

¹³²*See generally* United States v. Lopez, 514 U.S. 549 (1995).

¹³³*Id.*

¹³⁴Associated Press, *CNN Gains from Whitewater Coverage \ Ratings Have Jumped by 29 Percent for Network. Expert Says Those Watching Proceedings are Either Political Junkies or Those Who Want a Distilled Version of Case*, AKRON BEACON J., Aug. 6, 1994, at A4 (reporting that when Cable News Network broadcasted the congressional inquiry into President Clinton's involvement in a land transaction known as Whitewater, the network's ratings jumped twenty-nine percent, but still did not reach the viewership of the Clarence Thomas confirmation hearing or the Iran-Contra hearings).

Congress are routinely broadcast by comparatively sparse, low-rated C-SPAN¹³⁵ television networks, high-profile hearings are carried by larger networks and can command huge television audiences.¹³⁶ In these widely-televised hearings, legislators seem to face the challenge to accomplish two competing goals: appearing fair; and satisfying the desires of their constituents—not just geographical but also philosophical constituents—for a resounding victory. Such widely-followed hearings, along with other hearings on topics of great public interest, such as impeachments and national disasters, highlight the evidentiary decisions by which Congress displays its insistence on trustworthy evidence and therefore reveal whether legislators are concerned with the trustworthiness of the evidence they consider.

Any evaluation of the evidentiary rulings made in Congress must begin with the acknowledgement that no evidentiary rules govern congressional hearings. It is unfair to criticize Congress for failing to abide by the Federal Rules of Evidence when it is undisputed that neither those rules nor any other set of evidentiary rules apply to Congress, its two houses, or the committees of those houses. To the extent that the Federal Rules of Evidence and other such codes incorporate a concern with trustworthiness and fairness, however, those fundamental principles, as reflected in evidence codes, can be used as a yardstick by which to measure Congress's concern with such values. Such an evaluation, using hearings which were televised or bore on a matter of great public interest, follows.

B. The Rules of Congress Say Little About Evidence

An analysis of congressional hearings begins with those rules that do apply. The Constitution provides that each house of Congress is to “determine the Rules of its Proceedings.”¹³⁷ Pursuant to that language, each body has in fact adopted rules for conducting its legislative work on a day-to-day basis. Proceedings in the Senate are governed by the Standing Rules of the Senate, the most recent general revision to which occurred in 1979.¹³⁸ These Senate rules are largely parliamentary in nature; they relate to such matters as the order in which the Senate takes up its business,¹³⁹ the procedure for voting,¹⁴⁰ and the referral of matters to Senate committees.¹⁴¹ Just as the Senate is governed by the Standing Rules of the Senate, the House of

¹³⁵“C-SPAN” is an acronym for “Cable-Satellite Public Affairs Network.” Cable: National Cable & Telecommunications Association, <http://www.ncta.com/OrganizationType/CableNetwork/1426.aspx> (last visited March 11, 2008). C-SPAN 1 broadcasts proceedings in the House of Representatives. C-SPAN.org, <http://www.c-span.org/watch/cspan1.asp> (last visited March 11, 2008). C-SPAN 2 broadcasts proceedings in the Senate. C-SPAN.org, <http://www.c-span.org/watch/cspan2.asp> (last visited March 11, 2008).

¹³⁶See Associated Press, *supra* note 134.

¹³⁷U.S. CONST. art. I, § 5, cl. 2.

¹³⁸United States Senate Committee on Rules and Administration, Standing Rules of the Senate (2007), available at <http://rules.senate.gov/senaterules/>.

¹³⁹*Id.* at Rules VII and VIII.

¹⁴⁰*Id.* at Rule XII.

¹⁴¹*Id.* at Rule XVII.

Representatives is governed by the General House Rules Manual,¹⁴² which addresses not the quality of evidence the House and its committees will consider, but instead such questions as the organization and procedures of committees,¹⁴³ the order and priority of the work of the House,¹⁴⁴ and the process for voting.¹⁴⁵

Congress's business, however, is not exclusively parliamentary, so these rules do not suffice for all purposes. Each body of Congress conducts hearings in which it receives evidence, in order to discern the facts related to a matter. Among the proceedings in which this fact-finding work may be necessary are impeachment trials,¹⁴⁶ confirmation hearings,¹⁴⁷ oversight and investigative hearings,¹⁴⁸ and legislative hearings.¹⁴⁹ The General House Rules Manual and the Standing Rules of the Senate say little about such evidentiary proceedings. As a result, both houses of Congress may use additional rules, beyond the usual parliamentary procedures, to govern the availability, admission, and use of evidence. These special rules for taking evidence may be standing rules, such as the Senate Impeachment Rules, or they may comprise uncodified, precedent-setting decisions that the body has previously made regarding questions of evidence, such as those found in the House Precedents.¹⁵⁰ In addition, some of the committees that conducted the hearings described below had their own rules, but those rules rarely include any provisions related to evidentiary standards.¹⁵¹

¹⁴²H.R. Doc. No. 108-241 (2005), available at http://www.gpoaccess.gov/hrm/browse_109.html.

¹⁴³See generally *id.* at 424-592 (Rules X and XI). Also included in the Manual are rulings, covering a period of more than 200 years, made by the officers presiding over the business of the house; these precedents have been compiled by the House Parliamentarians. See GPO Access, House Rules and Manual: About (Sept. 20, 2004), <http://www.gpoaccess.gov/hrm/about.html>.

¹⁴⁴*Id.* at 641 (Rule XIV).

¹⁴⁵*Id.* at 795 (Rule XX).

¹⁴⁶See *infra* Part II.C.

¹⁴⁷See *infra* Part II.D.

¹⁴⁸See *infra* Part II.D.

¹⁴⁹There is not always a bright line separating the various types of hearings. For example, a proceeding that begins as an investigative hearing may become the basis for a proposed law, intended to remedy the problems that prompted the investigation. In such as case, the investigative hearing becomes a legislative hearing.

¹⁵⁰See, e.g., 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 738-57 (1907) (proceedings in the impeachment of Justice Samuel Chase). Rule 19(c)(1) provides that the rules of the House of Representatives Committee on Standards of Official Conduct provide that in a proceeding to investigate the conduct of a Member of Congress, all relevant evidence is admissible unless privileged. H.R. COMM. ON STANDARDS OF OFFICIAL CONDUCT, 110TH CONG., RULES OF THE COMM. ON STANDARDS OF OFFICIAL CONDUCT, Rule 19(c)(1) (Adopted Feb. 16, 2007), available at http://www.house.gov/ethics/Rules_110th.html#_Toc36375680.

¹⁵¹See, e.g., Staff of Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition, 100th Cong., Rules of Procedure (Comm. Print 1987).

C. What Impeachment Trials in the Senate Reveal about Legislators' Emphasis on Reliable Evidence

Among the most dramatic congressional fact-finding hearings are those through which the Senate decides whether to remove from federal office a person who has been impeached by the House of Representatives. The roles of the constituent bodies of Congress in an impeachment are established in the Constitution, which vests in the House of Representatives the exclusive power to initiate impeachment proceedings,¹⁵² and vests in the Senate the exclusive power to try impeachments.¹⁵³ Because the Rules of the Senate offer no guidance regarding impeachment, the Senate has adopted standing rules for impeachment trials.¹⁵⁴ Those rules cover some aspects of the proceeding in great detail. For example, the rules mandate, verbatim, the words the Senate Sergeant at Arms must speak to open the trial;¹⁵⁵ they set the precise hour at which the impeachment proceedings in the Senate are to commence after presentation of the Articles of Impeachment;¹⁵⁶ they specify that the Chief Justice of the United States is to preside at the impeachment trial of any President, Vice-President, or person on whom "the powers and duties of the office of President shall have devolved,"¹⁵⁷ and they provide that the Senate may order that an impeachment be tried before a committee of the Senate, rather than the Senate as a whole.¹⁵⁸

The Senate Impeachment Rules also include references to the admission and exclusion of evidence. The Rules specify that the Presiding Officer of the Senate may rule on all evidence issues, "including, but not limited to, questions of relevancy, materiality, and redundancy of evidence."¹⁵⁹ The decisions of the Presiding Officer, however, are not necessarily final. The Rules provide that any senator may call for a vote by the Senate to resolve any evidentiary question in an

¹⁵²U.S. CONST. art. I, §.2, cl. 5.; I.N.S. v. Chadha, 462 U.S. 919, 955 (1983) (invalidating statute allowing one house of Congress to negate the executive branch's decision to allow a deportable alien to remain in the United States; and listing the only circumstances in which the unreviewable action of one house of Congress has the force of law: the House in initiating impeachment; the Senate in trying impeachment; the Senate in approving or disapproving presidential appointments; and the Senate in ratifying, or not, treaties negotiated by the President).

¹⁵³U.S. CONST., art. I, § 3, cl. 6.; I.N.S., 462 U.S. at 955.

¹⁵⁴S. REP. NO. 99-401, at 1 (1986). Each body receives evidence during its part of an impeachment, but the work of the Senate is a better example of congressional fact-finding, because the Senate is actually conducting a trial. *Id.* (summarizing the Senate's procedures in impeachment trials).

¹⁵⁵*Id.* at 11 ('All persons are commanded to keep silence, on pain of imprisonment while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment . . .').

¹⁵⁶*Id.* ("[A]t 1 o'clock the afternoon of the day (Sunday excepted) following [the House managers'] presentation . . . [unless] otherwise ordered by the Senate . . .").

¹⁵⁷*Id.* at 12.

¹⁵⁸*Id.* at 13.

¹⁵⁹*Id.* at 12.

impeachment trial. Such a vote is taken without debate and is governed not by the Senate Impeachment Rules, but by the Standing Rules of the Senate.¹⁶⁰ Although the Senate Impeachment Rules specify that these votes on evidence may be used to resolve such questions as relevancy, materiality, and redundancy, the Senate Impeachment Rules do not define relevancy, materiality, or redundancy, nor do they refer to any precedent or other authority from which those definitions may be derived. In fact, the Senate Impeachment Rules do not mandate that irrelevant, immaterial, or redundant evidence be excluded. Instead, they specify who is to make those decisions: ultimately, the Senate itself. Other provisions of the Rules specify that objections or requests by the parties or their counsel are to be addressed to the Presiding Officer.¹⁶¹ The Rules also allow direct- and cross-examination of witnesses,¹⁶² as well as opening statements and closing arguments.¹⁶³

Since the middle of the twentieth century, four impeachment trials have been conducted by the Senates: those of United States District Judge Harry Eugene Claiborne; United States District Judge Alcee Lamar Hastings; United States District Judge Walter Louis Nixon; and President William Jefferson Clinton. The records of these four most recent impeachment trials reveal that, while the Senate's Constitutional responsibility is to "try"¹⁶⁴ impeachments, a modern Senate impeachment trial bears little resemblance to a court trial,¹⁶⁵ because court trials are governed primarily by rules while impeachment trials are governed primarily by the broad, Constitutionally-conferred power of the Senate to conduct such trials and render a verdict.

1. Reliability in the First Impeachment Trial Hearing in More Than Half a Century: The Claiborne Impeachment

The 1986 Senate impeachment trial of United States District Judge Harry L. Claiborne was the first in more than fifty years. Unlike the judges impeached after him, Claiborne was not limited to presenting his case before the Senate Judiciary Committee. After the witnesses appeared before that committee, Claiborne and the House Managers were allowed to argue their cases to the Senate as a whole. In fact, Claiborne was allowed to address the Senate himself.¹⁶⁶ When the issue first arose as

¹⁶⁰*Id.*

¹⁶¹*Id.* at 14.

¹⁶²*Id.*

¹⁶³*Id.* at 15.

¹⁶⁴U.S. CONST. art. I, § 3, cl. 6 ("The Senate shall have the sole power to try all Impeachments.").

¹⁶⁵The Senate, of course, is under no obligation to conduct an impeachment trial the way a court conducts a jury trial. *Nixon v. United States*, 506 U.S. 224, 228-33 (1993) (finding the political question doctrine renders nonjusticiable the propriety of Senate's decision to try U.S. District Judge by committee).

¹⁶⁶*See Senate, After Slow Start, Sits as Jury*, N.Y. TIMES, Oct. 8, 1986, at A14 ("[U]p to 80 senators ultimately listen[ed] to the testimony of Judge Claiborne in his own behalf."); *see also* Associated Press, *Judge's Trial Goes to Floor*, SAN JOSE MERCURY NEWS, Oct. 6, 1986, at 9A (stating that Claiborne may be allowed to address the Senate).

to whether the full Senate would hear testimony, Robert Dole, then President Pro Tempore of the Senate, made clear that the Senate might hear a summary from Claiborne, but would not hear witnesses.¹⁶⁷ Explaining this decision, Dole said, “We want to protect his rights, but not in a way that will take all week”¹⁶⁸ After the summary and the arguments of counsel for both sides, the Senate would vote to remove Claiborne from office.

After the committee had concluded its hearing, when the day arrived for presentations to the full Senate, Claiborne and his lawyers were present, as were “nine members of the House Judiciary Committee” (who had the responsibility to present the case against Claiborne).¹⁶⁹ Fifty-one senators were necessary for a quorum, but at the hour the full-Senate segment of the trial was set to begin, only ten senators were present.¹⁷⁰ Before the day was out, there were enough senators to constitute a quorum, and Claiborne’s trial proceeded.¹⁷¹ Ultimately, the Senate removed Claiborne from office, convicting him on three of four articles of impeachment.¹⁷²

2. Reliability in an Impeachment in Which Senators Vote Without Being Present When the Evidence Is Received: The Case of Walter Nixon

In 1989, the Senate tried the impeachments of two federal district judges—Walter Nixon and Alcee Hastings. Each judge was removed from office, and each attempted, unsuccessfully, to challenge his removal in court on the basis that his impeachment trial should have been conducted by the Senate as a whole, rather than a Committee of the Senate.¹⁷³

Walter Nixon was convicted in federal district court of two counts of perjury, and those convictions were affirmed on appeal.¹⁷⁴ The House of Representatives subsequently handed down Articles of Impeachment against Nixon, charging that he committed perjury and made false statements to federal investigators, all with regard

¹⁶⁷*Judge’s Trial Goes to Floor*, *supra* note 166.

¹⁶⁸*Id.*

¹⁶⁹*Senate, After Slow Start, Sits as Jury*, *supra* note 166. The title of the article refers to the senators as “jurors,” the term that drew an objection during the Clinton impeachment trial. *See infra* notes 208-15 and accompanying text.

¹⁷⁰*Senate, After Slow Start, Sits as Jury*, *supra* note 166. A retired couple from Florida had ridden the train all night to be in the Senate Visitors Gallery for the historic trial. The husband asked, “Where are all the senators? Are they having parties in their office or are they really busy?” He added, “We belong to the Elks Club, and when people don’t show up it’s hard on everyone.” *Id.*

¹⁷¹*Id.*

¹⁷²*Senate Convicts Claiborne, Removes Him from Bench*, DALLAS MORNING NEWS, Oct. 10, 1986, at 1A.

¹⁷³*Nixon v. United States*, 506 U.S. 224, 227-29 (1993); *Hastings v. United States*, 837 F. Supp. 3, 4 (D.D.C. 1993).

¹⁷⁴*United States v. Nixon*, 816 F.2d 1022 (5th Cir. 1987), *cert. denied*, 484 U.S. 1026 (1988).

to whether he asked a state prosecutor to give favorable treatment to the son of Nixon's business partner.¹⁷⁵

Nixon's attorneys approached the impeachment trial largely as they would any other trial; the attorneys for the House of Representatives and the Senate Impeachment Trial Committee trying the impeachment followed the lead of the Nixon legal team to some extent, treating the matter for the most part like a court trial. For example, the opposing lawyers engaged in discovery disputes.¹⁷⁶

The attorneys representing Nixon employed a common trial tool when they submitted a motion in limine¹⁷⁷ urging the Senate Impeachment Trial Committee to exclude: (1) evidence of Nixon's business dealings with the father of the defendant in whose state drug case Nixon was alleged to have intervened; and (2) all transcripts in his criminal trial, the grand jury, and related proceedings, except when used to impeach a witness's credibility in the impeachment trial.¹⁷⁸ In support of the second part of this motion, Nixon argued, in keeping with settled evidence law, that the former testimony of any witness is inadmissible to prove the truth of what that testimony asserts, unless the witness is unavailable to testify at trial.¹⁷⁹ Nixon cited Rule 804 of the Federal Rules of Evidence, which requires unavailability, *inter alia*, as a prerequisite for the admission of former testimony as substantive evidence.

