



7-12-1975

Fragile Coalition Interviews - Group - Tapes 4&5, July 11-12, 1975

M. Caldwell Butler

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Recommended Citation

M. Caldwell Butler Papers, Carton 54

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Tape IV, pl

SESSION II: Friday, July 11, 1975, 6:45pm

Site: Board Room, Sea Pines Plantation, Hilton Head Island, S.C.

All same present

JM - I am curious about one little situation that was alluded to this morning, and that is how Jerry Waldie comes off as a kind of good guy in this deal in that Caldwell and others are communicating with him?

CB - I spoke to him one time.

WF - I was talking to him about what a good looking chick there was in the third row back there.

JM - Somehow I had the same recollection that Caldwell does — that is either Jerry and I were walking over talking about us getting together with the lowest common denominator idea, or that maybe it was after you spoke to Jerry that you came over and said, "Maybe I ought go and meet or something," and had I known that, I might have been suspicious.

LAUGHTER.

WF - Those guys were so anxious to get an article of impeachment they would take it any way they could get it. Waldie and that crowd were ready to impeach Nixon on November 7, 1972.

HF - '69.

WF - '68, I guess, yeah, right after the election.

WC - That probably revealed wisdom.

CB - One of the remarkable things was that all of those gentlemen had such restraint when they got on national television.

HF - Was there some control? Did the word go out that Drinan and Conyers and those guys were supposed to be quiet during this thing?

JM - It wasn't expressed in our presence, but I have got the distinct impression that there must have been a little rump session somewhere with Rodino maybe, putting Conyers particularly and one or two others under control.

WF - I think the others were pretty much capable of exercising some discretion. Except Drinan, and the guy they were more fearful of than anybody else, Seiberling, because he has got diarrhea of the mouth.

JM - Exactly.

LAUGHTER.

WF - He can't stop when he gets started, and he doesn't know where he is going to end up anymore than a man in the moon. You can have a full-grown idea in John Seiberling, where he knows exactly what he is supposed to do with it, and he will be turned around 180 degrees in three seconds, won't he?

Tape IV, p2

JM - Yes.

HF - It is very obvious to me, particularly on article II, that the deal was that if any Republican wanted to talk in favor of it, you'd get recognition to focus attention on our side, and build up....

JM - I don't think that Barbara Jordan was ever a problem. She was moderate in the whole matter. I think Wrangle might have had a little talking to.

WF - Rodino thought we were getting a few too many crazies at the time. Barbara, I think, probably understood the political maneuvering better than Charlie [?] did, don't you? She is pretty much of a pro, she understands what you're trying to do and we were trying to lay our story out where it would be understood by the people. She understood that.

JM - I think there is one interesting aspect in this matter that is probably worthy of noting. That is one where Walter has the same feeling, and Ray too, altho we did not communicate to the same degree. In the early stages, I can't say whether this was before or after October 23, and the Democrats met one or more times in EF 100 [?] when Rodino issued the statement that it was unanimous, and there hadn't been any vote taken, as you know. But my recollection at that point of my own feelings, and I expressed it, I remember, to Barbara and Ed Mesvinsky in front of the Longworth Building one day, saying, "We were engaged in an exercise of futility. We are not going to be able to develop the evidence and we might make fools of ourselves." I don't think I added that last sentence, but I implied that. And I think you and I had an exchange of a similar nature somewhere along the line, Walter.

WF - Especially the way they wanted to head out on it, and I think then Rodino understood that, don't you? For shortly after that meeting, the likes of that did not happen again.

RT - That is true.

JM - That was sort of a one-shot when he had all the Democrats together in EF 100, and there would have been no gunbelt. [?]

WF - This was shortly after the whole mess had been referred to the Judiciary Committee and there was no real action taken and he was trying to get some sort of consensus to start. Those guys were ready to vote the articles right then and there, weren't they? With virtually not very much else done. Isn't that about how you remember it?

RT - Yes, in part, but I think the meeting was more procedural: how did we go? what steps do we take? There was some thought, I believe, that the committee could just move right ahead and start hearing the witnesses.

WF - You know, they wanted to set up a task force with Drinan goin' all over the field and shootin' somewhere.

LAUGHTER..

Tape IV, p3

- RT - There was an excess there about expressing that we were in agreement. I think the agreement was that an inquiry did need to begin, an orderly inquiry, and I believe there was a consensus among you and Walter and I that that was an appropriate course of action.
- WF - But not a "task force."
- CB - The thing I had difficulty with was envisioning anybody with a master plan at the beginning to have it go along. Both of these publications [White and Breslin] indicate that Rodino or O'Neil had a master plan. I just don't, in the first place, think Rodino for all of his charm, had that good a mind.
- WF - It was more reaction than action? It was far more stops and stances and so on than planning. It was fortuitous events on top of each other.
- CB - All together, yes. And our getting together was only under the pressure of time.
- JM - Rodino, of course, came out of the matter a whole lot better than anybody would have ever predicted.
- WF - No question of that.
- JM - As for his apparent leadership ability in matters of concern, initially I think that can be attributed to an abundance of caution, after that first injudicious statement in EB 100. He showed after that great care in the selection of the general counsel.
- TR - Yes, I think you are right.
- JM - It took him two months or more to select a general counsel.
- TR - It was slow motion.
- JM - Yes, it was frustrating.
- WF - Can you imagine the kind of help he had before that in Jerry Ziefman, though?
- JM - Well, not much. But it really came off at that point as a kind of lack of leadership ability, but it kind of turned as time went along.
- HF - I had the impression that Peter played it very close to the chest thruout '73, and I once asked Jerry Ziefman to list for me one one page 20 or 30 threshold issues that only he and the chairman had consulted about to decide whether or not the full committee would consider as the ad hoc committee referred to or as a subcommittee, or just how to go about this, for there was no book which said "how to impeach." He had a lot of decisions before he got involved with the whole committee.

Tape IV, p4

WF - All during that period when he and Hutchinson were going thru the transcripts hours and hours each day, it kind of boggles the mind -- them not communicating at all, doesn't it?

LAUGHTER.

CB - And those insidious remarks about the Italian-Americans, you know.

RT - It's been mentioned on numerous occasions, but I think deserves repetition here, that one of the key decisions made by the leadership was to have the inquiry conducted by the Judiciary Committee, rather than forming a special blue ribbon committee for that purpose. It may well be that by letting that burden fall on a committee which was not specifically selected for that purpose, you got among that committee a group of people who approached the problem as those here and some others on the committee did approach it -- namely, trying to do so objectively. I think that was possibly one of the key decisions of the entire process.

JM - I don't think we can overemphasize two things: one, the fact that Rodino did not do any arm-twisting with the individual members of the committee to my knowledge, and two, that the Democrats did not act in concert on but very, very few issues -- the only one I can really recall is when we recessed the meeting and went back and had a little brain session and came back and voted the other way. But otherwise not.

WF - We were not in concert even then; I was on the other side of that issue.

JM - Yes, but it was about the only part of the "plan" that I can recall.

WF - It was a 20 to 18 vote.

JM - Now you Republicans had a little difficulty understanding that.

TR - Well, I will tell you, Jim, that is not exactly right. There were some procedural things where we got into fights about....

HF - Early on, too.