The Senate Impeachment Trial Committee addressed Nixon's objection to former testimony when it met to discuss procedures in preparation for the Committee trial.¹⁸⁰ During this meeting, Senator Howell Heflin of Alabama advised the Committee regarding evidence law. Heflin was both a member of the Senate Impeachment Trial Committee for the Walter Nixon impeachment trial, and a member of the Senate Judiciary Committee, the body responsible for reports and recommendations to the full Senate regarding proposed changes in the Federal Rules of Evidence. Heflin's reputation as an expert on evidence was further enhanced by the seven years he served as Chief Justice of the Alabama Supreme Court¹⁸¹ before his election to the Senate. Heflin's status as a former Chief Justice of the Alabama Supreme Court, and the significance of that service to his work in the Senate, is emphasized in the title of his biography, *A Judge in Senate*. In advising his colleagues regarding the admissibility of the record of Nixon's criminal trial, Heflin indicated that, under the

¹⁷⁵See generally S. Doc. No. 101-17 (1989).

¹⁷⁶See generally Rep. of the S. Impeachment Trial Committee on the Articles against Judge Walter L. Nixon, Jr.: Hearings Before the S. Impeachment Trial Comm. 101st Cong. pt. 1 (1989) [hereinafter *Hearings Nixon*]

¹⁷⁷"In limine" is a Latin phrase meaning "at the threshold," as a metaphor for the presentation of such a motion as the parties and judge enter the courthouse. *Tennant v. MarionHealthCare Found., Inc.*, 459 S.E.2d 374, 389 (W. Va. 1995); *Hartford Accident & Indem. Co. v. Samuel Gross & Sons, Inc.*, No. CIV. A. 92-2567, 1993 WL 117580 (E.D. Pa. Mar. 31, 1993).

¹⁷⁸*Hearings Nixon*, *supra* note 176, at 83-84.

¹⁷⁹*Id.* at 213.

¹⁸⁰*Hearings Nixon*, *supra* note 176, at 21.

¹⁸¹JOHN HAYMAN WITH CLARA RUTH HAYMAN, *A JUDGE IN SENATE: HOWELL HEFLIN'S CAREER OF POLITICS AND PRINCIPLE* (2001).

rules of evidence, matters discussed in the presence of the defendant would be admissible when the defendant had the opportunity to respond.¹⁸² It appears to have been Senator Heflin's position that the entire record of Nixon's three-week¹⁸³ criminal trial was admissible in the Committee trial as an admission by silence, i.e., Heflin advised his colleagues that Nixon had adopted as his own statement everything said at his criminal trial by anyone—whether witness, prosecutor, or presiding judge—because Nixon was present and could have objected to anything with which he disagreed.¹⁸⁴ Senator Heflin's concept of an entire trial as an adoption by silence is puzzling. Nixon did dispute statements adverse to him which were made during his criminal trial. That is the reason he entered a plea of not guilty and sat at the defense table with his lawyers, fighting the criminal charges.

The Committee followed Heflin's advice and admitted the testimony, but cited a different theory from Heflin's. The Committee concluded, "The prior testimony has been the subject of adverse cross-examination, and its use will not prejudice any party."¹⁸⁵ By basing its ruling on the status of the disputed statements as prior testimony, the Committee avoided the significant problems with Heflin's theory of admission by silence while creating other, lesser, problems. When it referred to Nixon's opportunity to cross-examine the prior testimony, the Committee established the existence of one, but not all, of the conditions required to admit prior testimony as an exception to the hearsay rule.¹⁸⁶ The additional requirement imposed by the Federal Rules of Evidence, but omitted by the Committee, was that the prior testimony be admitted only if the declarant is unavailable to testify.¹⁸⁷ While neither the Senate nor the Committee was obligated to conduct the trial in accordance with the Federal Rules of Evidence, they chose to use those rules in addressing prior testimony; yet they deviated from those rules without explanation. In its other significant evidentiary rulings, the Committee denied the House Managers' motion to exclude evidence that Nixon was the victim of prosecutorial misconduct and denied Nixon's motion to exclude evidence of his oil investments with the father of the criminal defendant he had been accused of assisting.¹⁸⁸

The Committee did not rely exclusively on the transcripts of prior proceedings. Witnesses testified in person before the Committee.¹⁸⁹ Direct- and cross-examination were conducted somewhat as they would be in a courtroom.¹⁹⁰ The Committee

¹⁸²*Hearings Nixon*, *supra* note 176, at 21.

¹⁸³Associated Press, *Defense Rests Case in Trial of U.S. Judge in Mississippi*, N.Y. TIMES, Feb. 8, 1986, at A17.

¹⁸⁴*Hearings Nixon*, *supra* note 176, at 21; *see, e.g.*, *United States v. Ward*, 377 F.3d 671, 675 (7th Cir. 2004) (finding that failure to dispute a statement that money had been obtained in bank robbery was adoption of the statement).

¹⁸⁵*Hearings Nixon*, *supra* note 176, at 323.

¹⁸⁶FED. R. EVID. 804(b).

¹⁸⁷*See generally* FED. R. EVID. 804.

¹⁸⁸FED. R. EVID. 1101

¹⁸⁹135 CONG. REC. D956-02, 9-7-89.

¹⁹⁰*Id.*

members also questioned the witnesses.¹⁹¹ The Committee did not have the responsibility of rendering a verdict or even making a recommendation on the question of Nixon's removal from office.¹⁹² That decision was to be made by the entire Senate. The Committee's General Counsel attended a pre-trial meeting of the Committee and explained the Committee's role to its members:

[T]o receive and report evidence to the Senate [T]o shape the evidentiary proceeding, to rule on questions of evidence, to make determinations about relevance, describe the outer boundaries of the proceedings, what issues are relevant for the taking of evidence, and then to monitor those rules and require adherence to them in a consistent way through the proceedings. . . . [T]o submit a summary report . . . of the party's [sic] evidence on contested issues¹⁹³

The Senate did not, however, meet with either party or their lawyers. Neither Nixon nor his lawyers were allowed to address the Senate, but the decision was made by the Senate—the decision to remove Nixon from office.

3. Reliability in an Impeachment Where the Senate Convicts After a Jury Acquits: The Hastings Impeachment

In the impeachment trial of United States District Judge Alcee Hastings, as in that of Judge Walter Nixon, witnesses and documents were presented before a Senate Impeachment Trial Committee.¹⁹⁴ Judge Hastings's trial, like Judge Nixon's before it, resembled a court trial to some extent, at least during the Committee phase. The Senate trial, however, did not involve any presentation before the Senate by the parties. The role of the Senate was to decide, and their decision was to remove Hastings from office. There was at least one significant difference between the two impeachment trials. In Walter Nixon's trial, the disputes were primarily evidentiary; in the Hastings trial, there was one overriding dispute, which related to a question of law: whether the Senate could convict Hastings and remove him from office when a jury had acquitted him of the charges forming the basis for the Articles of Impeachment. Ruling that it was not bound by the jury verdict, the Senate removed Hastings from office.¹⁹⁵ A few years after the Senate removed him from the federal bench, Judge Hastings was a candidate to represent the Twenty-third Congressional District of Florida, a position to which he was elected in 1992 and in which he remains as of 2007, having successfully campaigned for re-election seven times.¹⁹⁶

¹⁹¹*Id.*; FED R. EVID. 614 (calling and questioning of witnesses by the court).

¹⁹²*Hearings Nixon, supra* note 176, at pt. 1, 9.

¹⁹³*Id.* at 10-11.

¹⁹⁴*Hastings v. United States*, 837 F. Supp. 3, 4 (D.D.C. 1993).

¹⁹⁵*Id.* at 5.

¹⁹⁶Byron York, *The Battle of Hastings: Should the Impeached Judge Head the House Intel Committee?*, NAT'L REV., Dec. 4, 2006.

4. Reliability in an Impeachment in Which the Senate as a Whole Makes the Decision, but Does Not Hear Any Witnesses in Person: The Clinton Impeachment

The record of the 1999 impeachment trial of President William Jefferson Clinton demonstrates that evidentiary rules are not a paramount consideration in a trial that will culminate with an unreviewable decision rendered by an elected body. The relatively unimportant role of evidentiary rules to the House Managers, the Senate, and Clinton is apparent in: (1) the admission of 14,201¹⁹⁷ pages of transcripts and documents, from legal proceedings having common facts with the impeachment trial, without any objection or discussion; (2) the Senate's unanimous vote to conduct a trial in which no witnesses would appear in person to testify before and be questioned by the Senate; and (3) the Senate's emphasis on its own role in the proceeding—an emphasis beside which the relevancy, materiality, redundancy, and admissibility of evidence may have paled by comparison.

The Clinton impeachment arose from two legal proceedings to which Clinton was a party. One was a civil action in which he was a defendant—an action he ultimately settled after the trial court resolved the matter in his favor on his motion for summary judgment.¹⁹⁸ Before summary judgment was granted, however, the plaintiff gave notice of her intent to call a former intern in the Clinton White House as a witness.¹⁹⁹ One of the Articles of Impeachment approved by the House of Representatives alleged that after learning the former intern was on the plaintiff's witness list, Clinton obstructed justice by persuading the former intern to submit a false affidavit in the civil action—persuasion that included the use of Clinton's contacts and connections to obtain for the former intern employment of the type in which she was most interested.²⁰⁰

The other legal proceeding from which the impeachment arose was an investigation, by the Office of Independent Counsel, into various allegations against Clinton.²⁰¹ In connection with one part of that investigation, the Independent Counsel subpoenaed Clinton to testify before a grand jury.²⁰² The Independent Counsel's investigation was wide-ranging; among the areas of inquiry were Clinton's conduct in the civil action, especially any effort to influence the former intern once notice was given that she would be a witness, and the nature of his

¹⁹⁷S. DOC. NO. 106-3 (1999), available at www.access.gpo.gov/congress/senate/sd106-3.html (figure obtained by totaling the number of pages in each Independent Counsel document listed as part of the evidentiary record).

¹⁹⁸Reuters, *Clinton Pays Jones \$850,000 Settlement The Money Included \$475,000 from a Company that Provided the President with Personal-Liability Insurance*, ORLANDO SENTINEL, Jan. 13, 1999, at A8.

¹⁹⁹Richard T. Cooper et al., *The Starr Report: The Affair, 'I Never Expected to Fall in Love with the President'*, L.A. TIMES, Sept. 12, 1998, at A1 (Lewinski appeared on Jones's witness in the sexual harassment civil trial on December 5, 1997).

²⁰⁰KENNETH STARR, INDEPENDENT COUNSEL INVESTIGATION (1998), available at <http://icreport.access.gpo.gov/report/2toc.htm>.

²⁰¹*Id.*

²⁰²*Id.*

relationship with the former intern.²⁰³ One of the Articles of Impeachment alleged that Clinton committed perjury in his testimony before the grand jury.²⁰⁴

In trying Clinton, the Senate had both the benefit and the burden of a 14,201-page record, which included, *inter alia*, evidence accumulated during the two related legal proceedings: the civil action and the investigation by the Office of Independent Counsel. One of the first acts of the Senate in the impeachment trial was a unanimous vote²⁰⁵ to admit this vast record en mass, and to provide each senator with a copy of these “publicly available materials that have been submitted to or produced by the House Judiciary Committee, including . . . any materials printed by the House of Representatives or House Judiciary Committee” related to the Clinton impeachment.²⁰⁶ Although the Senate Impeachment Rules include procedures for resolving such questions as the relevancy, materiality, and redundancy of evidence,²⁰⁷ no such questions were raised about any part of this lengthy record—by Clinton, the House Managers, or any senator—and so it was admitted in its entirety.²⁰⁸

Although the Senate admitted those 14,201 pages without objection or discussion, a single word in the presentation of the House Managers drew an objection because it mischaracterized the Senate’s role in the impeachment. In setting forth one part of the case against Clinton on behalf of the House of Representatives, a House Manager referred to the senators as “jurors,”²⁰⁹ prompting Senator Thomas Harkin to make an objection and argue it in detail. He and his colleagues were not jurors, Harkin told the Chief Justice, but instead “triers” of the impeachment.²¹⁰ He quoted the Federalist Papers to the effect that, in an impeachment trial, “There will be no jury to stand between the judges who are to pronounce the sentence of the law and the party who is to receive or suffer it.”²¹¹ Arguing in support of his objection, Harkin rejected the notion that he and his colleagues were jurors, in any sense of the word. He drew that sharp distinction by enumerating powers which jurors lack and senators have: jurors have no prior knowledge of the case, but senators do; jurors cannot overrule the officer presiding over the impeachment, but senators can; jurors do not decide what evidence they will hear, as senators do; and jurors do not set the standards for admitting and excluding evidence, which the Senate does.²¹² The Chief Justice, sitting as Presiding Officer,

²⁰³*Id.*

²⁰⁴*Id.*

²⁰⁵Trial of Wiliam Jefferson Clinton, President of the United States, 145 CONG. REC. S1199-S1254 (February 4, 1999).

²⁰⁶*Id.*

²⁰⁷S. REP. NO. 99-401, at 12 (1986).

²⁰⁸Trial of Wiliam Jefferson Clinton, President of the United States, 145 CONG. REC. S1199-S1254 (February 4, 1999).

²⁰⁹145 CONG. REC. S59, 279 (daily ed. Jan. 14, 1999).

²¹⁰*Id.*

²¹¹*Id.*

²¹²*Id.*

agreed with Senator Harkin that the word “jurors” was inaccurate and should not be used to refer to senators in an impeachment trial.²¹³ Senator Harkin was correct: senators trying an impeachment are not jurors, although they do make determinations of fact as necessary. The significance of Senator Harkins’ objection lies less in its undisputed validity and more in its status as the first objection, and one of the few overall, of any type raised during the Clinton impeachment trial before the Senate.²¹⁴

Not only are senators not jurors, but Senate impeachment proceedings resemble a court trial in only the most rudimentary sense, i.e., in the sense that both proceedings are conducted by an arm of the government, both involve the application of standards to facts ascertained in the proceeding, and each, if completed, results in some type of decision. Beyond that, there is little similarity. A jury’s work is circumscribed by a well-established set of evidentiary rules,²¹⁵ along with the court decisions interpreting those rules, all applied by the presiding judge. By contrast, in deciding whether to remove an impeached official, the Senate is bound by no authority external to itself to make such determinations as these: which high crimes and misdemeanors in addition to treason and bribery constitute impeachable offenses; whether the official in fact did what he is accused of doing; whether any given item of evidence is relevant, material, or redundant; and what burden of proof must be satisfied and who bears it—if in fact any burden of proof actually rests with anyone in a Senate impeachment trial.

While there were no objections to the admission of evidence in the Clinton trial, the Senate did make one significant evidentiary decision: whether to call witnesses to appear and testify in person before the Senate.²¹⁶ Although the Managers from the House of Representatives sought to have witnesses appear before the Senate,²¹⁷ the unanimous decision of the Senate was that only three witnesses would be called, that even those three would appear only through excerpts of video-taped depositions, and that each of those depositions would be taken not before the Senate, but before three senators assigned to preside at each of the depositions.²¹⁸ No witness would testify in person in the Senate chamber. The motivations for this decision may have had little to do with the relevance, materiality, or redundancy of the witnesses’ testimony. Instead, the factors influencing senators in this highly visible proceeding likely included: (1) the electorate’s lack of support for removing Clinton from office for what the public saw as “private” misconduct;²¹⁹ (2) the forty-four to fifty-six vote by which a motion to dismiss the charges failed—a vote which, though insufficient to carry the motion by the required majority vote, demonstrated that there were not enough votes to remove Clinton from office;²²⁰ and (3) the prospect of testimony in

²¹³*Id.*

²¹⁴*See id.*

²¹⁵*See generally* FED. R. EVID.

²¹⁶145 CONG. REC. S991-92 (January 36, 1999) (House Manager McCollum argues for having witnesses appear live in Senate chamber).

²¹⁷*Id.*

²¹⁸*Id.*

²¹⁹*Id.*

²²⁰*Id.*

the Senate chamber regarding unseemly details of Clinton's relationship with the intern—a relationship about which the electorate had heard more than enough by the time of the impeachment trial.²²¹

The record of the Clinton trial indicates that even the three depositions which were taken in locations remote from the Senate chamber had little significance to the Senate's decision. When the attorney for one of the three witnesses objected that a question was repetitive of the witness's prior testimony already in the Senate record as part of the fourteen-thousand-plus documents admitted without discussion, one of the senators presiding at the deposition made a telling statement about the trial as a whole:

Well, I appreciate that, but, uh, if this is going to be the case, we don't even need the deposition, because we're limited to the record and everything is in the record. So I think, uh, to be fair, we're—we're obviously going to have to talk about, uh, some things for 8 [sic] hours here, or else we can go home.²²²

The Senate's readiness to accept documents and unwillingness to hear live testimony may have been a consequence of the television cameras that were, by this time, commonplace in Congress. The massive documentary record admitted by the Senate has essentially no news value and little chance of arousing public interest, so the Senate did not mind admitting this evidence, the status of which as documents practically guaranteed very little press coverage. These documents were primarily from the civil action against Clinton and the investigation by the Office of the Independent Counsel. The Senate's warm welcome of the documentary record stood in stark contrast to the cold shoulder given to the idea that witnesses would testify about the details of Clinton's sexual relationship with the intern, in the Senate chamber. Therefore, the Senate ruled that no witnesses would testify in the Senate chamber, where the senators could observe their demeanor and evaluate their credibility. Instead, as discussed above, only three witnesses would appear at all, and those by excerpts from the videotape of their depositions taken for the Senate trial. The proceeding was less a search for truth—i.e., the facts on which to base a decision to remove Clinton from office or not—and more the simple exercise of the Senate's Constitutional power to remove an impeached President from office or not. Using that power—individually and corporately—arguably did not require that the Senate admit and consider evidence at all, especially after the vote on the motion to dismiss revealed what the outcome would be. In fact, nothing in the Constitution, except arguably the word “try,” indicates that the Senate must admit or review any evidence at all in an impeachment trial.²²³

The Senate's decisions—to devote little time to evidence, and to find Clinton not guilty—comported with the desires of the public, as expressed in opinion polls.²²⁴ By the time of the impeachment trial, the electorate held three opinions strongly. First,

²²¹Associated Press, *Polls Remain Solid for Clinton More Than Half Disapproves of GOP's Handling of Case*, MIAMI HERALD, Jan. 14, 1999 at 19A.

²²²145 CONG. REC. S1017, January 27, 1999 (motion to dismiss fails by vote of 56-64).

²²³U.S. CONST. art. I, § 3, cl. 6; *see also* I.N.S. v. Chadha, 462 U.S. 919, 955 (1983).

²²⁴Associated Press, *supra* note 221.

the public believed Clinton had testified falsely before the grand jury, but, second, they did not want him removed from office for that offense. Finally, and most of all, the public wanted the matter to end. In its evidence rulings and its verdict, the Senate (a political body whose members are elected) in spite of its lack of attention to evidence presented at the impeachment trial, carried out the will of the voters.

In none of these post-1932 Senate impeachment trials were any witnesses questioned before the full Senate. In only one of the trials—the Clinton impeachment trial—did the full Senate hear any witness, and then only by excerpts on videotape.

D. High Stakes and Low Blows: The Senate Judiciary Committee's Hearing on Sexual Harassment Charges Against United States Supreme Court Nominee Clarence Thomas

When Judge Clarence Thomas was nominated to the United States Supreme Court, the Senate Judiciary Committee conducted a hearing to address allegations that Thomas had sexually harassed Anita Hill. A law professor at the time of the hearings, Hill had worked for Thomas at two federal agencies.²²⁵ The hearing was highly contentious and partisan. Some questioning evidenced a lack of concern with even minimal standards of reliability, and so the Thomas hearings are indicative of the extent to which legislators, when conducting a hearing that will change the makeup of the Supreme Court, are concerned with the trustworthiness of evidence.

Senator Joseph Biden, Chair of the Senate Judiciary Committee, opened that body's hearing on Hill's sexual harassment charges against Thomas with a statement of the ground rules: although witnesses would testify under oath, the hearing was not a trial, and it would not end with a formal verdict.²²⁶ He also announced that rules of courtroom evidence would not apply.²²⁷ Senator Biden's rejection of the rules had an entirely different tenor, but the same effect, as Senator Inouye's similar decision in the Iran-Contra hearings.²²⁸ Inouye acknowledged he was choosing not to apply the rules of evidence, based on his and the Committee's authority to conduct the hearings "as [they] wish[ed] to."²²⁹ Apparently unwilling to assert such an imperial prerogative before a large television audience, but also unwilling to be bound by evidentiary rules, Biden announced that he was prohibited from using such rules. In fact, Biden went so far as to declare that Senate rules not only prohibited the use of standard evidentiary rules, but that those Senate rules *required* the admission of evidence that would not be allowed in a courtroom. Biden said, "Thus, evidence and questions that would not be permitted in the court of law must, under Senate rules, be allowed here."²³⁰ It is not clear to what provision Senator Biden was referring when he said the Senate's rules required that certain questions be allowed during the

²²⁵*Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 102d Cong. pt. 4, 36-37 (1991) [hereinafter *Hearings Thomas*].

²²⁶*Id.* at 2.

²²⁷*Id.*

²²⁸*Hearings Iran*, *supra* note 4, at 34.

²²⁹*Id.* at 134.

²³⁰*Hearings Thomas*, *supra* note 225, at 2.

hearing. Nothing in the Constitution or the Rules of the Senate required, or forbade, the use of courtroom evidentiary rules in a Senate confirmation hearing. In contrast to Inouye's bold assertion of power, Biden claimed reliance "on the advice of the [unidentified] nonpartisan Senate legal counsel"²³¹ Biden concluded his discussion of evidentiary rules by announcing that he did have, and would exercise, the power to declare questions to be out of order if they were not relevant to the proceedings, including questions about the "out-of-the-workplace relationships, and the intimate lives" of Thomas, Hill, or any other witness.²³²

These rulings established at least minimal evidentiary parameters for the hearing: the rules of courtroom evidence did not apply, but only relevant evidence would be allowed, and evidence of any witness's out-of-the-workplace intimate life was not relevant. Although Biden's rulings omitted important issues that were almost certain to arise—such as hearsay and the impeachment of witnesses—he did provide significantly more information than was available when the Iran-Contra hearings began.²³³

The first significant evidentiary issue that arose in the hearing in fact related to a topic that Biden did not mention in his opening comments: in questioning Professor Anita Hill, Senator Arlen Specter said to her:

[O]ne of your more recent statements, at least according to a man by the name of Carl Stewart, who says that he met you in August of this year. He said that he ran into you at the American Bar Association Convention in Atlanta, where Professor Hill stated to him in the presence of Stanley Grayson, "How great Clarence's nomination was, and how much he deserved it."²³⁴

Carl Stewart, according to Specter, also reported that Hill, in the same conversation at the American Bar Association meeting, went on to discuss Thomas and her time working for him when he was Chair of the Equal Employment Opportunity Commission, and that Hill said nothing about sexual harassment or anything else negative about Thomas.²³⁵ Specter added that Carl Stewart had provided this information and that Stanley Grayson corroborated it.²³⁶ Stewart and Grayson testified about the incidents much later in the hearing.²³⁷

Specter's second question, like the first, injected hearsay into the proceedings. He referred to a statement from a former dean of Oral Roberts University Law School,

²³¹*Id.*

²³²*Id.* at 3.

²³³*Hearings Iran, supra* note 4.

²³⁴*Hearings Thomas, supra* note 225, at 58.

²³⁵*Id.* at 59.

²³⁶*Id.* Hill responded to Specter saying that she had said what a good opportunity the nomination was for Thomas, not that it was generally a good development. *Id.*

²³⁷*Hearings Thomas, supra* note 225, at 427. Cross-examining the declarant later in the hearing does not change the status of the statement as hearsay; the statement at the time it was made must be in the hearing and subject to cross-examination. *See* FED. R. EVID. 801.

where Hill had taught.²³⁸ Specter said the former dean had recounted a conversation in which Hill had referred to Thomas as ““a fine man and excellent legal scholar.””²³⁹ Hill responded that she would not have spoken disparagingly of Thomas to the former dean, who admired Thomas a great deal; she further replied that she did not recall any comment she made about Thomas’s legal scholarship, especially at that time. Databases of all articles appearing in legal periodicals and texts, which are virtually complete, reflect that Thomas did not publish any legal scholarship until after Hill left her position at the law school where the conversation with the dean was alleged to have occurred.²⁴⁰

In his third question, Specter again called on Hill to respond to hearsay allegations, this time before he even named the declarants. The question was an effort to impeach Hill on the issue of whether she knew a woman named Phyllis Barry. Hill had given a newspaper interview in which she was asked to respond to statements made by her former co-worker Phyllis Barry. The newspaper article reported that Hill, when confronted with Barry’s statements, responded that she did not know a woman named Phyllis Barry, and Phyllis Barry did not know her.²⁴¹ Hill’s statement was significant, because she made it in response to Barry’s allegation that Hill had fabricated her charges against Thomas because she was disappointed Thomas did not show any interest in her sexually.²⁴² Challenging Hill’s assertion she and Barry did not know each other, Specter again relied on hearsay: ““And there are quite a few people who have come forward to say that they saw you and Ms. Barry together and that you knew each other very well.””²⁴³ After Hill disagreed with the anonymous allegations that Barry knew her well, Specter named two of the ““quite a few people who . . . [had] come forward”” to say Barry did know Hill:²⁴⁴ J.C. Alvarez and Anna Jenkins, both of whom testified later in the hearing.²⁴⁵

When it was his turn to question Hill again, Specter read yet another hearsay statement into the record and asked Hill to explain it. Specter again quoted another former dean of the law school where Hill had previously taught. According to Specter, the former dean had said, regarding Hill’s charges against Thomas, ““I find

²³⁸*Hearings Thomas*, *supra* note 225, at 59.

²³⁹*Id.* Hill responded, saying that she was influenced by the former dean’s high regard for Thomas, and that she did not recall any specific conversations about Thomas in which she made reference to his scholarship. *Id.*

²⁴⁰*Compare* Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause of the Fourteenth Amendment*, 12 HARV. J.L. & PUB. POL’Y 63 (1989) (illustrating that Thomas published a work of legal scholarship in 1989), *and Hearings Thomas*, *supra* note 225, at 31-33 (providing Anita Hill’s C.V., which reflects that she left her position at Oral Roberts University, where the conversation about Thomas’s scholarship is alleged to have occurred, in 1986, to teach at the University of Oklahoma).

²⁴¹*Hearings Thomas*, *supra* note 225, at 60.

²⁴²*Id.*

²⁴³*Id.*

²⁴⁴*Id.*

²⁴⁵*Id.* at 337 (beginning of J.C. Alvarez’s testimony); *id.* at 590 (beginning of Ann Jenkins’s testimony).

the references to the alleged sexual harassment not only unbelievable but preposterous. I am convinced that such are the product of fantasy.”²⁴⁶ This question, based on hearsay, was followed by a lengthy discussion of whether it was appropriate for a senator to question Hill about the allegations in the affidavit when the witness had not appeared.

During that discussion regarding the impropriety of using hearsay evidence, Senator Leahy raised a concern about calling on Hill to respond to such statements. He asked:

How fair can it be to either Professor Hill or any other witness if any of us can sit up here and say, “I have this stack of affidavits, and in affidavit No. 5 in the third paragraph somebody says such-and-such. What do you have to say about that?”

I mean, at the very least, at the very least they ought to be able to see these affidavits. At the very least, they ought to have some idea of who the person is and if they are credible.²⁴⁷

Chairman Biden responded:

It is appropriate to ask Professor Hill anything any Member wishes to ask her to plumb the depths of her credibility. It would be appropriate to ask her about Mr. Singleton [whose affidavit the Committee had in its possession], but it is inappropriate to represent what Mr. Singleton says via an affidavit. There is a distinction.²⁴⁸

Biden’s ruling had a rough similarity to elemental principles of fairness embodied in the Federal Rules of Evidence: when he ruled that it was not appropriate to conduct a trial by affidavit,²⁴⁹ he acted in keeping with the rule that witnesses should be subject to cross-examination; when he concluded that senators could ask questions about incidents or topics covered in affidavits without reading or quoting from the affidavit, he affirmed the need for broad latitude in the cross-examination of a witness.²⁵⁰

When it was his turn to question Judge Thomas, Senator Howell Heflin began on an ominous note: “Judge Thomas, in addition to Anita Hill, there have surfaced some other allegations against you.”²⁵¹ This statement would ultimately deliver far less than it had promised. As Heflin continued, it became apparent that there he was not referring to additional charges that Thomas had committed sexual harassment. Referring to the new allegations, Heflin said they had been broadcast “on a television show last evening here in Washington, channel 7.”²⁵² Heflin also said it had been

²⁴⁶*Hearings Thomas, supra* note 225, at 83.

²⁴⁷*Id.* at 101.

²⁴⁸*Id.* at 101-02.

²⁴⁹FED. R. EVID. 801 & 802.

²⁵⁰*Cf.* FED R. EVID. 608 (impeachment of witness).

²⁵¹*Hearings Thomas, supra* note 225, at 158.

²⁵²*Id.*

reported to him (Heflin) that a congressman named Kluge had said that he (Kluge) in the “1980’s, 1983 or something, was a television reporter for a channel here in Washington and that he . . . disclosed . . . [allegations that Thomas had not responded adequately to a charge, brought by an employee of the agency Thomas directed, that another employee of the agency had committed sexual harassment].”²⁵³ In asking this question, Heflin related compound hearsay. An unidentified person had reported to Heflin that Kluge had said, on television the evening before the hearing, that he (Kluge) said some years before that Thomas moved too slowly and was too lenient with regard to the charges that someone in Thomas’s agency was guilty of sexual harassment.²⁵⁴ In making the allegation against Thomas, Heflin used such phrases as, “Now, it is reported to me . . . [and] . . . I hear by hearsay . . . [and] . . . Well, that is the way it has been reported to me”²⁵⁵ Heflin also described efforts he had made to obtain documents in order have more information about the matter.²⁵⁶ Senator Hatch objected to Heflin’s questions on the ground of relevance, and Chairman Biden agreed that the questions were out of order, because they were irrelevant: they did not pertain to the incident about which Hill had testified.²⁵⁷ The questions were outside the subject matter of the hearing, which, as described by Biden at the outset, was “to hear evidence on sexual harassment charges that have been made against Judge Clarence Thomas”²⁵⁸

When Senator Hatch had his opportunity to question Thomas, he served not only as a decision maker, and a questioner, but also as a character witness for Thomas. Hatch said, “And those of us who know you, know that all of these [allegations by Hill] are inconsistent with the real Clarence Thomas.”²⁵⁹ Hatch also described a newspaper column that asserted that the charges against Thomas were the product of a smear campaign by vicious public interest groups.²⁶⁰ Hatch’s testimony illustrates the almost insurmountable challenge faced by legislators when they are called on to judge the admissibility of evidence that they will then consider in making a determination in which they obviously have an interest.

The analogy to a trial is imperfect, but it does demonstrate the multiple, conflicting roles a legislator must play in a hearing. The legislator will ultimately be the judge of the matter, and the very existence of the hearing is an indication of some level of expectation that he will judge in an impartial and fair manner. If he could simply vote the way he wished to vote, in complete disregard of the evidence, why even conduct a hearing? So, an expectation of some fairness is inherent in the use of hearings and the admission of evidence. Yet the legislator is not actually an impartial judge, because he acts as an advocate in the hearing—Senator Metzenbaum seeks to

²⁵³*Id.* at 159.

²⁵⁴*See id.*

²⁵⁵*Id.*

²⁵⁶*Id.*

²⁵⁷*Id.*

²⁵⁸*Id.* at 1.

²⁵⁹*Id.* at 165.

²⁶⁰*Id.* at 206.

discredit one of Judge Thomas's witnesses because he does not want Thomas confirmed, and Senator Specter refers to Professor Hill as a perjurer because he does want Thomas confirmed. When such strident activists become judges of the facts, confidence in the outcome is understandably diminished.

Senator Specter's allegation of perjury came in later questioning of Professor Hill. Specter stated his "legal judgment" that Professor Hill had committed "flat-out perjury."²⁶¹ He did not make the allegation to Professor Hill, so that she would have had an opportunity to respond. Instead, he leveled the charge during his questioning of Judge Thomas. In explaining his accusation of perjury, Specter quoted Hill's testimony in a morning session of the hearing, when she denied that any Senate staffer had told her that her "charges themselves in writing would result in Judge Thomas withdrawing" his name from nomination.²⁶² Specter attempted to contrast that answer with Hill's testimony during the afternoon session, when she answered "yes" to the question whether a specific Senate staffer whom Specter named had told her "that Judge Thomas might not wish to continue to go forward with his nomination if [Hill] came forward."²⁶³ Senator Specter's legal opinion to the contrary notwithstanding, the question to which Hill answered "no," was materially different from the one to which she answered "yes." The statements differed as to the consequences predicted to result from her charges. In the morning she had no recollection of being told Thomas *would* withdraw, but in the afternoon she testified that she had been told he *might*.²⁶⁴ More importantly, the statements also differed as to the specific action on Hill's part that was predicted to cause the result. She denied in the morning having any recollection of being told that such withdrawal would result from *her charges being made in writing*,²⁶⁵ but acknowledged in the afternoon having been told that withdrawal might result if she *came forward*.²⁶⁶ Specter's reference to his "legal opinion" reflects the complex nature of a senator's role in hearings. In one sense, his opinion was expert testimony from a witness whose qualifications, regardless of how significant they might be, had not been established on the record. In another regard, however, Specter's role was analogous not to that of a witness, but to that of a judge. He would ultimately vote on the confirmation, so it was his responsibility and his prerogative to evaluate the credibility of witnesses. Finally, he acted as a party: an adversary attempting to influence the outcome of the hearings.

Hearsay remained a prominent feature of the hearing, not just in the questioning by senators, but in the testimony as well. As his testimony continued, Thomas said a member of his staff had told him repeatedly, when Hill was working for him, that "she did not have [Thomas's] best interests at heart."²⁶⁷ That same general theme of dangerousness was touched upon by Senator Simpson, who said he had received

²⁶¹*Id.* at 230.

²⁶²*Id.* at 229.