WC - Let me tell you that I think Rodino almost blew it one time. That was at the beginning of the issue of St. Clair's participation in the sessions. You recall that was very crucial as far as the Republicans were concerned. The Democrats mostly said at that time that St. Clair can't come in, you can't cross-examine. That issue erupted. Well, Peter was outside the speaker's lobby one time and advised me that they were not going to allow St. Clair to actively participate and I said, "Well, Peter, if you take that position, you had better forget about any bi-partisan approach to this whole thing."

TR - Sure.

Tape IV, p5

WC - And he said, "If you say that, Bill, if you take that action, then this will amount to a coverup of a coverup." And I said, "Peter, if you say that publically, it is all over for this whole procedure." And he went back to his office, and I don't know who he talked to at that point, but St.Clair was thereafter allowed.

WF - That is exactly what I mean by some of his doings were really a reaction from your pressure, like our pressure on the witnesses: we're going to stick with four witnesses, and by God, nothing else. That was it. I called him, "To hell with that!" I was going to scream to high heaven about it.

TR - That's right, and I went up to a press conference with McClory. It was a very placid, tranquil conference until Peter called on me and I just raised hell. He was going to let him call four witnesses. I just jumped all over him. It was a one-man subpoena. It was letting our guy go along and they take depositions -- that was another one.

WC - Not calling Colson.

WF - Not calling Colson -- that got to be the issue. I just heard on the radio a minute ago that Alexander Butterfield was a CIA plant in the White House.

HF - Could not have been a better located fellow.

LAUGHTER.

WF - I never got to where I really understood, though, what was his motivation was, because he had stooled -- there is no question about it -- he stooled on 'em. I am not saying that he didn't tell the truth, but he's a stoolie.

CB - I don't think that's fair. I think the guy was a messenger boy and he answered every question they asked him and didn't volunteer anything.

JM - Let me get something off my chest, because frankly I think the partisanship issue is of importance historically here.

TR - Yeah, I do too.

JM - Before getting back to it, which I will do very quickly, I want to say this about my dealings with Rodino. Rodino was involved during last two or three weeks with me in one private conversation, that was on a Sunday morning. McClory, Rodino, Doar, Frank Polk, and you, Tom?

TM - No, I wasn't there.

JM - OK, you weren't there. We tried to kick off the final polishing of article II.

Tape IV, p6

WF - That was after we voted on article I.

JM - Yes, it was Sunday morning at 10:00. We met in my office; McClory and Rodino each stayed only about ten or fifteen minutes. Then they left. We had a brief general discussion about where we were heading and the general agreement and then they left. That was the only input Rodino personally ever had with me in this article preparation I did, unless it was in a meeting in which he may have expressed an opinion somewhere along the line, which I don't think he did.

But now, let me insult you. I started to ask earlier today if you -- and I will refer to you as Republicans -- were to go back and review your votes on the procedural issues, would you vote the same today? Now, I'll tell you I would, and I will also tell you that I cast one partisan vote during that whole time, otherwise I thought I was casting the logical, common-sense, procedurally efficient vote. There was not more than one damn one that was partisan. And my attitude about your position, and that is the one we talked about when we went out and came back and changed the vote for some damn reason. I changed my vote, and that was a political vote, the only one I can remember casting. But I remember saying to friends and to myself: it is mighty easy to play minority politics, because if you are the minority, you can take a partisan position because you are the underdog. The President is the underdog. And you can get away with it. But as a majority, we cannot get away with it.

CB - We could, that's true.

JM - That's right. We get criticized harshly, and can better believe that I looked for a reason to vote with the minority on everyone of those procedural votes, but my common sense would not let me do it.

TR - Well, let me just list a few. You know, I agree with you on one: I think I would change my vote, but there are some....

CB - Which one are you talking about?

WF - Where you were standing alone, that's where.

TR - But starting out, the very first order of business, was a terrible, terrible mistake in my opinion on Rodino's part and on the part of the Democrats. And I don't mean that against you personally, but I think it was a mistake, and that is where he came in requesting one man subpoena power.

HF - That's right.

TR - That was the first order of business, the press jumped on, we jumped on. It was a straight party line vote. The second one, abolishing the notice requirement for holding meetings, there were 48 hours under the Hungate rule. They tried to abolish that. We had fights on St.Clair's participation. I certainly would vote the same way.

Tape IV, p7

WF - You didn't have a vote on St.Clair's participation.

TR - Yeah, I know this.

WF - We were with you all the way.

TR - I know you were. We had plenty debate about it, and I had discussions with Peter Rodino.

WC - The questions of whether he could also go the depositions....

TR - That is another one.

CB - They abandoned depositions, so that wouldn't be....

TR - Probably one of the biggest mistakes was his adamant position on calling four witnesses, instead of letting St.Clair leeway. I voted with you, but St.Clair was, in my opinion, just completely reasonable on everything he did. He didn't want much time, he took two hours when they took, hell, I don't know how many hours presenting their thing. St.Clair was, I thought, just, and then when he did finally get his right to call witnesses, he called eight or something like that. We will go back and there were many, many points. I'll tell you, Peter Rodino, to his credit, and all of you guys, and Walter almost always, and the sensible Democrats backed off on procedural questions.

WC - It's true.

WF - That is why it was so dumb to get wrapped up in them.

TR - You were smart enough to see when it was gonna be a real dispute. It could have been a party thing.

RT - Quite the contrary.

WF - That's the worst thing in the world for my political position, and I know for Ray and Jim too.

JM - The more strongly partisan you were the less you wanted it to appear so.

TR - Yeah. The right to cross-examine was another one. I got into it with Kastenmeier whether we meant that when we questioned the right to cross-examine [?]. I argued that we did, because I'd asked Jenner, "Does that statement have anything in there that prevents a person from cross-examining?" He said, "Of course not."

WF - You all think that our staff did what they should have in the way of investigation?

TR - Not at all.

CB - They didn't have enough manpower.

LAUGHTER.

Tape IV, p8

WE - Virtually nothing.

WF - Compared with what the Senate did in about the same amount of time, you know, thank God that the Senate cut the mustard, because we borrowed of their investigative work all the way, all the way.

WC - The fact of the matter is, there would never have been an impeachment process if you didn't have the Senate's work.

WF - And the tapes.

WC - And Sirica, because what other judge would have given out 35 year provisional sentences provided you talk — not too many that I am aware of.

WF - You all remember the matter that preceded impeachment ^{that} I think had something to do with the ultimate outcome. And I'm going to make myself a hero here, but Jim just got caught in the crack there. I refer to the matter of the Hungate subcommittee trying to backtrack on Jaworski. You remember that? The committee voted on partisan lines except me voting with you guys, 20 to 18, to report out a bill that would have required a new special prosecutor.

RT - A court-appointed special prosecutor.

WF - Which in effect would have voted Jaworski out, and they never even brought it up.

WC - Well, I don't want to engage in any self-hypothesis either, but you may recall it did come out of the full committee to go to the House.

WF - It was never brought up in the House.

WC - No, but they passed it out of our committee, it went to the House. And I had the opportunity to write an article which the Post printed, and wrote an editorial one or two days before it came out, saying, "Don't do it, don't put a new man in." My reasons were entirely different. I had been talking with Elliot Richardson, drove him in from his house one day to downtown, and asked him about what the situation was with Jaworski. What had happened was that the White House originally intended when they fired Richardson and got rid of Cox and Ruckelshaus, they expected Peterson and Bork to take over the prosecution. And when that didn't fly after about two days of public vitriol being expressed, they decided they had to come up with some guy. They picked Jaworski with a long, safe tradition, head of the ABA, president of the ABA, chances are, representing a lot of corporate fat.