²⁶³*Id.* at 230.

²⁶⁴*Id.* at 229-30.

²⁶⁵*Id.* at 229.

²⁶⁶*Id.* at 230.

²⁶⁷*Id.* at 265.

many letters from people who knew Hill saying, “[W]atch out for this woman.”²⁶⁸ Not only were these letters hearsay²⁶⁹ from anonymous declarants, but they also touched on Hill’s character, not for trustworthiness, but for an ill-defined trait of being someone to “watch out for.”²⁷⁰

Senator Leahy then made an announcement arguably out-of-place in a hearing devoted to determining what happened: that calls to his office were “split down the middle.”²⁷¹ When Leahy is seen in his role as a judge, with the responsibility to base his decision on the facts, his reference to phone calls to his office is troubling. He is aware, of course, of such expressions of opinion by constituents, but if he plans to cast his vote based on the tally of telephone calls he receives, why bother receiving evidence?

Biden himself addressed the relative merits of a congressional hearing and a court proceeding as vehicles for resolving disputes such as the charges against Thomas. He spoke of the difficulty of judging allegations of the type Hill had made. Referring to male nominees for other positions, who have been accused of physically abusing their wives, he said:

Now, we have an option in that particular [spousal abuse] case to say, well, we will send it to the court first. Before we decide whether to confirm this particular person, have the court decide that issue. Believe me, I would like that. I did not sign onto this job or run for it to be a judge.²⁷²

Biden’s distaste for a judicial role is emblematic of the chief flaw in a system that uses partisan legislators as finders of fact: they are not neutral—being neutral is inconsistent with their responsibilities—and they are ill-at-ease with neutrality. They fight for their constituents, their parties, and their principles—and rightfully so, when they act as legislators making policy, but not so when they function as fact-finders. Biden then explained why the matter must remain with his committee, rather than a court, even though he (and supposedly his colleagues) were uncomfortable acting as judges. With reference to the Thomas confirmation hearings, apparently referring to the need to act expeditiously, Biden said, “We could say we are not going to resolve that, let’s put this nomination on hold and send it to the courts. Not a possibility. Not able to do that”²⁷³

Then, as if to illustrate one reason he had no desire to be a judge—the fact that he and his Senate colleagues were ill-suited to make evidentiary rulings and findings of fact—Biden began testifying. He stated that every expert he knew on the topic had said (about the type of allegations Hill made against Thomas) that “[i]t doesn’t

²⁶⁸*Id.* at 253.

²⁶⁹*See* FED. R. EVID. 801 (“‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”).

²⁷⁰*Hearings Thomas, supra* note 225, at 253.

²⁷¹*Id.* at 265-66.

²⁷²*Id.* at 266.

²⁷³*Id.* at 267.

happen in isolated instances. It is a pattern.²⁷⁴ Biden not only introduced hearsay, he introduced hearsay expert testimony.²⁷⁵

The witness who immediately followed Hill and Thomas presented a textbook example of prior consistent statement constituting non-hearsay.²⁷⁶ Until this point in the hearing, the major themes had been Hill's accusation that Thomas sexually harassed her a number of years before the hearing, and the assertions of some senators that after Thomas was nominated to the high court, Hill had fabricated or embellished the charges at the behest of a member or members of the Senate staff to keep Thomas off the Court because of his judicial philosophy.²⁷⁷ As to this claim, a witness testified that around the time when the harassment allegedly occurred—and thus long before Thomas's nomination to the Supreme Court—Hill had confided in her about the harassment.²⁷⁸ This witness was followed by three more witnesses who described conversations, long before Thomas's nomination, in which Hill informed them of the sexual harassment about which she was now testifying before the Committee.²⁷⁹ As Biden made clear, the hearing room was not a courtroom, and the rules of evidence did not apply. The testimony of these four witnesses, however, provides a precise illustration of the circumstances under which a witness's prior consistent statement is admissible. Hill testified in 1991 that Thomas had sexually harassed her in the early eighties. She was then accused of fabricating the charges after she learned of²⁸⁰ Thomas's nomination to the Supreme Court because she disagreed with his politics. Once the charge of recent fabrication was made, her statements to these four witnesses about the harassment, statements made several years before the hearing, were admissible to rebut the claim. Because the rules of evidence did not apply, the testimony of these witnesses was not subject to a hearsay objection, and so the analysis described above was not necessary. The rule regarding prior consistent statements does demonstrate why the testimony of these four witnesses was more pertinent than, for example, Senator Simpson's assertion that he had received many letters from many unnamed people who claimed to know Hill, advising Specter to watch out for this woman. The letters were not placed in the record, nor did Hill have the opportunity to review them or respond to them.

During the questioning of another panel of witnesses, an exchange occurred which demonstrated how little regard the committee had for evidentiary principles and the extent to which the committee members, as was their prerogative, did not consider themselves bound by those principles. The hearing went so far afield from fact-finding that a senator began questioning another senator. While Biden was

²⁷⁴*Id.*

²⁷⁵See FED. R. EVID. 801, 702, 703.

²⁷⁶Fed R. Evid. 801.

²⁷⁷*Hearings Thomas, supra* note 225, at 233-34.

²⁷⁸*Id.* at 273 (testimony of Ellen M. Wells, Project Manager, Am. Welfare Ass'n).

²⁷⁹See generally *Hearings Thomas, supra* note 225, at 274-333 (testimonies of John W. Carr, Esq., Susan Hoerchner, Worker's Comp. Judge, and Joel Paul, Assoc. Prof., Am. Univ. Law Sch.).

²⁸⁰Andrew Rosenthal *White House Role in Thomas Defense*, N.Y. TIMES, Oct. 14, 1991, at A1.

questioning one member of this pro-Thomas panel of witnesses, Biden stated to one of the witnesses that he believed her.²⁸¹ The next question was directed to Biden by Senator Thurmond: "In fact, you would believe all of them, wouldn't you?"²⁸² Biden replied, "Yes."²⁸³

Senator Metzenbaum then put into the record a letter from sixty-six of Hill's law school classmates, attesting to her decency and integrity.²⁸⁴ A witness appearing in favor of Thomas responded to Metzenbaum's questions about the letter in this way: "Well, I am sure that we had at least [sixty-six] women that were ready to come before this committee to tell them that Judge Thomas is a man of great decency and integrity if we are going to play the numbers game."²⁸⁵ Another of the witnesses who had spoken in Thomas's favor said, "You will have six times [sixty-six] . . ."²⁸⁶

The issue of relevance arose, but was not addressed, when the hearing moved beyond the issue of Hill's accusations; Ms. Barry, responding to a comment by Metzenbaum, accused him of using an old tactic employed for too long in the nation's history, and told him she was sickened by the tactic. Then Ms. Barry, Mr. Alvarez, and Senator Kohl argued heatedly, cutting each other off, about whether the treatment of Thomas by the committee constituted a lynching.

Disregard for reliability was vividly displayed in Senator Metzenbaum's questioning of a witness who appeared on behalf of Thomas. When John Doggett offered testimony unfavorable to Hill, Metzenbaum saw the opportunity to ask Doggett about allegations that he, Doggett, had touched women inappropriately and made unwelcome sexual remarks to women, all in the workplace. The primary obstacle to Metzenbaum's plan to explore this line of questioning was that the women who allegedly leveled these charges were not testifying²⁸⁷ before the Committee, providing a sworn statement, or even a letter. Because he was not constrained by any standard evidentiary rules,²⁸⁸ Metzenbaum found a device by which he could raise these allegations. That device was the use of rank hearsay from telephone interviews conducted by members of the Senate staff, and a remarkable effort to characterize the hearsay as Doggett's own statement.

In preparation for the hearings, members of the Senate staff had interviewed by telephone the women who apparently made the accusations, and those interviews

²⁸¹*Hearings Thomas, supra* note 225, at 373.

²⁸²*Id.*

²⁸³*Id.*

²⁸⁴*Id.* at 418.

²⁸⁵*Id.* at 419.

²⁸⁶*Id.* The witness's statement seems to employ the eloquent style and meter of the Biblical injunction to forgive, not seven times, but seventy times seven. *Cf.* Matthew 18: 21-22.

²⁸⁷The witnesses may have been unwilling to make the allegations before the committee, or the committee may have declined to hear the witnesses because of the risk that testimony of minimal relevance could waste the Committee's limited time.

²⁸⁸Although Chairman Biden had prohibited reading from the affidavits of witnesses who did not testify, that rule did not govern the materials Metzenbaum used, because it was not an affidavit.

were transcribed. Those staff members subsequently conducted a telephone interview with Doggett, in which the staff members recounted the allegations made by the women in the earlier telephone interviews and asked Doggett for a response. The telephone interview of Doggett was also transcribed. During his questioning of Doggett in the committee hearing, Metzenbaum read from that transcript of the staff members' telephone interview of Doggett. Specifically, Metzenbaum read a staff member's recitation, in the Doggett telephone interview, of allegations which members of the Senate staff had heard in their telephone conversation with the women.²⁸⁹

These allegations that Metzenbaum made to the Senate Judiciary Committee during the confirmation hearing were triple hearsay: Metzenbaum said that the transcript of staff's call to Doggett said that the staff members had said during the Doggett interview that Amy Graham and Joane Checci in their own interviews had said Doggett had engaged in inappropriate touching and unwelcome sexual comments in the workplace.²⁹⁰ After Metzenbaum finished reading the accusations, he said, "Mr. Doggett, you have an interesting series of questions and answers in this transcript. I wonder if you would care to tell us what are the facts with respect to these several ladies who have raised questions concerning your own conduct?"²⁹¹ Doggett denied the allegations. He also said that the women's statements were unsworn. Metzenbaum then delivered the final acrobatic flourish of his inquiry. Referring to the transcript of the staff/Doggett telephone interview in which Senate staff members recited the women's allegations, Metzenbaum said, "This isn't *her* statement. I'm reading from *your* statement, Mr. Doggett."²⁹² Biden made a somewhat tardy ruling that questions about unsworn allegations by witnesses who would not appear before the Committee were out of order.²⁹³

The next significant ruling appears to be in conflict with the ground rules Biden had announced at the beginning of the hearing. Although Biden had disclaimed that any courtroom rules of evidence applied to the hearing,²⁹⁴ the committee used just such rules in excluding evidence that Anita Hill had taken a polygraph test regarding her charges against Thomas and passed. In making that ruling, the Committee relied on its conclusion that polygraphs are inadmissible in court trials. Reliance on courtroom evidentiary rules to determine the admissibility of these polygraph rules was inappropriate for at least two reasons. First, the rule that polygraphs are inadmissible is by no means uniform. Testimony about polygraph test results can be admitted as substantive evidence of the test outcome under the proper circumstances in the Sixth,²⁹⁵ Eighth,²⁹⁶ and Ninth²⁹⁷ U.S. Circuit Courts of Appeal. Other circuits

²⁸⁹*Hearings Thomas, supra* note 225, at 562-64.

²⁹⁰*Id.* at 563-64.

²⁹¹*Id.* at 564.

²⁹²*Id.* (emphasis added).

²⁹³*Id.* at 565.

²⁹⁴*Id.* at 2.

²⁹⁵*United States v. Stephens*, 148 F. App'x 385, 389 (6th Cir. 2005) (describing the Sixth Circuit's standard for the admissibility of polygraph tests).

have admitted the evidence of polygraphs tests for limited purposes.²⁹⁸ Second, the committee, through its chair, had expressly disclaimed being bound by evidentiary rules and had in fact asserted that Senate rules required the committee to admit evidence that would not be admissible at a trial.²⁹⁹

Even though the committee declined to consider the results of the polygraph Hill took and passed, unidentified experts whose double-hearsay statements were submitted through the affidavit of a former United States Attorney were allowed to impeach those results by alleging that Hill passed the polygraph because she was delusional. These allegations that Hill was suffering from delusions were made in the affidavit of former U.S. Attorney, Larry Thompson.³⁰⁰ Two evidentiary issues, in addition to the polygraph question, are presented by Thompson's statement. The first is notable for its status as double hearsay, in that it consisted of statements made by Thompson *and* statements made by Thompson's unidentified scientific sources. Thompson did not testify at the hearing, nor did his sources. Thompson's affidavit, referring to the statements of his unidentified sources, was admitted at the hearing. The second issue arises from the first. Because the statement was hearsay, no one could ask Thompson to clarify his assertion, in order that the Committee could understand exactly the identity and expert qualifications, if any, of the person who was alleging that Hill was delusional. Thompson's statement read:

In the context of these proceedings I understand, based on information from reliable scientific sources, that if a person suffers from a delusional disorder he or she may pass a polygraph test. Therefore, a polygraph examination 'in this context has absolutely no bearing on whether the events at issue are true or untrue.'³⁰¹

What did Thompson, in reliance on his sources, have to say to the Committee? He was saying much more than that a delusional person could pass a polygraph while stating falsehoods. That statement had no bearing on the hearing unless there was reason to believe Hill was in fact delusional. Had Thompson's scientific sources told him Hill was delusional? Were those sources psychiatrists? Had they examined or treated Hill? Or had Thompson (or his scientific sources) concluded that Hill was delusional because they had turned on the television and seen some lay witnesses express the lay opinion that Hill was fantasizing—an opinion which, if expressed by

²⁹⁶Galloway v. Brewer, 525 F.2d 369, 371 (8th Cir. 1975) (weighing probative value against prejudice).

²⁹⁷United States v. McIntyre, 582 F.2d 1221, 1226 (9th Cir. 1978) (stating that trial court has wide discretion in admitting or excluding polygraphs).

²⁹⁸See, e.g., United States v. Ramos, 933 F.2d 968, 976 (11th Cir. 1991) (not admissible until witness's credibility attacked) Lenea v. Lane, 882 F.2d 1171, 1174 (7th Cir. 1989) (admissible in prison disciplinary proceeding); Marcial v. Coronet Ins., 880 F.2d 954, 961 (7th Cir. 1989) (admissible to prove party's good faith); United States v. Lynn, 856 F.2d 430, 433 (1st Cir. 1988) (citing United States v. Estrada-Lucas, 651 F.2d 1261, 1264 (9th Cir. 1980) (admissible for impeachment)).

²⁹⁹Hearings Thomas, *supra* note 225, at 2.

³⁰⁰See *id.* at 374.

³⁰¹*Id.* at 373.

anyone, should have been expressed by an expert, in keeping with rudimentary evidentiary principles.³⁰²

No qualified expert opined at any point that Hill was delusional. Yet Thompson's statement, without identifying the field in which his sources were experts, asserted that Hill passed the polygraph because she was delusional. The affidavit contains this allegation, yet is vague enough that the source of the allegation that Hill may be delusional cannot be identified.

Quoted below are statements from Thompson's affidavit, interlineated with hypothetical questions that might have been used to clarify his statements, if he had appeared at the hearing, taken the oath, and testified.

Thompson: In the context of these proceedings . . .

Question: What context? Do you mean in the context of a hearing in which a witness who took a polygraph and passed is accused by lay witnesses of being delusional? Do you believe Hill is delusional? If so, do you form that expert opinion based on your own evaluation or someone else's? Has any expert said she was delusional?

Thompson: "I understand, based on information from reliable scientific sources, that if a person suffers from a delusional disorder, he or she may pass a polygraph test."³⁰³

Questions: Why does that matter in this hearing? Is there someone in this hearing you believe is delusional? Who is it? Why do you believe that person is delusional? Are you an expert in that area?

Thompson: "Therefore, a polygraph examination in this context has absolutely no bearing on whether the events at issue are true or untrue."³⁰⁴

Question: What is "this context"? It would be the context of a delusional person taking a polygraph, right? So, you cannot state the polygraph has no bearing unless you have concluded that Hill is delusional, correct? Have you reached that conclusion? On what basis?

³⁰²*Id.* at 83 (Specter quoting from law school dean's statement to the effect Hill's allegations were the product of fantasy); *id.* at 438 (Specter's statement that he intends to discuss Dogett's affidavit which develops the idea of Hill's fantasies); *id.* at 385. Mr. Fitch, a lay witness, testifies,

I may be on shaky ground here. I have read a little bit in psychiatry, but there is something called transference. . . .
 . . . [Y]ou're able to focus on someone who is either a therapist or someone who has been kind to you, and things get kind of muddled and they carry the burden of whatever someone else may or may not have done or . . . something that you think actually happened.

Id.

³⁰³*Hearings Thomas, supra* note 225, at 373 (quoting Mr. Thompson's affidavit). The questions throughout this section are inserted by the author.

³⁰⁴*Id.* at 373 (quoting Mr. Thompson's affidavit).

Because Thompson was allowed to put his opinion before the senators by affidavit, he was not asked these or similar questions. Allegations that Hill was suffering from delusions, made by lay people with no psychiatric training, were bootstrapped into an affidavit creating the implication that, “in the context” of her delusions, the fact that she had passed the polygraph had no tendency at all to prove that she was telling the truth.