WF - A wolf in sheep's clothing.

WC - OK, when they appointed him, they expected him to can all of Cox's men. He didn't do that, so once he came in, he then became the captive of Cox's staff, and that is why the White House was upset with him. They expected him to fire everybody, bring in his own people and start fresh. So now he couldn't back away from any issue that Cox had begun without them blowing the whistle. So the White House wanted him out, and that is the article that I wrote for the Post, saying why you shouldn't create a new special prosecutor.

Tape IV, p9

WF - We would've gotten bogged down and fighting over Jaworski and it would have taken the steam out of the impeachment inquiry about the same time, because this was the fall of '73.

HF - On these procedural issues, and even the more substantive issues, for example in trying to respond to the edited White House transcripts and so forth, it was the Republicans who were meeting periodically, almost weekly, and except for the four of us, I think it should be noted, the pressure, the intensity of feeling, on the part of every other Republican there, including those like Hogan and Froelich, was very intense to the point when you just don't want to participate in the discussion, but I remember Bill and I as late as May 1st felt so.

JM - Correct me if I'm wrong, but we didn't have caucuses on these procedural issues.

RT - That's correct.

JM - They were spontaneous on our part. The only one was the time we recessed, as I've said.

TR - No, I'll bet you on that.

JM - All right.

CB - But Jim, you don't need to have a caucus when your invading army is overrunning the continent. Everybody knows you are going to follow it. To say it wasn't part of the motivation I'd have to doubt.

JM - No, that's not true. I'm saying that I don't think that Walter and Ray and I were partisan motivated on the procedural votes.

TR - No, I am not saying that.

JM - I would bet I could take and win, before an impartial jury, on the issue of the subpoena power.

TR - I don't know.

JM - I do.

CB - What the question there was, do you want to give the minority the right, Ed Hutchinson, to subpoena anybody he wanted to, unlimited. It might make a good trial out of the power of investigation. That was the alternative.

WC - No, it wasn't.

TR - No. The majority overruled.

JM - What difference does that make — or the entire committee doing the subpoenaing, what's the difference?

TR - We will have Mooney go over these procedural points and list them and I'll tell you, it wasn't all the Republicans who were wrong. I thought we were wrong on open meetings. Weren't we for opening it all up?

Tape IV, pl0

WC - Yes, but for a different reason.

TR - We were demagogues. I was wrong in the letter [?]. You [CB] were the only one who supported that.

CB - Don't get into that. That was the dumbest thing I ever heard of; who ever heard of writing a letter to a judge? You ain't doing right.

TR - No, no, then we wrote a letter to Nixon.

CB - I know. Who ever heard of a court writing a letter to a litigant. There ain't no such animal. Who ever heard of it?

TR - Well, I will tell you the reason: we wanted to bend over backwards to be fair.

CB - No, the reason was we did not have enough evidence to charge him with any official failure to measure up to our requirements, so had to do it informally.

TR - Oh, no.

JM - I had one basic hangup about the matter. I was looking for an objective investigation, and you were all looking for a trial, that was the difference.

TR - No.

WF - What could have done and might have done at the point when we wrote the letter is cite for contempt.

CB - Yeah, you do or you don't.

WF - But it would never have had to come to that.

TR - Conyers wanted to do that.

JM - It would have had the effect of straightening out the problem with the executive branch as it was then. And it would have been on the basis of the facts as opposed to some procedural basis like the contempt of Congress.

TR - But, Jim, you do not start out that way. It is not whether Hutchinson has the power, it is whether Rodino show have it unilaterally.

HF - Solely.

TR - Sure, you're trying to convince the American public this guy should be given a legitimate, fair inquiry. So you give a Democratic chairman who's met with Albert and Tip O'Neil, the power to start an impeachment inquiry. And you don't abolish the notice requirement for holding meetings. That sounds terrible.

Tape IV, pll

JM - Of course, it did to the layman. And you all acted like laymen.

TR - And so you don't do it.

LAUGHTER.

WC - This is more heated than the real time.

LAUGHTER.

RT - As a matter of interest, it seems to me that we have proven by this discussion that it is easier to disagree on procedural or really superficial points than on matters of real substance as to whether or not the President was guilty.

CB - But the hang-up was Peter Rodino, who was basically saying, "Trust me, fellers." And it was so much easier for the Democrats to trust him than for us.

JM - Well, that may be.

CB - That was my hang-up.

TR - Sure.

JM - Don't think that I don't understand the situation, but of course we will recall that it required consultation with Hutchinson, and a right of appeal to the committee, as I recall.

If
WF -/Hutchinson disagreed, it would go to the committee.

HF - That's right -- a compromise, that's what came out.

TR - That was not the initial proposal.

HF - Only after we had a party-line vote on the joint power.

TR - Everything was compromised.

CB - It was a procedural point, if we didn't win that....

WF - I don't blame you all for having your hesitation in May or April, or whenever this was, about Rodino. But you wouldn't have had the same hesitation on July 26? For by then you knew where he stood, and he stood with us.

Tape IV, pl2

HF - We might just contemplate what difference it is now from a year ago: two to one plus one — there is a lot of difference between that and 21 to 17.

JM - There sure is.

TR - Peter was trying to control the crazies.

CB - I don't think the matter would have been referred to the present committee, do you?

HF - It might have been. But the Republicans would not have been shown all these considerations.

CB - Well, I feel that now it is not that representative of even the whole body.

SL - What if Cellar had still been chairman?

WC - What if Jack Brooks had been chairman? ^{WF -} /If Cellar had been chairman, it don't think he would have brought it along. He would have stifled it somehow or another. I don't think he ever thought that Nixon should have been impeached. What do you all think?

TR - I just saw him the other night. He is looking senile. Good guy.

LAUGHTER.

WC - A Railsback remark.

DS - On that autobiographical remark [TR - That was great, thank you.], I would like to make one more comment. Do you recall that in most of your interviews, I told that little analogy of Lincoln saying that if you want to stop religion or a church — well, this is the time to give the credit to the real author, Ray Thornton. Tell 'em right.

APPLAUSE.

RT - If you want to stop the construction of a church, don't start an argument with the religion, but over the location of the building.

DS - We showed that again tonight. Shall we adjourn? You know the agenda for tomorrow.

END OF TAPE IV AND OF SESSION II.

Tape V, pl

Persons present and site - same.

Time: Saturday, July 12, 1975, 9:30am

JM - I mentioned yesterday that I'd had this Winthrop College professor, Bill Blunt, whom I'd borrowed from Tom Geddes, helping me, and as Walter mentioned, he was with us for lunch on that Saturday after that more or less ineffective meeting of the Judiciary Committee, getting ready for the hearings the following week. I guess it was about that time that I got him and John Labowicz on the impeachment staff working on articles. Now I apologize to the group for not having brought with me and not having located the file which he kept and which I instructed him to prepare and consolidate and make notes on and deliver to me, which he did. It was then packaged in my impeachment material. I instructed my Greenville staff to go thru that material and get out what appeared to be my personal notes, and I went by to pick them up last week, and found they were in a very small room, boxes stacked upon boxes, and not a damn thing located — just everything open. I just didn't have the time nor the strength nor the arrangement to try to find it, so I am relying on independent recollection, when I really owe it to you to review some of those notes. I called him this morning, and he will call me back in the next ten minutes. I don't know whether he kept any extra copies of certain things or will be able to confirm his and my belief that we did have an article II ready on Tuesday morning when we met in Railsback's office. There was some type of article II in addition to article I that had been prepared. Bill Cohen's recollection about turning them in is of course accurate, and those extra copies are no doubt in my files, and I am sorry I don't have them here.

CB - I thought Mooney had all those.

TM - At first we started, on article I, numbering the drafts and signing them and so forth, and frankly that fell thru after about the third or fourth meeting. They were being passed out, some of them would be returned, some wouldn't be returned, and some were handing them back and not signing them — we got pretty well mixed up a couple of times.

JM - You will recall, we did not locate the article I that I brought to the meeting on Tuesday morning, but Bill Blunt and I are of the opinion that we would be able to locate it in the files he left me. Now I cannot by looking at these drafts put them in chronological order; somehow this one that we have marked here "third draft" is first, in my notebook.

TR - Mooney, how did you assign the draft numbers?

TM - I just assumed that the Donahue draft is not the first draft, that is what he dropped in on Wednesday, thinking that there had to be something before that.

JM - That's correct. Bill Blunt and I, in my recollection, on Tuesday night put together what was probably the Donahue substitute that I might have finished....

TR - It wasn't the substitute, it was the original.

Tape V, p2

JM - That's right.

TM - In your book, it is number 2. The Donahue draft is 2. This may be what you handed out Wednesday, before we went into the committee room at 7:30.

JM - Yes, that was on the bottom of the resolutions, wasn't it?

TM - About ahlf an hour before that you did hand us something.

JM - Well, I don't recall.

TM - You gave it to us somewhat reluctantly, as I remember. You were not sure that you wanted to do that. You did say, "Here is a rough draft of article II."

JM - All right. Generally you will notice these drafts do have a date and later on, as things heated up, a time. That indicates that they were done at the impeachment staff offices. John Labowicz and Bill Blunt, after going over the latest draft with me in my office when I would return from one of our meetings, would then go over to the impeachment headquarters. John Doar and I had frequent discussions as I brought back from you any suggestions pertaining to eliminations. He would try to implement. I never had any problem with him asserting himself on any points, except one or two isolated ones, like we discovered yesterday on that business of making "his policy," certain things that he considered essential to sustain the level of an impeachable offense. But basically it just was drafting. One other major point of difference that he and I maintained throughout was the question of the inclusion of the subpoena contempt as part of article II, rather than as a separate article. As I recall, that was the only point of difference that was ever discussed with any other group, and it was mentioned once or twice at the time of the little Democratic caucus meetings in Ziefman's office. I remember one morning in particular, in giving a progress report, there was concern how that should be handled and his opinion whether it should be second [?].

WF - We all wanted it to be a part of II also, even you, Ray.

RT - Oh, yes.

WF - Even tho you ended up voting for it as article III.

RT - Yes, at the time of the vote, I expressed a preference that it be inserted as part of article II.

JM - Well, that is not exactly correct. I'd say we wanted it to be a part of article II, but you were prepared to strike it earlier. You recall the first day we had a discssion, you [WF] and Ray in particular.

RT - I think that may be right. We didn't like it at all.

Tape V, p3

JM - That's why I finally gave in frankly, because I knew that even tho you all were going to vote on the article, you were unhappy.

RT - The indication was that you would vote for article II whether or not that addition was included.

TR - Exactly. I could have supported it, with it or not.

JM - Your position on that finally caused me to make a separate article.

WC - It really belonged as part of I rather than of II.

RT - You're correct -- the obstruction of justice. But the discussion was whether to add it to article II.

TR - That's right. But I think that at one point, we did discuss making it part of the Watergate coverup.

WC - That's right. When it came up for debate during McClory's article III, I believe, Ray, you said something and I said something at that time that we were supporting an amendment on the floor or something to that effect -- to have it included in article I or II, and not as a separate article.

RT - That's right, but I would have still supported it as a separate article.

WC - That's right, you did say that during the debate.

TR - I just felt that we had not exhausted our proper remedies to enforce the power that we had, there were also other measures.

HF - Do you still feel that way?

TR - Yes, I do.

[?]- I am not sure that I do anymore.

[Mr. Mann takes telephone call].

TR - For the record, let me just state that I felt there were certain customary, traditional procedures that the House had available to it to enforce subpoenas, and also to enforce compliance with subpoenas, and they involved letting a guy come before the House with an attorney to confront the body.

CB - What you call due process.

TR - Yeah, due process. And the other part of it was executive privilege. I thought that we had a right probably to go into court and I thought that it would have sustained the House in its attempt to get that material against the argument of executive privilege, but I thought the President had a right to assert that.

WF - Well, I didn't support anything to do with it, but I initially felt that we did not elevate it to that status because we should have even cited him for contempt for failure to comply or we should have gone to the

Tape V, p4

WF - Congress and gotten the authority, rather than the courts; we were really acting with Rodino's subpoena, and it wasn't the whole Congress speaking except by agency there.

TR - That's right.

CB - We wrote him a letter.

TR - That doesn't make any difference.

WF - I retrospect, I think I would say that it is well that there was an article voted there.

RT - If I may speak to that, because it seems to me an important part of the continuing violation as I saw it. The President even at the time that we were deliberating this was still in a position of not complying with a lawful request by the committee constituted to conduct this inquiry. And I think as a general matter in a legislative inquiry into the executive, that it might be appropriate to test it in the courts. But the function of an impeachment inquiry is a different ballgame; there you are dealing with the very roots of our constitutional system and there is no other court involved in that decision, and what the legislative body is doing there is not a legislative function. It is a basic constitutional function and therefore its inquiry, if grounded upon an investigation which is to an impeachable offense, itself I think should be enforced by that body in order to get that information. Otherwise, you frustrate the constitutional procedure.

WF - Basically, there was no court high enough to have jurisdiction.

WC - That was the question that was raised as to where there is a right of appeal from the impeachment proceeding, and the only one who came down in favor of that was Raul Berger in his book.

TR - He said perhaps there might be a right of appeal.

WC - Berger argued very clearly there was.

RT - In retrospect, the amendment that I introduced on that morning, which was a last-minute drafting exercise in my office just before coming over there, I did think satisfactorily tie article III to articles I and II. It said, "the subpoenaed papers and things were deemed necessary by the committee in order to resolve by direct evidence fundamental factual questions relating to presidential directions, knowledge, or approval of actions demonstrated by other evidence to be substantial grounds for impeachment of the President." So you're tying in the function of the subpoena directly to impeachable offenses. And "then in refusing to produce these things Richard M. Nixon, substituting his judgment as to what materials were necessary for the inquiry, interposed the powers of the presidency against the lawful subpoenas of the House of Representatives, assuming to himself functions and judgments necessary to the exercise of the sole power of impeachment."

Tape V, p5

TR - Ray, if you'll yield. I want to congratulate and compliment your statement, which I thought was excellent, and this is very, very important, I think, in our meeting this morning. I don't agree with you, but I thought your statement was just excellent. As far as going to court, I was voted down, you know; I think we got six votes to go to court.

RT - Reasonable men can disagree.

TR - But I just wanted to add a postscript: that Alex Bickel, who I think knows more about it than Bill Cohen -- he was a hell of a great constitutional expert --

CB - I hope so.

WC - He does.

TR - about ten days after that vote was taken, came out with an article that said that we should have gone to court. Very strongly arguing from a constitutional standpoint and then shortly thereafter he died. But there was a very important part of the precedent-setting....