Characterized as it was by hearsay, unidentified expert witnesses, anonymous hearsay declarants, a senator as a character witness, one senator interrogating another, the committee chairman’s reference to the views reflected in telephone calls to his office, and letters from unidentified witnesses as character evidence, the Thomas hearings may be the modern-day nadir of Senate concern with reliability. The low emphasis on trustworthiness can perhaps be attributed to the highly-charged political nature of the hearing. The Senate was so closely divided on the question of Thomas’s nomination that Vice-President Dan Quayle, serving in the administration of the President who nominated Thomas, appeared in the Senate chamber at the time the vote was to be taken, prepared to break a tie if necessary.³⁰⁵ The vote to confirm Thomas was fifty-two to forty-eight.³⁰⁶ At those points during the hearings when senators abandoned trustworthiness, they may have acted on a variation of the truism “any port in a storm:” any evidence in a struggle for control of the Supreme Court.

*E. Oversight and Investigation by a House Subcommittee:
Responding to Hurricane Katrina*

Hurricane Katrina made landfall on the southern coast of the United States on August 29, 2005.³⁰⁷ By the time she had run her course, Katrina had proven to be one of the most devastating storms in the history of the nation.³⁰⁸ The hurricane had caused injury, death, and economic loss, all on a massive scale.³⁰⁹ In the storm, its aftermath, and the public furor over the response to the disaster, the government’s actions in predicting the storm and reacting to it were sharply condemned.³¹⁰ Michael Brown, Director of the Federal Emergency Management Agency (“FEMA”), was the subject of a firestorm of criticism, which ultimately led to his resignation.³¹¹ To carry out its responsibility with regard to a matter of such great public concern and anger, the House of Representatives appointed the Select Bipartisan Committee to

³⁰⁵Examiner News Service, *Words by Foe Aided Thomas, The Thomas Confirmation, Biden’s Call for “Benefit of Doubt” Cited by Senators; Oath of Office May Be Taken Monday*, SAN FRANCISCO EXAMINER, Oct. 16, 1991, at A1.

³⁰⁶*Id.*

³⁰⁷RICHARD D. KNABB ET AL., TROPICAL CYCLONE REPORT, HURRICANE KATRINA 3 (National Hurricane Center Dec. 20, 2005), available at http://www.nhc.noaa.gov/pdf/TCR-AL122005_Katrina.pdf.

³⁰⁸*Id.* at 1.

³⁰⁹*Id.*

³¹⁰A Failure of Initiative: Final Rep. of the Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina, H.R. REP. NO. 109-377, at 1-6 (2006).

³¹¹Trenton Daniel, *Hurricane Katrina: Meek Applauds Changes at FEMA*, MIAMI HERALD, Sept. 13, 2005, at B4.

Investigate the Preparation for and Response to Hurricane Katrina. Congressman Tom Davis, a Republican from Virginia, chaired the Select Committee. Davis opened the hearings by offering his interpretation of the Select Committee's mandate: "to stop attacking or defending government entities for partisan purposes, and do the oversight we're charged with doing."³¹² As a member of the party in power at the time of the prediction of and reaction to the storm, Davis seems to be saying that he does not want the committee to be too zealous in its search for the facts. He appears to be steering the committee away from any exacting scrutiny of the administration's actions with regard to the hurricane.

One of the witnesses allowed to submit testimony to the committee was James Bernhard, the Chairman of the Board and Chief Executive Officer of The Shaw Group, Inc. ("Shaw"). Shaw, a Louisiana corporation, had entered into a contract with FEMA to provide services in areas devastated by the storm.³¹³ Shaw was awarded the contract without any process of competitive bidding.³¹⁴ One justification for such a contract is that in the wake of a disaster, there is no time for bidding. Still, the no-bid contract, along with Shaw's political contributions to the party controlling the executive branch during the storm and the response to it came under the scrutiny of media and government watchdogs.³¹⁵ Yet Bernhard's written testimony before the select committee consisted only of a patently self-serving written statement. No committee member posed any questions to Bernhard regarding the no-bid contract, the campaign contributions, or the quality of Shaw's work. Because no questions were asked, the only effect of this testimony was to bolster the assertions that the politically-connected contractor had performed well. No significant relationship between the testimony and the committee's task of oversight and investigation is apparent. This select committee, like Congress and all of its committees, exercised the power Senator Harkin had guarded so jealously with his objection during the Clinton impeachment trial: the power of Congress, its two constituent bodies, and the committees of those two bodies, to determine which questions they will ask, which witnesses they will hear, and which documents they will review.³¹⁶ If the House Subcommittee in fact called Bernhard in order to allow Shaw to defend its work—and thereby defend the administration's decision to award Shaw a no-bid contract, the decision to call Bernhard for that purpose was within the power and prerogative of the committee. Such a decision, however, to the extent it is politically motivated, should call into question the neutrality of any findings made on the basis of that testimony.

³¹²U.S. Representative Thomas M. Davis III (R-VA) Holds a Hearing on Hurricane Prediction, Part 1, FDCH Cap. Transcripts 2005 WLNR 15024382 (September 22, 2005).

³¹³Laura Jesse, *No-bid Contracts to be Reopened*, SAN ANTONIO EXPRESS-NEWS, Oct. 17, 2005, at 5A.

³¹⁴*Id.*

³¹⁵*Id.*

³¹⁶*See supra* notes 208-212 and accompanying text.

III. THE PARTIAL-BIRTH ABORTION PROHIBITION ACT OF 2003: CONGRESS MAKES FINDINGS BEFORE HEARING EVIDENCE; THE COURT EMPLOYS THOSE FINDINGS, THOUGH ACKNOWLEDGING THEY ARE INCORRECT

A. *Erroneous Legislative Findings Underlying the Partial-Birth Abortion Prohibition Act of 2003*

The fact-finding process leading up to Congress's passage of the "Partial Birth Abortion Prohibition Act of 2003"³¹⁷ ("PBAPA 2003") was so inadequate that some findings, including the keystone finding that the banned procedure was never medically necessary to protect the health of the pregnant woman, were simply wrong. Even in upholding the ban, the United States Supreme Court acknowledged these errors made by Congress in reaching the conclusions on which the law was based. Describing the findings as "factually incorrect,"³¹⁸ the Supreme Court explained why they were erroneous by citing to those pages of the trial court opinion in which their inaccuracy is detailed,³¹⁹ the explanation of the errors in Congress's finding of "a 'moral, medical, and ethical consensus' that . . . [the procedure] 'is never medically necessary.'"³²⁰ The trial court explains the flaws in the congressional process which resulted in this finding—a finding that the trial court, the appellate court, and the Supreme Court all conclude to be incorrect. Congress claimed that there was such "a medical consensus that the . . . procedure [wa]s never medically necessary"³²¹ when in fact nine medical associations, including the American College of Obstetricians and Gynecologists, as well as individual physicians, had testified before Congress in opposition to the ban because of their medical opinion that it was, for some women under some circumstances, safer than other procedures.³²²

Among the unspecified number of congressional findings which the Supreme Court determines to be incorrect, it names only two, concluding that "[t]wo examples suffice."³²³ One of those two findings is that a medical consensus exists that the banned procedure is never medically necessary to protect health. The other example the Supreme Court gives of an incorrect finding is Congress's determination that no medical schools teach the procedure that is the subject of the ban.³²⁴ The Court refers to two scenarios that may account for the erroneous congressional findings: the findings may have been inaccurate at the time they were made, and, regardless of

³¹⁷18 U.S.C.A. § 1531 (2008).

³¹⁸*Gonzales v. Carhart*, 127 S. Ct. 1610, 1637-38 (2007).

³¹⁹*Id.* at 1638.

³²⁰*Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436, 488 (S.D.N.Y. 2004) (quoting Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(1), 117 stat. 120 (3003) *reversed by but cited for some propositions in Gonzales*, 127 S. Ct. 1610).

³²¹*Gonzales*, 127 S. Ct. at 1638.

³²²*Nat'l Abortion Fed'n*, 330 F. Supp at 481-82.

³²³*Gonzales*, 127 S. Ct. at 1638.

³²⁴*Id.*

whether correct when made, they may have been superseded,³²⁵ presumably by changes in circumstances between the legislative hearings and the litigation. Although the Court leaves each of those possibilities open as to each of the two erroneous findings, the record establishes that Congress's erroneous conclusion that there is a medical consensus that the procedure is never medically necessary to protect health was incorrect at the time Congress made it. That section of the trial court's decision to which the Supreme Court cites for the proposition that the congressional finding was incorrect³²⁶ describes, for example, the evidence before Congress that individual physicians and nine medical associations opposed the ban, including the American College of Obstetricians and Gynecologists.³²⁷ With Congress aware, at the time of its finding, of such a significant body of medical opinion that the procedure was sometimes necessary to protect health, any court would be hard-pressed to conclude the finding was correct.

B. Judicial Review of Congressional Findings, Erroneous and Otherwise

The limits of the Supreme Court's prerogative to rely on the erroneous Congressional findings underlying PBAPA 2003—and the level of scrutiny with which the Court is to review any given legislative enactment—depend on the jurisprudence of judicial deference to congressional findings. That body of law exists because the Court, over time, has calibrated its level of respect for Congress's findings to account for the legal theory under which the challenge to the statute is brought, the asserted rights or interests of the parties making the challenge, and the legal status of those parties.

Any exploration of legislative findings and judicial review begins at the "Continental Divide" of judicial deference: the border separating those legislative acts that the Court reviews to determine whether they have any rational basis, and those in which the Court strictly scrutinizes the legislature's action. Rational basis is a forgiving analysis, while strict scrutiny is not, so the standard of review is crucial to the outcome of the challenge. Statutes enacted pursuant to Congress's power to regulate interstate commerce, along with statutes creating classifications that are not suspect, are upheld if there is any rational basis for the legislature's action. In sharp contrast, statutes that impinge on individual liberties or involve a suspect classification, are strictly scrutinized.

The theory behind the level of deference applicable in rational basis cases is that the legislature possesses a superior ability, as compared to the court, "to 'amass and evaluate . . . vast amounts of [information]'" necessary to decide complex fact questions subject to change over time.³²⁸ Following from that comparison of institutional competency are a number of ever more deferential rules, in which the Court seems to outdo itself time and again in deferring to Congress. For example, deference is appropriate not only when Congress has in fact "'amass[ed] and

³²⁵*Id.*

³²⁶*Nat'l Abortion Fed'n v. Ashcroft*, 330 F.Supp.2d 436, 481-82 (S.D.N.Y. 2004), *reversed by but cited for some propositions in Gonzales*, 127 S. Ct. 1610.

³²⁷*Id.*

³²⁸*Cal. Pro-life Council Political Action Comm. v. Scully*, 989 F. Supp. 1282, 1299 (E.D. Cal. 1998) (striking down state statute regulating political contributions).

evaluate[d] . . . vast amounts of data”³²⁹ it may also be appropriate even when empirical information is incomplete or wholly unavailable. The rationale for this rule is that, whether there is data or not, the legislative branch is better equipped than the judicial branch to make the determination.

The zenith of court deference, and thus of legislative power, is represented by the decision of the United States Court of Appeals for the Seventh Circuit, in a dispute involving a government benefit available to blind Medicaid recipients, but not to other Medicaid recipients.³³⁰ The benefit provided to blind Medicaid recipients consisted in the State of Indiana’s treatment of income from another government assistance program known as the Plan for Achieving Self-Support (“PASS”).³³¹ Indiana considered the PASS payments to some recipients in determining their income for purposes of Medicaid eligibility, but did not consider the PASS income of blind recipients in determining their eligibility for Medicaid benefits.³³² As lead plaintiffs in a class action, two recipients of PASS benefits, who were severely disabled but not blind, challenged on multiple grounds Indiana’s decision to provide a particular benefit to blind recipients, but not to others.³³³

Although the class raised multiple attacks to the statute based on a number of theories, the challenge which is significant to the relationship between legislative trustworthiness and judicial deference is the equal protection challenge, evaluated pursuant to a rational basis standard because the non-blind PASS recipients were not members of a protected class.³³⁴ Even in the absence of any findings supporting the distinction between the two types of aid recipients, the court concluded that the statute creating the benefit, and limiting it to blind recipients, did not offend the Constitution. Although the legislature did not point to any evidence or empirical data to support the finding on which it relied to provide more benefits to blind Medicaid recipients, the court stated that no such evidence or data was needed, because the Indiana legislature’s decision was valid even if it was based on nothing more than “rational speculation.”³³⁵ The court’s deference was so great that it was even willing to serve as a proxy for the Indiana legislature and conduct the “rational speculation unsupported by evidence or empirical data” which the legislature had neglected to do, or of which it had at best neglected to make a record.³³⁶ The speculation which

³²⁹*Id.*

³³⁰*Vaughn v. Sullivan*, 83 F. 3d 907 (7th Cir. 1996).

³³¹*Id.* at 909 (citing 42 U.S.C. §§ 1382a(b)(4)(B)(iv), 1382b(a)(4) (2000)).

³³²*Id.* at 910.

³³³*Id.*

³³⁴*See Wisconsin v. City of New York*, 517 U.S. 1, 18 (1996) (stating that strict scrutiny is not applicable to alleged failure to count persons in census, absent showing of intentional discrimination by government); *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 489 (1977) (finding that furloughed employee denied unemployment compensation pursuant to state statute denying such benefits to worker employed as result of labor dispute not a member of protected class and, thus, statute is not reviewed under strict scrutiny standard).

³³⁵*Vaughn*, 83 F.3d at 913 (quoting *F.C.C. v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)).

³³⁶*Id.* (quoting *F.C.C.*, 508 U.S. at 315).

the court provided was this: “one potential difference between the blind and the members of the plaintiff class... [was] that blind participants in PASS programs are more likely to become self-sufficient.”³³⁷ The court then applied the forgiving rational basis standard to the speculation the court believed the legislature could have conducted, and declared that speculation to be rational. Even legislative findings which are wrong come within the broad sweep of the *Vaughn* court’s deference: “Wrong or not, . . . such a belief [that blind Medicaid recipients were more likely than other recipients to become self-sufficient if provided the statute’s benefit] could not be called irrational.”³³⁸

Just when it might appear that the limits of deference could not expand any further, the United States Court of Appeals for the Third Circuit, one year after the *Vaughn*³³⁹ decision, ruled not only that a statute subject to rational basis analysis must be upheld when the finding of the legislature could have been based on rational speculation, but also that a statute subject to such analysis must be upheld unless the facts on which the court speculates the legislature relied “could not reasonably be conceived as true by the governmental decisionmaker [sic].”³⁴⁰ As was the case in *Vaughn*, there was no requirement that the legislature make a finding, because the court speculated as to the facts on which the legislature may have relied. Just as the Seventh Circuit was willing to uphold a finding even if it was wrong, Third Circuit seemed to go even further, expressing its willingness to uphold a statute unless it is impossible to conceive of the findings on which the statute may be based as true.

This deference of monumental proportions, when applicable, extends not just to the finding itself, but to the process by which that finding is made. One example of that deference to process is the holding that Congress is not obligated to make a record of the type an administrative agency or a court would be required to make.

When rational basis is not the test, legislatures tend to fair poorly. One rung below rational basis on the deference ladder is the intermediate scrutiny applicable to First Amendment cases involving restrictions that are neutral as to content. In such disputes, the statute is upheld if “Congress has drawn reasonable inferences [that are] based on substantial evidence.”³⁴¹ A leading example of this intermediate level of scrutiny is a First Amendment challenge to a statute requiring cable companies to carry local broadcast television channels. This proper standard to apply to such a content-neutral regulation is whether it: (1) advances government interests which are important and unrelated to suppression of speech; and (2) does not burden a substantially greater quantum of speech than necessary to further those interests. Even employing intermediate scrutiny, the Court conducted so vigilant a review that it examined, in some detail, the very documents relied on by Congress in making its determinations. The legislative record included a study conducted by the Federal

³³⁷*Id.*

³³⁸*Id.*

³³⁹83 F.3d 907 (7th Cir. 1993).

³⁴⁰*Sammon v. N.J. Bd. of Med. Exam’rs*, 66 F.3d 639, 647 (3d Cir. 1995) (internal quotation marks omitted) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)).

³⁴¹*Turner Broad. Sys. v. F.C.C.* 512 U.S. 622, 666 (1994) (reviewing statute requiring cable companies to carry local channels) (citing *Century Comm’n Corp. v. F.C.C.*, 835 F.2d 292, 304 (D.C. Cir 1987)).

Communications System regarding the extent to which cable companies dropped or refused to carry local channels. The Court evaluated this study and found it not only unhelpful, but also insufficient to support Congress's findings that must-carry legislation was needed. The Court reached this conclusion because the study specified neither what time period it covered, nor whether the dropping of stations was permanent. Even if all those questions could have been answered to the Court's satisfaction, the statute would not have survived in the absence of a congressional finding, based on evidence, that local broadcasters would be hurt financially or otherwise disadvantaged in the absence of such a statute. Moreover, there was no information in the record about the effect of the statute on cable programmers. Related to this flaw is the absence of any findings by the trial court regarding the availability and efficacy of constitutionally acceptable, less restrictive means to achieve government's purposes.