WC - Being punished, probably.

CB - The whole question that you are directing us to is really that we didn't just go far enough down the road.

TR - No, two things, altho that was part of it. We didn't exhaust our traditional remedies. In not exhausting them, we in effect, took away some of the rights of our due process that I think are guaranteed to other possible persons to be held in contempt, in other words, witnesses. We didn't protect them by us seeing that they had the traditional rights. And the second part is executive privilege. All during these proceedings, the President was arguing executive privilege. That is where you get into the court tests. Is it proper to test that argument by going to court? I think we would have won and settled it. I think the Supreme Court would have held that we did have a right, and executive privilege would give way in that case. We did not see fit to do so.

CB - And summarily so.

WC - I think your position was best expressed on page 16 in the report where it reads, "Before the President's refusal to comply with committee subpoenas can be raised to the level of an impeachable offense, the committee at a minimum should wait until the House of Representatives has found that non-compliance to be wilful, contemptuous, and illegitimate. Since the committee did not pursue this course of action, it should not now seek to raise non-compliance to the level of a separate and independent act."

Tape V, p6

TR - Exactly. That is right.

WC - That's really well stated.

TR - Who made that -- you?

WC - Yes.

LAUGHTER.

HF - I gather from that, Bill, that you would have voted to include it as part of our article I.

WC - Yes, I would have.

TR - Ray, your statement was excellent.

HF - It was a little different here, because even though I am the one who voted against article III, a week later I signed the concurrent views, supplementary views that McClory had in favor of it.

TR - How did you do that?

HF - I was just concerned that....

WC - McClory's schizophrenia was contagious.

LAUGHTER.

HF - The language that Bill just read about raising it to the level of an impeachable offense, that concerned me. I didn't think that we'd adequately considered this, but I disagreed with you that we had to take those other steps. For as Ray said, it is the constitutional issue and not a legislative issue, and the sole, the word is right there, the sole responsibility was vested in the House of Representatives. And I viewed a lot of this effort to bring in the courts as trying to share the burden, which we weren't entitled to share. But secondly, it is absolutely essential to the impeachment process that the House has access to the information that it deems necessary. I think the clincher for me came upon the following Monday with the release of the June 23rd transcript. This is something we had subpoenaed, and apparently had we received it in May, would have saved everybody an awful lot of anguish for those two months following. That I think was proof of the seriousness of the scope of the subpoena power. For a matter of history, it should have been an article of impeachment.

CB- Well, suppose that the tapes of the 23rd had not convicted the President but exonerated him. Now an impeachment inquiry and the reason we were subpoenaing would have been for evidence that would not have been sustained. Then the subpoena power would have had to stand alone, and would have been impeaching the President for amounts to failing to cooperate in the construction of the scaffolding for his own execution. And that would not be right.

Tape V, p7

HF - But by then the House would not have voted articles of impeachment.

CB - But the argument that you keep advancing is the failure to cooperate and to comply with the subpoena is of itself impeachable, and if that is the case, you can hang a man not for the crime but the failure to cooperate in his impeachment as such.

WC - You could do it, but it would be wrong. You're saying "crime"....

CB - I'm using the word rather loosely.

RT - The point is, whether there is an attack on the constitutional system of government itself, at least that is what I think it is. That is what the question is. If there is some evidence to support the idea that the President is about to dissolve the Congress by an executive proclamation, because it is no longer needed to carry out the affairs of the United States, and if the Congress hears of it and has some reasonable basis to conduct an inquiry as to whether the President is indeed about to issue such an order, I think the Congress would have a right to inquire into it and to subpoena whatever documents the Congress needs to determine whether he is about to dissolve it. And if the President refuses to honor that subpoena, even by the production of exculpatory material, then I think he has committed an impeachable offense, because he is in effect denying to the Congress the sole power of impeachment.

WF - You can make the analogy in our work just as well, Ray, you don't have to make up this story. Let's say that he had just totally refused to give us a damn thing, totally, and the courts had not come to our aid on the tapes, but they just stood mute totally and disregarded it, where would we have gone?

CB - If they had denied jurisdiction....

WF - Yeah, what we are saying is, what would we have done if we hadn't had the tapes?

HF - The situation in India today, by virtue of having the majority of parliament, the prime minister can incarcerate political enemies. Now if this started happening here, and we did not have the impeachment power, we'd be in the position of the parliament of India.

CB - If you don't have enough evidence to impeach the President aside from what he has in his own limited domain, then you got no business impeaching him.

HF - Even if you have identified with precision, as we did, the tape, the hour on which it was on tape, the people present at the conversation -- not just a fishing expedition?

CB - You're entitled to access to it, but you are not entitled to impeach him for invoking executive privilege.

RT - I just don't think that executive privilege applies in an impeachment process to the extent that it does in the normal legislative process.

Tape V, p8

TR - Who is going to decide that?

RT - The Congress.

HF - The House.

TR - Who normally interprets the Constitution?

RT - The court does, but the court doesn't in cases of impeachment, because impeachment may include the court itself. What if you are impeaching the Chief Justice of the United States, instead of the President? Would you refer the exercise of the power of subpoena to this court? to the White House?

WF - To the executive branch? I agree with Ray there.

CB - Even in this instance we hadn't gone that far. We hadn't gone to all the processes.

RT - That is literally the legal argument: whether we had exhausted all the processes.

TR - We had not, clearly.

CB - That's right.

WC - Doesn't the person, before he can be cited for contempt, have an opportunity to go before the House?

TR - Yes, to make a statement.

HF - The time, you remember, when we talked about contempt, we figured it would delay proceedings a year, a year and a half.

TR - All the safeguards normally accorded to a criminal defendant do the same thing.

HF - But as a practical matter, we were reluctant to put it off.

TR - As a practical matter, we should knock ourselves out to assure that he is given all, if not more, of the safeguards that the ordinary witness who has to appear enjoys. The important thing to remember is this was a separate article and must stand on its own feet. Forget the Watergate coverup, forget the abuse of power of the sensitive agencies. Are you going to impeach a guy when he asserts executive privilege and fails to produce? Here he is asserting executive privilege, he fails to produce, so instead of going thru your traditional contempt processes, you impeach him. That would never stand up.

Tape V, p9

HF - I think the example that Ray gave, if we had been thwarted from the start, and gotten nothing we'd asked for, you're saying then that we just would have said, "Yes, you're absolved"?

TR - Assume that there is a threat, that the President is going to dissolve the Congress, but there is no evidence of it. I'm saying that in the past Presidents have exerted executive privilege and failed to produce certain things that they felt belonged to the executive. I think that doctrine gives way....

HF - Do we find that in the Constitution?

WC - Where is the doctrine of executive privilege spelled out in the Constitution?

TR - It is not.

HF - You're balancing a specific authority written into the Constitution, vested in the House of Representatives, with something that is implied from custom and practice and respected as an important principle but not specified.

WF - But not on impeachable proceedings [?].

TR - No, it's never been.

WF - This is not a normal information-seeking device for the Congress to find out about an authorization bill.

TR - Now wait, let me make it very clear. I think that executive privilege gives way in this case. I am not agreeing with what the President did or what he asserted. What I am saying is he did assert it, and there has to be somebody to determine whether it should give way. I am saying the impartial arbiter would be the Supreme Court.

HF - When you have the sole power, where is the arbiter? There is not any distinction or need.

TR - I'll tell you, Raoul Berger would disagree.

WF - Who's he?

WC - That was a minority view.

JM - I would agree that it would be appropriate under the circumstances to have a contempt proceeding, as a forerunner of impeachment, but should Congress determine that the refusal was unwarranted, then impeachment is our only remedy.

TR - Exactly.

Tape V, p10

RT - That's it.

TR - But you exhaust every avenue first.

CB - Now wait a minute.

WF - You don't think you got to go to court, Jim?

CB - It is not your only remedy, because you can go to court to enforce your subpoena.

WF - We could send Fishbait Miller after him.

LAUGHTER.

TM - How do you sacrifice your sole power of impeachment by permitting the court to determine whether or not certain information should or should not be turned over?

TR - Yeah, how does that affect your sole power?

CB - I don't think the court would go that far. The court would have to determine if it was related to our impeachment inquiry or we had a reasonable basis for it, not whether we were entitled to the information or not. That would probably be another question.

JM - It might not have been an impeachment inquiry initially.

WC - The court would have to determine whether you are seeking relevant information, and in order to find out what is relevant, they'd have to find out what is an impeachable offense.

WF - If they do that, then they are invading your power to impeach.

WC - That's correct. That was the argument that Jenner used to defeat Railsback's motion to go to the court in the first place.

HF - A solid argument.

WC - Once you get into the question of relevancy, you have to define impeachment and then you have the court defining an impeachable offense as opposed to the Congress.

TR - Alex Bickel came right back and destroyed in effect Jenner's argument.

WC - I agree with Nora Ephron that you wear ice cream suits and that probably affected the validity of the argument.

Tape V, p11

RT - You know that we didn't go into this depth at the time we were doing the drafting.

WC - No, we sure didn't.

RT - It might be that we are overdoing it now, but I do think that the court decisions themselves have indicated that they should not be involved in the determinations which by nature are political or assigned to another department of government, and clearly the impeachment process is assigned to the Congress. Baker vs. Carr, and the other cases seem to support that, but whether they did or not, I still go back to the very practical point, that impeachment cuts across the departments of government. It addresses both the executive branch of government and the judicial branch. Most impeachments have occurred in the judicial branch, and if you are going to relate questions back to the judiciary when you are dealing with a process which goes to the judiciary itself, that logically just doesn't follow.

DS - May I interrupt just a moment? Ray just said, "We did not go into this depth at the time." This is a significant thing. Do you all agree that this is hindsight now?

WF - Yeah.

DS - In other words, you didn't do this kind of thing a year ago?

HF - Not this way. We expressed how we felt at that time, but we didn't as a group discuss at this depth whether or not....

TR - No, but we were dealing with it, and Cohen had a statement and I had a statement, I argued it. I think everybody was involved.

CB - WE had a substantial discussion of it when article III came before the committee. But as far as our drafting problem, as I remember, we really weren't concerned whether we were going to slip it into article II or not. We had been resolving it on a whole less esoteric level than that.

TR - No, ^{it was} my argument and Bill's argument against article III. But I think this discussion today is perhaps the most important as far as the future, in other words, it gives an inkling to any future House members who might have an impeachment problem, how to go about it.

WF - I think that is the value of Article III having been voted on. It is important for the future, and that is the rationale of my basic turnabout on it, is that in retrospect I think to maintain the viability of a potential investigation under circumstances where you did not have the aid and comfort that we did — you know, hell, we had more help than you can possibly imagine thru other fortuitous circumstances.

Tape V, pl2

WC - My concern was that we had, in my opinion, a fair and rather impartial investigation. Let us suppose you go back to the Johnson impeachment. You got people like Benjamin Butler leading a charge against the President, not, in my opinion, on valid grounds, but for purely political reasons. Say you have a heavy majority in Congress who is opposed to the presidential policies, whether it be impoundment or dismantling of OEO, or whatever, suddenly saying, "Here are our subpoenas, we got to bring it in or otherwise impeach you."

JM - That's the danger.

CB - Suppose you had two to one plus one.

RT - That is exactly the hypothesis that Raoul Berger poses in discussing judicial review. And I want to say that your position seems to me to be identical with President Ford's in the Douglas case — that impeachment is whatever you make it. Let me tell you Berger took Ford to task there.

HF - You raise a good point, just make it two to one plus one, three to one totally politically hatchet job. But first of all, we do have a standard of what constitutes an impeachable offense, and what you're saying would not measure up.

TR - You disagree with Ford, then?

WF - I also disagree with it.

HF - Secondly, to see your argument, you have this impeachable offense which is a crime against the government, the structure of the Constitution, and so forth. Clearly what you are saying it would not be that, but nevertheless, the Senate votes it, the trial held, and they convict the civil officer. Now the court of review is the people of the United States in the next election, as it is in so many of the things we do. You are posing a most extreme position, a most extreme breakdown in the civilities that are essential to our system.

WF - I agree with you, Ham. The only and final recourse is the people.

TR - Ham, you are stating the argument very well. I think it is very important.

WF - I think ^{you} could have a totally political impeachment.

TR - Sure, that's possible.

WF - When you get down to it, the system is no better than the people that are operating it. If you had even two to one plus one Republican, that could impeach a Democratic President.

CB - They would.

DS - That was Butler for the record.

LAUGHTER.

Tape V, pl3

WC - I think one other point could be made so long as we are on this light note, and it's the one you made last night, Ray, that all of us thought during the course of the impeachment, how in the world could someone, who knew he was being recorded, had his own taping system set up, and having engaged in the conversations he did and they did, how could they allow the recording to take place? Then when we compare it with what we did the past day, and what we are doing now, the answer becomes rather clear: that these will never see the light of day.

LAUGHTER.

HF - I certainly want these edited before they do see the light of day.

JM - Let's don't fail to recall though, contrary to the impression that I got a moment ago, that there was a brief discussion concerning these matters in our meeting, because it involved the position of Rails and Walter with reference to whether this should be an impeachable offense, and that discussion caused Ray Thornton in effect to develop an amendment to article III, which was presented to the Democratic caucus, and I guess to the full committee when it was considered.

RT - Right, and it was adopted.

CB - It was salutary in every sense of the word. It surely did improve it.

RT - What it did, Tom, once again was to tie the right to have an article based on a failure to comply with subpoenas to two elements: one, that it was a clearly identifiable effort to get specific evidence related to an offense which was demonstrated to be an impeachable offense by other evidence.

CB - It was the finding of a jurisdictional prerequisite for impeachment. Yeah, that is a good one.

JM - I just looked at article III. I don't see that language ended up in it.

RT - Yes, it does.

JM - Yes, I see it now.

RT - It, second, was necessary in order to resolve by direct evidence factual questions relating to presidential direction, knowledge or approval of action, demonstrated by other evidence, to be substantial grounds for impeachment.

JM - Right.

WF - Frankly, it just boggled my mind that we were going to get down to what at the time I considered a rather technical kind of legalistic approach to the matter, when we were dealing with these offenses—and in retrospect I changed my position — but then these God-awful offenses like obstruction of justice, abuse of sensitive agencies, and things that would be politically sexier by back home than failure to comply with a subpoena issued by a bunch of Democrats in the House of Representatives. And you know, how many times have you heard Eddie Ebert say, we got fifty subpoenas sitting on the Armed Services Committee, and the Congress doesn't honor subpoenas of the judicial branch, if they don't want to.