The rules established so far are that deference is greatest in rational basis cases and less in intermediate scrutiny cases. The lowest quantum of judicial deference is applied in challenges to the legislature's impingement on fundamental rights or reliance on suspect classifications. The restrictions applicable to Congress's incursion on a constitutional right apply regardless of whether that right is explicit or implicit;³⁴² the same standard is applied to those statutes in which different groups, defined by use of suspect classifications, are treated differently.³⁴³ Examples of statutes and other government actions subject to strict scrutiny because they impinge on fundamental rights include: a state statute prohibiting publication of the names of juvenile offenders, which violates the free speech guarantees of the First Amendment;³⁴⁴ and a state statute completely prohibiting even truthful advertising regarding liquor prices, which violates the First Amendment.³⁴⁵

Strict scrutiny applies to equal protection challenges only when the challenged statute metes out different treatment based on a suspect classification. Not all classifications are suspect. For example, an attorney's right not to divulge accurate information about his services did not require the Court to strictly scrutinize the state's requirement for disclosures by attorneys who advertise their services.³⁴⁶ Prison regulations affecting prisoners' rights to marry and correspond are not evaluated pursuant to a strict scrutiny standard, because a more deferential standard is appropriate in the context of prison rules.³⁴⁷ Classifications that are suspect include race,³⁴⁸ sex,³⁴⁹ national origin,³⁵⁰ and status as an alien.³⁵¹ Among classifications that

³⁴²Harris v. McRae, 448 U.S. 297, 312 (1980).

³⁴³*Id.* at 322-24.

³⁴⁴Smith v. Daily Mail Pub., 443 U.S. 97, 101-02 (1979).

³⁴⁵44 Liquormart v. Rhode Island, 517 U.S. 484, 534 (1996).

³⁴⁶Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985).

³⁴⁷Turner v. Safley, 482 U.S. 78, 90 (1987).

³⁴⁸Brown v. Bd. of Educ., 347 U.S. 483 (1954), *cited in* Harris v. McRae, 448 U.S. 297, 322 (1980).

³⁴⁹Frontiero v. Richardson, 411 U.S. 677, 682 (1973).

³⁵⁰Regan v. Taxation with Representation of Washington, 461 U.S. 540, 548 (1983) (listing national origin among suspect classifications); U.S. R.R. Ret. Bd. v. Fritz, 449 U.S.

are not suspect, and which therefore do not implicate the equal protection clause, are the desire to participate in assisted suicide,³⁵² status as out-of-state attorneys aggrieved by local court rules,³⁵³ status as children of undocumented immigrants,³⁵⁴ and age.³⁵⁵

The hierarchy which the Court has established, in decreasing order of deference, consists of rational basis review, intermediate scrutiny, and strict scrutiny. As the Court gives, so the Court can take away, and the Court has taken away some deference previously enjoyed by the legislature in Commerce Clause cases. Paradoxically, the Court seems to have given Congress some leeway in those matters traditionally governed by the most exacting level of deference—strict scrutiny.

Traditionally, courts have afforded the most forgiving review and the greatest deference³⁵⁶ to Congress's findings that an activity it seeks to regulate has an effect on interstate commerce. Even in Commerce Clause cases, however, deference is not unlimited. A trend toward limiting Congress's power to legislate pursuant to the Commerce Clause—and specifically to limit deference to Congress's finding that an activity it sought to regulate affected interstate commerce—began in the waning years of the twentieth century. Deference was reined in considerably when the Court considered a challenge to the federal Gun-Free School Zones Act, which prohibited possession of guns within a certain distance of a school and rendered such possession a federal offense.³⁵⁷ In considering the attack mounted by a person convicted pursuant to the statute, the United States Supreme Court noted that Congress had not made any finding as to the effect that guns in school zones had on interstate commerce.³⁵⁸ Acknowledging that there is no requirement for Congress to make such a finding, the Court nevertheless stated that a finding, to whatever extent it would be helpful, was absent and that “no such substantial effect was visible to the naked eye”³⁵⁹ Congress's “accumulated institutional expertise” about guns, gained through passing previous laws, could not be imported to form the basis for the finding of an effect on interstate commerce necessary to uphold this statute, because the

166, 174 (1980); *Oyama v. California*, 332 U.S. 633, 647 (1948) (striking down statute, on grounds of equal protection, where statute discriminated based on nationality).

³⁵¹*Graham v. Richardson*, 403 U.S. 365, 375-76 (1971) (invalidating statutes imposing waiting period for aliens to be eligible for government assistance).

³⁵²*Vacco v. Quill*, 521 U.S. 793, 799 (1997) (finding that state statutes prohibiting assisted suicide do not touch on fundamental rights or involve a suspect class).

³⁵³*Frazier v. Heebe*, 482 U.S. 641, 644 (1987) (stating out-of-state attorney subject to local court rule not a member of a suspect class).

³⁵⁴*Plyer v. Doe*, 457 U.S. 202, 223-25 (1982) (stating children of undocumented immigrants are not a suspect class).

³⁵⁵*Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (stating age is not a suspect classification) (citing multiple cases).

³⁵⁶*See Plyer*, 457 U.S. at 223.

³⁵⁷*United States v. Lopez*, 514 U.S. 549 (1995).

³⁵⁸*Id.* at 562.

³⁵⁹*Id.* at 563.

challenged statute prohibits a different act from those acts which Congress had previously criminalized based on data regarding guns.³⁶⁰

Throughout the litigation in the *Lopez* case, up to and including review by the United States Supreme Court, the government attempted to fill in the blanks left by Congress, asking the courts to supply rational speculation sufficient to uphold the enactment, just as the Seventh Circuit had done in *Vaughn*.³⁶¹ The government offered several arguments in an effort to persuade the courts that the statute came within the sweep of Congress's power to legislate pursuant to the Commerce Clause, and each of those arguments was rejected by the Court. For example, the government argued that violent crime affects the cost of insurance for everyone throughout the nation and causes individuals to be reluctant to visit the areas in which such crime occurs. The Court rejected these two arguments, noting that if so tenuous a relationship could justify the legislation, then Congress could regulate every violent crime.³⁶² The government also argued that violence near schools hurts the educational process, ultimately making for less productive citizens and a negative effect on the economy.³⁶³ The Court rejected this argument as well, based on similar reasoning.³⁶⁴

A similarly narrow view of deference resulted in the United States Supreme Court's decision that sections of the Violence Against Women Act were unconstitutional as beyond Congress's authority to legislate under the Commerce Clause. The Court held that whether the effect on interstate commerce is enough to bring an action within Congress's power to regulate pursuant to the Commerce Clause is for the court to decide.

Deference jurisprudence, then, includes the tripartite standard of review, and the Supreme Court's trend toward rejecting Commerce Clause findings. Although these threads of the law of deference can be difficult to weave into a whole garment, certain basic principles can be discerned. One such principle is that Congress's reach is far shorter, and judicial review correspondingly less deferential, when constitutional rights are at stake. The value at work in such cases is that the deference courts afford to legislative findings cannot preclude a court's independent review of the facts bearing on an issue of constitutional law. Absent such a rule, the legislature could, by means of fact-finding, protect a statute violative of human rights from the only review that could remedy that violation.

This traditionally jealous eye with which the Court has protected individual rights would seem to indicate that the recent tightening of deference in Commerce Clause cases would be accompanied by a corresponding tightening of that same standard in the already less deferential individual rights cases. Analysis of this Commerce Clause development leads to this conclusion: when the Court's deference to Commerce Clause findings diminishes as it did beginning in the 1990s, its deference to legislative findings in individual rights cases necessarily moves to an even lower level than such findings in individual rights cases had previously enjoyed, because

³⁶⁰*Id.* at 563.

³⁶¹83 F.3d 907 (7th Cir. 1996).

³⁶²*Lopez*, 514 U.S. at 564.

³⁶³*Id.*

³⁶⁴*Id.*

deference in individual rights cases was at the lowest rung on the deference ladder, even before the tightening of Commerce Clause deference.

This analysis was tested when the Court, after reining in deference in rational basis cases, faced the task of applying the much lower standard of deference in a case involving individual rights in the context of one of the most contentious public policy debates in the nation's history: abortion.

*C. The Court Incorporates Congress's Erroneous Findings into Its Analysis in
Gonzales v. Carhart*

In 2000, in *Stenberg v. Carhart*³⁶⁵ (“*Carhart I*”), the United States Supreme Court ruled that a Nebraska statute banning a certain type of late-term abortion violated the Constitution because it did not include an exception allowing the procedure when necessary to protect the health of the woman.³⁶⁶ Only seven years later, in *Gonzales v. Carhart*³⁶⁷ (“*Carhart II*”), the Court concluded that such a ban in a federal statute did *not* violate the Constitution, even though it included no exception allowing the procedure when necessary to protect the health of the pregnant woman.³⁶⁸ In explaining why a health exception was required in 2000 but not in 2007, the Court referred to changes which Congress made in response to *Carhart I*. “The [2003] Act responded to *Stenberg* [*Carhart I*] in two ways. First, Congress made factual findings. . . . Congress found, among other things, that ‘[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary’”³⁶⁹ Paradoxically, while the Court appeared to refer to Congress’s “never medically necessary” finding to explain what had changed between the dramatically different rulings in *Carhart I* and *Carhart II*, the Court also concluded that that same finding was incorrect and stated that it did not “place *dispositive* weight on Congress’s findings.”³⁷⁰

The “never medically necessary” finding made by Congress,³⁷¹ and the importance of that finding to the decision in *Carhart II*, give special significance to the degree of evidentiary rigor, or lack of it, which Congress employed in making that finding. Any evaluation of the trustworthiness of this finding begins with the Supreme Court’s determination that the finding is incorrect—that Congress got the proverbial cart before the horse, or, in this case, the finding before the proof. Instead of being based on the evidence that would ultimately be received by Congress, the

³⁶⁵*Stenberg v. Carhart*, 530 U.S. 914 (2000).

³⁶⁶*Id.* at 937-38; NEB. REV. STAT. §§ 28-326(9), 28-328(1) (2007).

³⁶⁷*Gonzales v. Carhart*, 127 S. Ct. 1610 (2007).

³⁶⁸*Id.* at 1635-37; *see also* 18 U.S.C.A. § 1531 (2008).

³⁶⁹*Gonzales*, 127 S. Ct. at 1624 (quoting Partial-Birth Abortion Act of 2003, P.L. No. 108-105, § 2, 117 Stat. 1201 (referring to the Congressional Findings in the historical and statutory notes following 18 U.S.C.A. § 1531 (2007))). Congress’s second response to *Carhart I*, described by the Court as “more relevant” to the Court’s decision in *Carhart II*, was to describe the prohibited procedure with more specificity. *Id.*

³⁷⁰*Id.* at 1637 (emphasis added).

³⁷¹ Partial-Birth Abortion Act of 2003, P.L. No. 108-105, § 2(1), 117 Stat. 1201.

“never medically necessary” finding, and essentially all the congressional findings enumerated in the statute, were made at the beginning of the 2003 legislative process, before the first witness testified or the first exhibit was examined. Any evidence that may have been before Congress when it passed abortion bans in 1995 and 1997 could not be considered in fact-finding conducted with regard to the 2003 act, for three reasons. First, medicine changes at such a pace that evidence which is at least six years old (carried forward from 1997 to 2003) cannot be assumed to be current. Second, the makeup of Congress is not stagnant. Most, if not all, of the senators and representatives who heard the evidence supporting the 1997 ban would have stood for re-election before the consideration of the 2003 ban. Third, the pre-2003 evidence was received in consideration of bans that were significantly different from the 2003 law—and the United States Supreme Court has made clear that evidence received while considering the prohibition of one act cannot be carried over and used in consideration of a statute prohibiting a different act.

When the Subcommittee on the Constitution of the House Judiciary Committee convened on March 25, 2003, Chairman Steve Chabot *opened* the hearings with a statement that corresponds, almost verbatim, with the congressional finding that Congress included in the law and on which the Supreme Court relied. Before his subcommittee had received any evidence, Chabot had already decided what he believed—and those beliefs would later be memorialized as the findings of Congress. Chabot said, “[a] moral, medical and ethical consensus exists that partial birth abortion is an inhumane procedure that is never medically necessary and should be prohibited.”³⁷² He spoke not from evidence, because no evidence had been received, but from the decision he had already made, before the hearing began.

Following Chabot’s statement, he and the other members of the committee had the opportunity to be present while evidence³⁷³ was presented on both sides of the question of the procedure’s medical necessity. The committee first received the statement of Mark G. Neerhof, a professor of obstetrics and gynecology. Dr. Neerhof testified that the procedure involved serious risks to the woman and that none of those risks are necessary because other procedures are available.³⁷⁴ He also testified that the type of abortion under discussion was “never the only procedure available[,]”³⁷⁵ but he did not testify that it was never the safest procedure available.³⁷⁶ The documents received by the Committee included the statement of board-certified Maternal-Fetal Medicine Specialist Curtis Cook, that in ten years of practicing maternal-fetal medicine he had never encountered a clinical situation in

³⁷²*Partial-Birth Abortion Act of 2003: Hearing on H.R. 760 Before the Subcomm. on the Constitution, Comm. on the Judiciary*, 108th Cong. 1 (2003) [hereinafter *Hearing on H.R. 760*], available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:85987.pdf.

³⁷³Although law professors and lawyers also testified before the subcommittee, those experts were called to assist the subcommittee in understanding the law, and so their statements had no bearing on the findings regarding a consensus opposition to the procedure and the finding that the procedure was never medically necessary.

³⁷⁴*Hearing on H.R. 760*, *supra* note 372, at 6-7.

³⁷⁵*Id.* at 7.

³⁷⁶*Id.* at 6-10.

which the procedure at issue was required or even considered a clinically superior option.³⁷⁷ Dr. Cook further described the procedure as “gruesome” and “inhumane.”³⁷⁸ Physician Camilla Hersh submitted a letter to the committee in which she stated that the procedure was never medically necessary to protect a woman’s health.³⁷⁹ The record of the hearing also includes a 1996 letter from an obstetrician/gynecologist. The physician stated that he had never seen a situation in which the procedure was necessary.³⁸⁰ The record includes letters from other physicians to the effect that the procedure (or the procedure about which the physician is writing) is never medically necessary to protect a woman’s health.³⁸¹

There was also substantial evidence offered in opposition to the ban. The record reflects opposition to the ban by the American College of Obstetricians and Gynecologists and eight other medical societies.³⁸² In addition, the record includes letters and statements from physicians to the effect that doctors should have the option of using the procedure because it is sometimes necessary to protect a woman’s health.³⁸³

Other details of the hearing raise additional concerns about Congress’s fidelity to accuracy and trustworthiness. The letters in the record, particularly the older letters dating back as much as a decade, raise hearsay concerns. In addition, Congressman Chabot put hearsay into the record in the guise of a question. Chabot asked Neerhof a question which consisted largely of quotations from the statements of a registered nurse, Brenda Pratt-Shaffer, particularly her graphic description of a late-term abortion procedure she had witnessed. She did not testify before the subcommittee considering the 2003 ban, nor was she available to be questioned at that hearing. But her statements are in the legislative record of that hearing because a congressman read them into the record in a lengthy narrative preceding a question to a different witness. The United States Supreme Court, in upholding the ban, quoted this hearsay statement.

A second significant evidentiary concern regarding the 2003 hearings, besides hearsay, is the qualification of expert witnesses who testified or submitted written statements, as well as the reliability of their methods. Of the many expert witnesses, none was required to establish, to the extent necessary in a courtroom *voir dire*, that he was qualified to offer testimony on the pertinent topic or that the methods by which he reached his conclusions were reliable methods appropriate to his specialty.³⁸⁴

³⁷⁷*Id.* at 88.

³⁷⁸*Id.* at 89.

³⁷⁹*Id.* at 115-16.

³⁸⁰*Id.* at 117.

³⁸¹*Id.* at 118-19, 130.

³⁸²*Gonzales v. Carhart*, 127 S. Ct. 1610, 1644 (2007).

³⁸³*Hearing on H.R. 760, supra* note 372, at 186-95.

³⁸⁴*See* FED R. EVID. 701 (setting forth the scope of opinion testimony by lay witnesses); *see also* FED R. EVID. 702 (setting forth the qualifications necessary to testify as an expert witness and the grounds for admissibility of an expert’s conclusions).

The fact-finding supporting the PBAPA 2003 is flawed in other respects. The minority party, which generally opposed the bill, was allowed only one witness at the hearing before the Subcommittee on the Constitution of the House Judiciary Committee. Forced to choose between a constitutional law expert and a medical expert, the minority opted to call the former, leaving the record devoid of any live medical testimony before the committee in support of the position that the procedure was sometimes necessary. Congress and its committees, as Senator Harkin stated so pointedly during the Clinton impeachment trial, choose the evidence they hear.³⁸⁵ More to the point, the majority in Congress chooses the evidence that will be heard. For that reason, there exists a risk that Congress, if it is predisposed to reach a particular outcome, can choose to accept witnesses and documents that support that outcome,³⁸⁶ rather than examining all pertinent evidence in order to make findings based on the facts.