Tape V, p14

CB - Well, a propos of that, it just seems to me that there is one other factor that justified my vote against article III, and I still feel this way. Our purpose in proposing the impeachment articles is to bring to the Senate the question whether the President should be removed or not. And we kept adding articles to it, it complicated the trial, extended the trial, when it seems to me when we brought the issue clearly before them in articles I and II. That was one of the reasons that I felt we should not get into Cambodia and all the others.

TR - Right.

JM - My conversation with Bill Blunt this morning [by phone] reveals that on July 12th I assigned to him the duty of reviewing the Brooks article, which had just been received, and certain other articles that were in our possession. Now that causes me to be curious about Caldwell's recollection that you didn't get those Doar proposed articles until Saturday before we started. We got the Brooks articles on July 9th, and Bill's notes show that on Friday, July 12th, we circulated the other articles. Blunt reviewed those articles and he said he spent Sunday the 14th doing that and then reported to me. During the course of that week we had no other permanent recollection at the moment of what we all did. Then leading up to our Saturday luncheon, which had been referred to, that would have been the 20th, wouldn't it? When Walter and I and Bill Blunt were having lunch, and he indicated to me that I was wrong about he and John Labowicz working on Monday. They didn't. Rather, all day Tuesday and Tuesday night, which goes back to Tom's question about why I wasn't working on article II. As a matter of fact, Bill Blunt was over in the Library of Congress when I got out of that meeting, and as soon as I did, I said to him and John to start working on article II at that point. Along about 7:30 that night we had a product and John Doar came over. He met and went over and over it, and about 9:30 we broke up. John Labowicz took our notes and drafts back over to the impeachment headquarters, and then the next morning, probably this draft entitled 7-24....

TM - There is a little note up there. Is that your handwriting?

JM - No, that is not my writing. We have labeled here the second draft with the number four and thirteen on it — that could have been the one we had earlier on when we met on Wednesday morning.

TM - 7-24-74.

JM - Right. That was Wednesday.

TM - 13, 17th draft. Certainly we had that one during the course of that day, because as you will notice, we made those changes in certain words, striking out, and a few other places. And then look at the Donahue resolution; it reflects the principal note that we made on this draft of 7-24.

TR - Yeah.

Tape V, p15

- JM - So the indications are that this is the one we had to work with on Wednesday morning, and it was prepared as a result of our meeting on Tuesday and my sessions with Blunt, Labowicz and Doar until Wednesday morning.
- CB - That is right.
- JM - So, unless we'd made two drafts on Wednesday prior to the Donahue resolution in preparation, this would appear to be the one made immediately before the Donahue resolution. The differences are explained by the notations on the draft preceding 7-24-74, which we will refer to as what number, since we have several?
- TM - 13, I believe.
- JM - Number 13 seems to have been the one that we considered as a group prior to the final preparation of the Donahue resolution during the later afternoon on Wednesday, and was handed to Donahue for introduction. Now did we meet once or twice on Wednesday?
- TM - We met twice on Wednesday, morning and afternoon, and we worked on article I.
- JM - OK. Blunt remembered delivering to us at Railsback's office copies of articles and it could well have been this article II.
- TM - Late that afternoon. Yes, which we then polished up and prepared the Donahue version. [?]
- DS - Just for the record, it is on page 24 of our notebook.
- TM - One of the problems here is that Mr. Mann handed out his draft Wednesday night. I took that and started to work on it. He continued to work at his office on another draft, and then Frank Polk was working on the third version. And so we had in circulation three different versions of article II, flowing back and forth. That accounts for a lot of the confusion of this thing.
- HF - My recollection is when we got McClory's drafts delivered to us, we did not pay any attention to them.
- JM - Not at that particular moment.
- WF - We did later on, though. He had pretty good input into it. To exhibit the problem that you all had in drafting, here is the word "improperly." I remembered when we got to talking about it, that "improperly" just does not lie here. I mean, we are not talking about an "improper" function by the executive, we are talking about "unlawful," so we took "improperly" out at that point.
- JM - Now that leaves us somewhat in the dark, and only my files may show whether or not I showed up Tuesday morning with an article II. Bill Blunt and I have no independent recollection of having prepared one, although he and I had been working for ten days on the general subject.

Tape V, pl6

CB - On Tuesday morning.

JM - Yes.

CB - My recollection is that you did not.

TR - I don't think you did either.

JM - I don't think I did either, because there was no reason for us to have identified abuse of power as the basis for an article. We were still mainly dealing with a multiple article idea at that point.

WC - At what point was that, Jim?

JM - On Tuesday morning when we first met.

WF - We were talking about an article II at that point.

WC - That is when we agreed that Mooney would take I and that you would take II.

JM - Yes, that's right.

WC - We broke up that morning, saying, "OK, Mann, work on number II and Mooney work on I." That's what I have in my notes.

JM - And I did exactly that. The three people I mentioned from then until Tuesday [sic?], when we brought to the committee this number 13, and whether or not one was brought earlier in the day I just can't say at the moment. The one you have marked #11 just doesn't strike any notes with me at the moment. It may have been the first one that was brought in the committee on Wednesday, but I just don't recall. I'll get together with Bill Blunt and see if I can recall that. But it is clear to me from the typing and other things that this is the culmination of our work all day Tuesday, Tuesday night, and Wednesday morning before presenting it to this committee.

CB - You brought it in 10:30 Wednesday morning?

JM - Yes, I either brought this, altho there's some question here about whether or not maybe an earlier one was brought at that time, and this one was brought later in the day. I hadn't checked every little notation.

WF - It's got the date of July 24th, which was Wednesday.

JM - But I haven't compared every little chicken scratch here against the Donahue resolution, but this appears to be the one from which we developed the final Donahue version. Most of the little changes do correspond to the Donahue resolution.

TR - Which number is that, the Donahue one?

JM - It's the second one. For convenience I put it behind the 7-24-74 draft.

TR - I think you are right.

Tape V, pl7

TM - I recall on Thursday at the dinner at the Capitol Hill Club when the group more or less polished off article I, and I had penciled in the changes agreed on at that time, I went back to the office, and went downstairs to Frank Polk's office, and started working on article II. And you, Mr. Mann, kept coming down and checking on us, until finally the meeting was over at around 11:30, at which time you came down again and we sat there until 2:30 in the morning rehashing. The one following the McClory article, #13, is the one we just talked about. Then there's McClory's letter and article, and then there's another one with my name at the top, on 16, and one with Railsback's name. [Going thru the drafts in the notebook].

HF - Exhibit page 57.

TM - Yes, exactly. That's an article which Mr. Mann and Polk and I were working on late into the night. I recognize this is my writing on the second page, page 58. I know that for input we were using McClory's article, his letter, and we were using an earlier draft of article II. Mr. Mann was kind of orchestrating the drafting, at least that evening.

DS - On page 58, in the margin, I believe that is not your writing, Tom?

TM - No, looks like Railsback's.

TR - No, it isn't.

TM - I don't know whose it was.

TR - I wonder if that's Hogan.

CB - No.

TM - Could be.

HF - He was with you on the 25th, Thursday evening?

TM - He was at the Capitol Hill Club, but he was not in Frank Polk's office.

TR - This is again what Hogan was concerned about, the specific mention of the FBI. That might be Hogan.

JM - Well, I am not that positive that's the case, because upon looking at 12, as you have them arranged, I hadn't frankly studied this enough to see how each of these evolved from one to the other. Maybe you have, and that is why you remember this way. On second glance, there may be another draft here that follows the Donahue a little closer. I see we changed the paragraph numbers from the 13 to....