Further evidence that Congress favored politics over reliability came from outside the government. After the Supreme Court decided *Carhart II*, confirmation that Congress's "never medically necessary" finding was wrong came from an unexpected quarter: Focus on the Family ("Focus"), one of the most conservative, and most politically active, Christian organizations in the country, with a radio audience of seven million, led by James Dobson.³⁸⁷ Focus's acknowledgement that the banned procedure has safety advantages is best understood in the context of a chronological review of two statements issued by Focus regarding the safety of the procedure.

Before the ban was enacted, in its lobbying for passage of the statute, Focus issued and posted on its website a statement, reassuring those who might be concerned that the proposed ban supported by Focus could pose a detriment to the health of some women. The Senior Policy Analyst for Focus, adopting the statements of certain physicians, set forth Focus's position regarding the need for a health exception: "[t]here is no obstetrical situation that requires the willful destruction of a partially delivered baby to protect the life, health or future of a woman."³⁸⁸ Focus used this adamant statement denying the need for a health exception as it rallied its

³⁸⁵145 CONG. REC. S59, 279 (daily ed. Jan. 14, 1999).

³⁸⁶Legislators do not have a corner on political fact-finding. Courts are as capable as legislatures of creating the very facts that will lead to the conclusion they favor. There are, however, limits on judges' political fact-finding, which do not apply in the legislative branch. Fact-finding in courts, at least of judicial facts, is typically conducted by jurors, making it impossible for judges to generate an outcome by manipulating the facts. In constitutional challenges, however, the fact findings will usually be made by the court. Another check on political fact-finding by judges is the appellate court. Finally, the court's obligation to generate a written explanation of its findings means that the court will not have unbridled discretion with regard to facts. The court can serve its political interests only in so far as it can explain them in some manner that does not strain credulity, and thus respect for the court, to the breaking point.

³⁸⁷Sheryl Gay Stolberg, *Bork Hearings Resurface as Impediment to Specter*, N.Y. TIMES, Nov. 11, 2004 at A26 (referring to *Focus on the Family's* seven million listeners).

³⁸⁸Carrie Gordon Earll, *Frequently Asked Questions: Partial-Birth Abortion*, (Jan. 4, 2005), <http://www.citizenlink.org/FOSI/bioethics/abortion/A000001313.cfm> (quoting Nancy Romer et al., Letter to the Editor, WALL ST. J., Oct. 14, 1996).

members to contact their legislators to ensure that no such exception would appear in the statute.

Yet, after the ban was passed and upheld by the Court, Focus was in circumstances where it would benefit from making a statement that was the polar opposite of what it said before the ban. Yielding to the exigency of the moment, Focus issued a post-ban statement diametrically opposed to its pre-ban statement. The ironic result was that Focus, with its second statement, confirmed that Congress's "never medically necessary" finding was wrong. After the decision in *Carhart II*, when the ban, without a health exception, was firmly in place, bearing the imprimatur of the United States Supreme Court, Focus was subjected to friendly fire: severe criticism from a number of other anti-choice/pro-life organizations that condemned Focus for supporting and celebrating a ban which these less incrementalist groups saw as worse than useless in the fight to outlaw abortion altogether.³⁸⁹ Responding to this criticism, Focus defended its support of the ban, insisting that the new law would decrease the number of abortions performed. Focus's Vice-President Tom Minnery argued Focus's position to the media: he explained that non-intact dilation and extraction, in which the fetus is dismembered in the uterus, remained legal. He further stated that this still-legal procedure in which the fetus is not extracted intact is not favored by physicians, because it "'involves using forceps to pull the baby apart in utero . . . [and therefore] means there is greater legal liability and danger of internal bleeding from a perforated uterus. So we firmly believe there will be fewer later-term abortions as a result of this ruling.'"³⁹⁰ Focus's about-face regarding the risk to women's health posed by the ban reflects the lack of trustworthiness, and perhaps the cynicism, which characterized Congress's fact-finding in relation to the ban. The individuals and organizations concerned about the issue naturally adopted the tactics of the Congress they hoped to influence: using evidence not to reach an accurate conclusion, but to support the outcome they wanted.

Congress's reliance on findings characterized by significant flaws would be troubling in any event, but any trust placed in those findings is especially disturbing because *Carhart II* involved strict scrutiny, the least deferential standard of review, applicable because individual rights were at stake.

IV. *CARHART II*: A RULING IN SEARCH OF A RATIONALE?

The United States Supreme Court's decision in *Carhart II* is a reversal of its holding only seven years earlier in *Carhart I*. The conflicting rulings, within a few years of each other, necessitate particular attention to the rationale for the second decision. One route to understanding *Carhart II* is analysis of the Court's opinion in that case. Another path is a more realistic, even cynical, recognition that the statute and the Court's opinion upholding it are products of the political battle from which they arose.

³⁸⁹Alan Cooperman, *Supreme Court Ruling Brings Split in Anti-abortion Movement*, WASH. POST, June 4, 2007, at A03.

³⁹⁰*Id.* (emphasis added).

A. *Searching for Answers in the Text of the Court's Opinion*

The Court's opinion in *Carhart II* presents multiple, inconsistent answers to four questions that are crucial to its ruling.

The first question to which the Court gives conflicting answers is this: did the Supreme Court rely on Congress's erroneous finding that there exists a medical consensus that the prohibited procedure is never necessary to protect the health of a pregnant woman? Because *Carhart II* and *Carhart I* reach opposite answers to essentially the same question, it is undeniable that something changed in the time elapsing between the two rulings. The opinion in *Carhart II* identifies one change on which the Court appears to place significance: between the two decisions, Congress made a fact-finding "that '[a] moral, medical and ethical consensus exists that the practice of performing a partial birth abortion . . . is never medically necessary'"³⁹¹ It appears, from the passage of the *Carhart II* decision emphasizing this finding, that the Court is inexplicably relying on the congressional fact-finding it has labeled erroneous. Several paragraphs later, the Court seems to distance itself from this erroneous finding, yet without jettisoning it altogether, perhaps because the Court needs the finding: "[W]e do not in the circumstances here place dispositive weight on Congress' findings."³⁹² It appears that the Court may be willing to place some weight on the erroneous finding it earlier cited as a change occurring between *Carhart I* and *Carhart II*, but not dispositive weight. Elsewhere in the opinion, the Court labels the finding "factually incorrect."³⁹³ Although the finding is incorrect, the Court keeps open its option to defer to that finding, asserting not that deference to such an erroneous finding—even in an individual liberties case—is entirely inappropriate, but only that *uncritical* deference to incorrect factual findings is inappropriate—leaving on the table the possibility of deferring from a critical perspective.³⁹⁴ Nothing in the opinion resolves the question whether the Court relied on the erroneous finding. The most that can be gleaned from the opinion is that Congress's erroneous finding should not be given uncritical deference or dispositive weight, but that perhaps it can be given deference meted out critically, along with some, though not dispositive, weight, all because the fact-finding was one concrete change between *Carhart I* and *Carhart II*. What the Court never reveals is whether it in fact placed some weight on and gave critical deference to this finding.

One additional nuance of the opinion in *Carhart II* is that the Court uses Congress's erroneous finding, *sub silentio*, to create the medical uncertainty that is the fulcrum of the Court's decision. The facts on which the Court bases its ruling must come from somewhere. Those facts cannot have come from the lower court rulings, because if the Supreme Court had relied on the findings of the lower court, it would have struck down the ban. The facts relied on by the Court cannot be legislative facts of its own making, because legislative findings, i.e., policy findings,

³⁹¹Gonzales v. Carhart, 127 S. Ct. 1610, 1624 (2007) (quoting PBAPA 2003, P.L. No. 108-105, § 2, 117 Stat. 1201 (referring to the Congressional Findings in the historical and statutory notes following 18 U.S.C.A. § 1531 (2008))).

³⁹²*Id.* at 1637.

³⁹³*Id.* at 1638 (citing Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 482, 488-91 (S.D.N.Y. 2004)).

³⁹⁴*Id.*

by the Court would constitute a new rule of law, abolishing constitutional protections the Court had reaffirmed just seven years earlier. Problematically for the Court, the only other source for the facts on which to base its ruling is the “never medically necessary” finding of Congress, which, as the Court acknowledges, is wrong. The actions of Congress and the lower courts leave the Supreme Court with few options. The Court does not want to affirm the lower courts, because the Court wants to uphold the ban. The Court does not want to embrace Congress’s finding, even though it would lead to the result the Court wants, because that finding is plainly wrong. So, the Court unapologetically melds the finding of the lower courts with the diametrically-opposed finding of Congress to create a third finding: no one knows whether the procedure is ever medically necessary. By ruling as if one of the two bodies to whom it could choose to defer had made this no-one-knows finding, the Court is able to proceed as if it were simply applying existing law to this new finding. This approach makes it possible for the Court to avoid expressly overruling a constitutional right reaffirmed seven years earlier.

The second important question to which the *Carhart II* Court’s answer is elusive is this: what standard of review does the Court employ: rational basis, with its correspondingly high level of deference; or the stricter standard applicable to statutes impinging on individual rights, under which the Court must conduct an independent review of the factual findings on which the statute is based? The Court states early in the opinion that it must, because constitutional rights are involved, conduct an “independent determination of all questions . . . of fact and law”³⁹⁵ But did the Court review this statute restricting access to abortion as an impingement on fundamental liberties, or as an exercise of Congress’s power to legislate pursuant to the Commerce Clause? Later in the opinion, the Court appears to change the standard and conduct a rational-basis review, concluding that Congress must be allowed to legislate in the face of medical uncertainty because the ban, which regulates the medical profession, was enacted pursuant to Congress’s Commerce Clause powers and should be upheld, unless the enactment cannot rationally have been based on those findings.³⁹⁶

The third question not clearly answered in *Carhart II* is this: what degree of uniformity in medical opinion must exist in order to reanimate the constitutional requirement of a health exception from the state of dormancy into which it was placed by the decision in *Carhart II*? The decision in *Carhart II* appears to arise from the Court’s unwillingness to require a health exception when there is conflict as to whether such an exception would ever be needed. Conversely, the opinion seems to indicate that as long as some segment of the medical profession believes the procedure is not needed to protect any woman’s health, Congress can criminalize the procedure. The Court has eliminated the “zero tolerance policy”³⁹⁷ prohibiting Congress from legislating in the context of uncertainty and imposed instead a zero tolerance policy prohibiting a woman from having the procedure in the context of medical uncertainty, regardless of her need for the procedure, because some unquantified segment of the medical profession believes she does not need it.

³⁹⁵*Id.* at 1637 (quoting *Crowell v. Benson*, 285 U.S. 22, 60 (1932)).

³⁹⁶*Id.* at 1638.

³⁹⁷*Id.*

The fourth question answered inconsistently by the Court is whether the decision precludes any woman from challenging the ban on the basis that she, specifically and individually, needs the procedure to protect her health. The Court goes to some lengths to insist that it is rejecting only the facial challenge to the statute and that an “as applied” challenge is still available. The Court’s first description of its decision portrays it as a ruling which upholds the ban against “the broad, facial attack brought against it.”³⁹⁸ The Court repeats the reference to the facial challenge as it begins to describe the reasons for its ruling³⁹⁹ and again when it phrases the question as whether the ban can stand when medical uncertainty persists.⁴⁰⁰ The Court then invites an as-applied challenge, concluding that such a challenge is “the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used.”⁴⁰¹ Ultimately, the Court makes the point in a direct, almost pointed, manner: “The Act is open to a proper as-applied challenge in a discrete case.”⁴⁰²

Yet, the Court painstakingly avoided an outright rejection of the “never medically necessary” finding. In fact, the Court relied on Congress’s findings, because it had to base its decision on some findings made somewhere, and only Congress’s findings would allow the Court to uphold the ban. The facts on which the Court based its decision had to come from one of three places. First, the Court could have adopted the findings of the lower courts, but then the ban would have been struck down, so that option was not chosen. Second, the Court could adopt the finding of Congress, but that finding was flatly wrong, making it almost impossible to accept wholeheartedly. The Court did not rely on the trial court finding, yet the Court could not rely, expressly and clearly, on a finding that was wrong. So the only remaining option apparently open to the Court was to reverse its seven-year-old reaffirmation of the individual rights at issue. With no attractive option available, the Court created a third fact-finding option: melding the lower court’s finding that the procedure was sometimes medically necessary with Congress’s finding that it was never medically necessary. By melding the findings of Congress and the lower court, the Court generated some compromise finding that no one had ever made. The Court accepted Congress’s “never medically necessary” and mixed it with the lower courts’ findings so that the Court could uphold the ban without acknowledging that it was overruling *Carhart I*. The Court’s reliance on Congress’s finding, to form half of the hybrid finding the Court would affirm, is puzzling in light of the erroneous nature of the finding.

B. Searching for Answers in the Subtext

The significance of President Bush’s appointment of Roberts and Alito is described from the position of a proponent of the ban, in the comments of Richard

³⁹⁸*Id.* at 1619.

³⁹⁹*Id.* at 1629.

⁴⁰⁰*Id.* at 1636.

⁴⁰¹*Id.* at 1638.

⁴⁰²*Id.* at 1639 (comparing *Wis. Right to Life, Inc. v. FEC*, 546 U.S. 410, 411-12 (2006) (per curiam)).

Land, President of the Southern Baptist Foundation for Ethics and Liberty regarding the decision in *Carhart II*: ““This decision is a powerful and timely reminder of the enormous significance of presidential elections and their pivotal impact on the makeup of the Supreme Court””⁴⁰³

It may be that only the naïve, in seeking to understand the United States Supreme Court’s about-face in the seven years between *Carhart I* and *Carhart II*, would focus exclusively on the opinion and ignore the change in the composition of the Court. Between those two decisions, Chief Justice William Rehnquist died, and President George W. Bush appointed Chief Justice John Roberts to fill the vacancy resulting from Chief Justice Rehnquist’s death.⁴⁰⁴ The other change in the Court’s personnel between the two decisions resulted from Justice Sandra Day O’Conner’s retirement, followed by President Bush’s appointment of Justice Samuel Alito to fill that vacancy.⁴⁰⁵ The practical effect of these changes on the decision in *Carhart II* is that Chief Justice Rehnquist’s vote, with the minority of four, to uphold the ban in *Carhart I*,⁴⁰⁶ was replaced with Chief Justice Roberts’s vote, with the majority of five, to uphold the ban in *Carhart II*,⁴⁰⁷ while Justice O’Conner’s vote, with the majority of five, to strike down the ban in *Carhart I*,⁴⁰⁸ was replaced with Justice Alito’s vote with the majority of five to uphold the ban in *Carhart II*.⁴⁰⁹ The realist and the cynic may conclude that these were the only changes of any significance that occurred in the years that elapsed between *Carhart I* and *Carhart II*, and that these changes in the personnel of the Court resulted in the diametrically opposed outcomes in the two cases. The realist-cynic, abandoning the search for answers in the text of the opinion in favor of answers in the subtext, may see an especially political influence at work in the appointment of Supreme Court justices, resulting in partisan decision-making in *Carhart II*. A few days after President Bush was elected to a second term, psychologist and religious broadcasting mogul James Dobson, whose radio program, Focus on the Family, commands an audience of seven million,⁴¹⁰ appeared on the ABC television program “This Week” with host George Stephanopoulos.⁴¹¹ When Stephanopoulos commented on Bush’s failure to refer to

⁴⁰³Adelle M. Banks, *Activists See Abortion Ruling as Call to Arms*, NAT’L CATHOLIC REP. (Kan. City), Apr. 27, 2007, at 8 (quoting Robert Land, the President of the Southern Baptist Ethics and Religious Liberty Commission).

⁴⁰⁴Alec Russell, *Bush’s Favourite is Sworn in to Key Court Role*, DAILY TELEGRAPH (London), Sep. 30, 2005, at 16.

⁴⁰⁵Jesse J. Holland, *With Roberts a Shoo-In, Bush Eyes Next Nominee*, INTELLIGENCER (Wash. D.C.), Sept. 27, 2005, at 10A; Charles Babington, *Alito is Sworn in on High Court: Senators Confirm Conservative Judge Largely on Party Lines*, WASH. POST, Feb. 1, 2006, at A01, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/14/AR2007081401015.html>.

⁴⁰⁶*Stenberg v. Carhart*, 530 U.S. 914, 980 (2000).

⁴⁰⁷*Gonzales*, 127 S. Ct. at 1619.

⁴⁰⁸*Stenberg*, 530 U.S. at 947.

⁴⁰⁹*Gonzales*, 127 S. Ct. at 1618.

⁴¹⁰*See supra* note 389.

⁴¹¹*This Week* (ABC television broadcast Nov. 7, 2004).

abortion in televised comments setting forth his mandate for the second term, Dobson was sanguine, assuring Stephanopoulos and the television audience that Bush has “been pretty consistent on [such] policies, sometimes behind the scenes.”⁴¹²

Stephanopoulos then inquired about a telephone call Dobson had received from a member of Bush’s White House staff shortly after the election, thanking Dobson for his own support and that of Dobson’s audience. Dobson responded to the expression of gratitude by issuing a warning, through the staff member, to Bush and the Republican party.⁴¹³ When Stephanopoulos inquired about the content of the warning, Dobson replied that the “people of faith . . . [who] put George Bush in power again have some very strong views.”⁴¹⁴ Dobson then came to the heart of the warning delivered to Bush and his fellow Republicans through the White House staff member: that the President and his party had two years, four at the most, to implement the policies of morality favored by the people of faith who handed Bush a second term, or “they’ll pay a price at the -in [sic] the next election.”⁴¹⁵

When Stephanopoulos asked Dobson for the specifics of what he and his listeners were pressing Bush to do, Dobson gave a reply foreshadowing not only the appointment of two conservative justices to the United States Supreme Court, but also the very issue that would come before that remade Court: “[the President] has strongly stated that he is – he is pro-life, that he wants to protect life, not only unborn life but the culture of life And especially, especially putting conservative judges on the judiciary. That is the key to everything.”⁴¹⁶ Dobson’s warning to the President and his party regarding the consequences of failing to carry through on pro-life policy, which preceded Bush’s appointment of Roberts and Alito, may reveal more regarding the reason for the decision in *Carhart II* than does the Court’s opinion.

V. CONGRESS SHOULD EMPLOY NEUTRAL FACT-FINDERS OR ADOPT AT LEAST RUDIMENTARY EVIDENCE STANDARDS

A. Evidentiary Rigor as Institutional Competency

Given that the basis for judicial deference to legislative findings relates to the special competence Congress is thought to possess in collecting and evaluating vast quantities of evidence on which to base its findings, that deference is unwarranted if Congress conducts hearings in which it fails to apply even minimal standards of relevance and reliability to the evidence it considers, preferring politically useful evidence over reliable evidence. Any argument that legislators should be expected to act in a partisan way because they are politicians, ignores this central fact regarding congressional hearings: their purpose is the ascertainment of accurate information on which to base a policy decision. The assumption that Congress will be neutral in its fact-finding, which finds one expression in the rules regarding judicial deference,

⁴¹²*Id.* (statement of Dr. Dobson). Dobson did not go so far as to state explicitly that Bush had acted behind the scenes to convey to Dobson assurances about his plans for pursuing an agenda opposed to choice. *Id.*

⁴¹³*Id.*

⁴¹⁴*Id.*

⁴¹⁵*Id.*

⁴¹⁶*Id.*

implicitly includes the assumption that Congress will endeavor to obtain and use the most reliable evidence possible, in order to make the most accurate finding possible. Making evidentiary rules applicable to congressional hearings would enhance Congress's ability to maintain and use such trustworthy evidence. The decision to adopt such standards can be made only by Congress, and any rules adopted must be tailored so as not to embroil Congress in evidentiary disputes or hinder the policy-making work of Congress. The suggestion that Congress's proceedings should be governed by, for example, the Federal Rules of Evidence, would be senseless. By contrast, implementation of the idea that Congress's hearings should be governed by minimal standards of trustworthiness is likely to improve fact-finding and thus enhance the confidence that the American people and the courts place in those findings.

The beginning point of the argument that Congress should adopt basic evidentiary standards is that there are types of evidence that Congress could consider in making a fact-finding that would be an inappropriate basis for a decision. If, for example, a witness in an impeachment trial wishes to testify that the official should be removed from office because he is an adherent of a religion different from the witness's, neither the Senate nor an impeachment trial committee should base a decision on that testimony or include it in the body of evidence to be considered in deciding the matter. Similarly, if a business executive testifies that regulations proposed for his industry might occupy his thoughts to such an extent as to hurt his golf game, that testimony should not be considered in reaching the legislative decision. A consumer protection advocate might appear at a hearing on proposed automobile safety legislation and present to the committee a letter typed on lined notebook paper and riddled with spelling and grammatical errors. The letter is in support of the legislation and purports to be from the chief executive officers of the three largest automobile companies doing business in the United States, but the three signatures appear to be in the same handwriting. The committee conducting the hearing on the consumer protection legislation should not include the letter in the body of evidence it considers in making its decisions.

Given that it is possible for Congress or its committees to be presented with evidence so lacking in trustworthiness that it should not be considered, and given that Congress has no rules regarding such evidence, the question arises: if proof is completely untrustworthy, as were, for example, the double hearsay claim that a witness in the Thomas hearing had committed sexual harassment, and the allegation—traceable to no expert—that Anita Hill was somehow delusional, should it be left to Congress to disregard it? The difficulty with that solution is evident from the review of impeachment hearings and other high-profile hearings, described in more detail above and summarized here, during which Congress repeatedly demonstrated its failings in judging the quality of evidence. For example, during the Clinton impeachment trial, the Senate admitted 14,201 pages of documents without any discussion of relevance, hearsay, or any other core evidentiary issues.⁴¹⁷ During one of the depositions taken before two or three senators, the witness's attorney objected because the question posed had already been asked and answered in a transcript included in the documents admitted earlier. The presiding senator responded, "[I]f this is going to be the case, we don't even need the deposition,

⁴¹⁷See *supra* notes 40-41 and accompanying text.

because we're limited to the record and everything is in the record. So I think, uh, to be fair, we're—we're obviously going to have to talk about, uh, some things for [eight] hours here, or else we can go home."⁴¹⁸

Congress also demonstrated its tendency to allow unreliable evidence in the Senate trial of Walter Nixon. In preparation for that trial, Senator Howell Heflin addressed the question of admitting the entire transcript of Nixon's criminal trial. Although Nixon's counsel objected to the transcript as hearsay, Heflin advised the committee that the transcript was admissible as an adoptive admission by silence, i.e., each statement in the trial was admissible because Nixon did not deny each statement individually, even though he had pleaded not guilty and was present with his attorneys to defend against the charges.⁴¹⁹

Further indications of Congress's need for evidentiary rules can be found in the record of the Clarence Thomas confirmation hearing. During that proceeding, Arlen Specter quoted a witness who claimed he had seen Anita Hill at a professional meeting, and she said that Thomas's nomination was great.⁴²⁰ Specter then asked Hill about a statement made by her former dean, to the effect that he had heard Hill praise Thomas.⁴²¹ Specter then asked Hill about two individuals who claimed Hill did know well a person whom Hill had denied knowing well.⁴²² Later in the hearing, Heflin asked Thomas about the allegation, made on local television the previous evening, that a television reporter had said Thomas was slow to react to allegations of sexual harassment in his own agency.⁴²³

Senator Metzenbaum made particularly troubling use of hearsay when he questioned a pro-Thomas witness about allegations of sexual harassment made against the witness, even though the witness's accusers neither testified nor made written statements.⁴²⁴ Metzenbaum even referred to the allegations as having come from the witness's own statement, because members of the Senate staff had quoted the accusers' allegations in their telephone interview of the pro-Thomas witness.⁴²⁵

B. Models of Non-Partisan Fact-Finding

The choice whether to separate fact-finding from policy-making, or to continue conflating the two, rests exclusively with Congress. That decision, however, is a legitimate consideration for the public in determining the confidence it places in lawmakers, and—in the case of legislative hearings—it is a legitimate, perhaps an

⁴¹⁸S. DOC. 106-4, at 1690 (1999), available at http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.183&filename=sdoo4v2.pdf&directory=/diska/wais/data/106_Cong_documents (quoting a statement made during the impeachment trial of President William Jefferson Clinton).

⁴¹⁹See *supra* notes 183, 185 and accompanying text.

⁴²⁰See *supra* note 236 and accompanying text.

⁴²¹See *supra* notes 240-41 and accompanying text.

⁴²²See *supra* note 243-46 and accompanying text.

⁴²³See *supra* notes 253-55 and accompanying text.

⁴²⁴*Hearings Thomas, supra* note 225, at 562-64.

⁴²⁵*Id.*

essential, consideration for a court determining whether to defer to a legislative finding.

If Congress⁴²⁶ decides to separate policy-making from fact-finding, leaving the former in its current partisan status but converting the latter to a neutral process, there is more than one framework for implementing that decision. Congress could empower a separate body or agency to conduct fact-finding and report to Congress. One such entity, which would consist of experts in the particular topic in question, would bear at least some resemblance to the Royal Commissions of Inquiry employed in Great Britain.⁴²⁷ These Royal Commissions were in use prior to the Revolutionary War, and, in fact, King George III of England established such a Royal Commission to hear complaints from loyalists living in the colonies as rebellion against the British throne fomented.⁴²⁸

Instead of a commission, Congress may choose to create a position similar to that of the special masters⁴²⁹ employed by courts, usually to make or recommend findings requiring particular expertise. The selection process for the master would be non-partisan, because any other approach would reintroduce the partisanship that the use of the special master should eliminate.

While such a commission of experts would likely examine questions regarding a single topic or incident, another, more permanent body that could accomplish non-partisan fact-finding and report to Congress is the Congressional Research Service.⁴³⁰ The highest ranking officers of the Congressional Research Service are appointed by the leadership of Congress. That system allows for the possibility that the Service would conduct its fact-finding in a partisan manner, because of loyalty to those who appointed them. Even with the current system of appointment by the party in control of Congress, the Service is regarded as non-partisan.⁴³¹ Careful design of the method for selecting the top officers of that Service could render the body more thoroughly non-partisan, and the same process would suffice for a commission of experts assigned to conduct fact-finding.

⁴²⁶If evidentiary rules are adopted, they should be adopted by the Congress as a whole, because having one house operate under such rules while the other does not is likely to prove unmanageable. Such a hybrid approach would likely preclude joint committees and joint hearings.

⁴²⁷*BHP Billiton Is Accused in "Saddam Kickbacks" Scandal*, EVENING STANDARD, p. 26 (January 31, 2006) (accusation of kickbacks to Saddam Hussein by Australian Wheat Board).

⁴²⁸*Robins Island Pres. Fund v. Southold Dev. Corp.*, 959 F.2d 409, 423 (2d Cir. 1992) (referring to a claim against the State of New York related to land that the State had acquired by means of the Attainder Act of 1779).

⁴²⁹FED. R. CIV. P. 73 (allowing appointment of special master for evidence requiring particular attention to voluminous evidence, or requiring particular knowledge in a certain field of expertise, if the parties stipulate to have such an issue tried by a special master).

⁴³⁰*Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 676 (1998) (citing the Congressional Research Services Campaign Debates in Presidential General Elections).

⁴³¹*See, e.g., Sabrina Eaton, Vote Cutoff Creates Furor in House*, PLAIN DEALER (Cleveland), Aug. 4, 2007, at A9 (referring to "nonpartisan Congressional Research Service" and its report on eligibility of undocumented immigrants for government assistance).

If the selection of the neutral fact-finding body is not done carefully, then the work of that purportedly neutral body can, like the political fact-finding it is intended to replace, become partisan. Because politically motivated selection of the members of the entity would defeat the goal of non-partisan fact-finding, the structure of the selection process is crucial. One viable option is for a fact-finding body, whether *ad hoc* or permanent, to be appointed by five officials: the highest-ranking members of the majority party and the minority party in the Senate, their counterparts in the House, and the Librarian of Congress (appointed by the President⁴³² but still at some distance from partisan considerations due to the lack of a term limit for the position). The Librarian of Congress, who is entrusted with the vast body of information maintained for the use of the legislative body, appears to be particularly qualified to participate in the selection of a Congressional Commission on a given topic of concern.

Neither an *ad hoc* commission nor a non-partisan agency of Congress is likely to have the skill to investigate issues such as Anita Hill's allegations against Clarence Thomas. In such cases, the independent body conducting fact-finding for Congress may find it necessary to employ skilled litigators to resolve such difficult questions, using rules similar to those applicable in a courtroom.

A third option, in addition to the commission of experts and the Congressional Research Service, is for Congress to retain its fact-finding function, but to render that process less partisan by adopting basic evidentiary rules to promote reliance on trustworthy evidence. The challenge Congress would face in implementing this recommendation is to draft standards that enhance reliability without entangling Congress, its two fact-finding bodies, and their committees in battles about the interpretation of the rules. To meet this test, the rules must cover only those matters that are essential to reliability; they must be clear and concise; they must leave little room for interpretation; and they must identify the person or persons who will apply the rules.

The evidentiary rules most essential to trustworthiness involve the authenticity of documents, hearsay, the reliability of expert witnesses, and the impeachment of witnesses. The authenticity of documents to be used in any hearing can be considered in advance by a neutral documents examiner acting as a part of one of the fact-finding bodies described above. If this recommendation is implemented, a hearing could begin with all questions about the authenticity of documents resolved.

One approach to the hearsay problem is for Congress to adopt a rule prohibiting the introduction of all statements made outside the hearing, with exceptions for: any previous statements of a witness who is testifying at the instant hearing; books, journals, magazines and newspapers bearing the date and name of the publication; and letters or written statements from individuals or associations interested in the matter under consideration. To avoid the need for interpretation of this rule, there should be no residual exception. Any lack in the exceptions, or in any of the rules, could be cured by Congress through the same process used to adopt the rules. Such amendments should not occur during a hearing, because of the likelihood of a rule resulting that is designed to guide the hearing to a particular outcome, and the likelihood of wasting time in the debate of the change in rules.

⁴³²2 U.S.C. § 136 (2000).

To ensure the proper qualifications of expert witnesses and the reliability of their methods, those qualifications and methods should be reviewed in advance of the hearing to the satisfaction of a commission of experts in the appropriate field, established in the manner described above.

Any witness should be subject to impeachment regarding bias, motive, perception, memory, or sincerity. Impeachment by proof of convictions or bad acts, however, should be limited to proof that the witness has been convicted of perjury, without a subsequent judgment or certificate of innocence. Nominees and government officials subject to oversight hearings should be subject to questioning about any conviction, bad act, misfeasance, nonfeasance, or other matter with which a legislator wishes to impeach them, although the prohibition against hearsay and other rules recommended here should still apply.

If the rules are in fact clear and concise, the role of the interpreter(s) will be appropriately minimal, because partisanship could otherwise creep into the process through the rulings of the interpreter(s). The choice as to who should interpret the rules would be as important as it would be difficult. One option is for the majority leader and minority leader in each house of Congress to choose, at the beginning of each Congress, a person to make any evidentiary rulings necessary to the proceedings of that house and its committees. The person could be an academic or practitioner with particular expertise in evidence, or a leader in a respected organization such as the American Bar Association. This officer, appointed without term limits and serving during good behavior, would be called upon only when a legislator asserts that there has been a violation of the basic evidentiary rules adopted by Congress. The ruling of the officer could not be appealed, even to Congress, because any other rule would sacrifice the non-partisan fact-finding these recommendations are intended to promote.

If Congress chose to adopt rules similar to these, it could do so in a way as to maintain maximum flexibility while vigorously promoting reliability. For example, Congress could utilize a neutrally-appointed body for some issues and conduct its own fact-finding in other cases, utilizing basic evidentiary rules. Congress could pose specific questions to the neutral body, which would, if Congress so specified, be limited to answering those questions, with explanation if Congress so specified. Congress could instead ask one of the neutral bodies for general guidance, depending on the matter being investigated. Moreover, Congress could implement these suggestions in some instances while engaging in old-fashioned partisan fact-finding on other occasions, mindful that a court might pay careful attention to the method of fact-finding when deciding what deference is appropriate. Most important, any legislator could base her or his vote on anything, including evidence not presented, or even on a whim, and could refer to any evidence or information whatsoever in casting the vote, or in any context other than the fact-finding hearing. The official findings of the body, however, could not be based on these remarks outside the hearing process and would instead depend exclusively on the evidence actually considered during the fact-finding process.

Judicial review of congressional fact-finding arises only in the context of legislative hearings, and therefore courts can consider the legislature's evidentiary rigor in determining deference only in the context of a challenged statute. In making that decision, the absence of any evidentiary standards governing congressional hearings—or the failure to abide by those rules—should weigh heavily against deference. In other types of hearings, the extent to which Congress adopts rules to

ensure the trustworthiness of the evidence on which it bases its findings will be determined by the interest of Congress, and the public, in reliable findings.

VI. CONCLUSION

It is fundamental to the United States system of tripartite government that each branch of that government be independent. It is equally fundamental to the independence of the legislative branch that each member of Congress—elected, after all, to represent her constituents—have the power to influence the nation’s policies by debate, argument, and vote, as she, in her discretion, deems appropriate. In such a body, partisanship is no evil; it is necessary to carry out the business of the representative body. While partisanship should influence policy decisions, it should, to the extent possible, be eliminated from the process of fact-finding. The proper functioning of the legislature does not depend on the power currently possessed by senators and representatives to treat fact-finding as a partisan tool, which can be shaped and manipulated to justify a particular outcome in a policy decision. The danger to democracy lies not in a requirement that Congress evaluate evidence pursuant to standards sufficient to ensure its trustworthiness, but in the temptation of a brawling, maneuvering politician to wrap himself in the homespun cloak of the earnest pilgrim seeking truth.