TR - Yeah, but clearly the Donahue should be later.

Tape V, pl8

JM - No question about that, yes. What the timeframe of 12 is I am not sure.

CB - My notes say this: "On Wednesday we came back from luncheon, we then got into the abuse of power and that draft has proven to me to be extremely difficult. Now Jim Mann had two drafts with him, and he is agonizing, he's gotten help from John Doar and others. We're trying to put the draft in there with all the abuses of power, without putting in things we don't think are provable. In this regard, Jim Mann had with him two drafts. All of them had IRS for example. He evidently had thrown up his hands and told his office people, try again, and they were going to bring a third draft over." That accord with your recollection?

JM - Yes, that does. Bill Blunt was bringing another one over.

CB - Right. I got the copies of the draft whihc we can prepare when we get a chance, but I don't know where they are. [?]

TM - These are first. You notice draft 12, which has a "first" at the top, draft 13 has a "second."

JM - Well, frankly, I think that I could sit down in an hour with Tom and we decide which ones of these comes in what order, the ten or twelve articles leading up to the Donahue resolution.

CB - During the course of the deliberations, there was a moment when we decided, almost said, we just can't make it with abuse of power and then Tom [R] got on his high horse and said the IRS was enough for an article for abuse of power and pretty well did it, and we all fell in line with that. Walter was one of the first ones that said, if I remember, "We just haven't fot enough for abuse of power." Railsback had second thoughts on that.

HF - Why not just submit a memorandum to Don about your papers and drafts?

JM - It's just a little detailed comparative drafting job which I would be happy to do and I will recover my other notes before I do it. I think we can line those up. But I think it is clear that we didn't have a written article for abuse of power until Wednesday, at which time we considered two or three different ones leading up to the Donahue one, which we all agreed was still in draft or tentative form, and not a final product. And then it wasn't until later, it may have been that same day, that we had the indication from McClory about his willingness to go along with an article, II, the abuse of power article, faithful execution of the laws — altho his letter to Caldwell that's in our file is dated Thursday.

CB - That comes from McClory?

JM - Right, that's from McClory. But we had it reported to us sometime along there that he was willing to do so.

Tape V, p19

- CB - Well, my notes indicate that when we came back after lunch, we had a call from Frank Polk that McClory was drafting his abuse of power. That's wednesday.
- TM- I think maybe Frank Polk at that time may have sent it over, a draft to the group, and later on the next day, Thursday, a letter went out to the rest of the people on the committee.
- JM - I do recall a draft of some nature. It was going to "take care that the laws are faithfully executed," and did not itemize the other.
- WF - Let me ask this, do you all think that McClory was committed to vote for impeachment at this point?
- JM - Yes, I do.
- WF - I don't think I really felt like he was committed until he voted.
- HF - He was circulating on the House floor an article III. I remember that and a memorandum supporting it. He gave them to John Rhodes to read one of those days on the House floor.
- TR - Yeah.
- JM - Let me recite in brief terms what happened later. On Sunday morning at 10:00, after the final vote on article I the night before, there was a meeting in my office of McClory, Rodino, John Labowicz probably, Bill Blunt. McClory was there just very briefly and then left it in Frank Polk's hands to stick with me and we worked out the final detailed, precise language, altho what we had at that time I thought was almost a final product. The next morning, on Monday, I met in McClory's office with the Republicans. It was Monday morning before we were starting to consider article II. We passed around the copy that we had and it was generally acceptable. I then went to the Democratic caucus in Ziefman's office, and with Frank Polk, went into the meeting, presented what we had, but we were not quite satisfied with the language of that last paragraph, which was number 5. The last type-written article II in the book demonstrates the problem I am talking about.
- That last type-written article II, paragraph 5, reads: "he misuses the executive power." I just wasn't satisfied with that language, and as Frank Polk and maybe Sarbanes were drifting along with me, the language, "in disregard of the rule of law" occurred to me, and we went into Bill Skatuck's [?] office and struck out what we had and wrote in "in disregard of the rule of law he knowingly misused." We handed it to somebody real fast to retype it, because we were already walking toward the committee room. We had recessed the Democratic caucus and they all were waiting on us on the way in there. We killed a little time while it was retyped and copied and handed to Hungate and to Dutch [?]. It had been on Sunday afternoon that we had called Hungate from John Doar's office, and offered to send it over to him, but I think we read it to him on the telephone, and he was going to come in at 8:00 in the morning to take a look at it and be prepared. So that is the way Hungate got involved.
- WF - He was volunteered.

Tape V, p20

HF - Why was it that Sarbanes and Hungate were chosen, and that you yourself weren't interested in presenting the substitute?

TR - Yes, that's a good question.

WF - He's smart, but he ain't dumb.

LAUGHTER.

JM - I think that says it as well as anything. In the first place, politically, I did not want to be out front. I think that is the most obvious answer I can give. Secondly, I knew that these were both people of ability and moderation and the image would be just the right one to present.

WF - That's the way I view it too.

JM - That's the only real answer.

CB - I think it was a pretty good choice, all things considered. It would have been hard for Kastenmeier or Edwards to put that over with the same conviction that Hungate did, the same standard.

WF - It would have been hard for you all to go along with it.

CB - Yeah, that's what I meant.

WC - Let me say this about Hungate: my opinion changed. I wasn't terribly impressed with his opening statement because it was too light, flippant for the gravity of the proceedings.

TR - Yeah, sure.

WC - And so he would not have been my choice because of his Missouri humor, his Mark Twain quotes, and so forth. I would not have picked him, but I would have picked Sarbanes as opposed to Hungate, but then during the course of the debate, my opinion changed on Hungate, because he did a serious and good job.

CB - I have a note that Bob McClory came over to me and asked me if I would be interested in introducing one of those things. I can't figure out which one it was, but you know I thought it was a little bit presumptuous and I didn't give that a whole lot of thought.

LAUGHTER.

CB - But where in the world did he get that from?

TR - There is one other thing about McClory. I had heard that he was really going to come out strong against article I. So I called him and in effect said, "McClory, if you come out too strong against article I, I think we are going to make a monkey out of you. Here is what we have." And I listed the chain of events where we could prove that the President had not told the truth.

WF - He's got to be schizophrenic to come out strong against article I and support article II. You got to be kidding.

LAUGHTER

Tape V, p21

TR - I didn't want to hurt him.

WF - I mean they are so wrapped up in each other, it is just hard to imagine a guy being for one and against the other, which ever way.

JM - It was rather interesting how Frank Polk threw himself into this task, working on article II, indicated to me that he really believed in it. But I say that as a preliminary to the fact that McClory never really seemed to put his mind to this thing in my presence. He passed it off to Polk. That happened on that Sunday morning and to a degree on Monday morning. There was so little said at the Monday morning meeting — just a cursory examination of what we did.

HF - Before we read this article, I see that ⁱⁿthe final type-written version which appears following page 80 of the exhibits, there are some of our names in the margin. Article II, subparagraph one, it says "Rails" at the left; and the next page, it says "Fish and Hogan" on the right hand side and "Cohen" at the bottom. Do you remember, Tom, how this came about? Were these the things we were to prepare ourselves for in the course of the debate on this article — were we going to speak in favor of certain aspects?

JM - That is the case. Whose writing is this?

TM - That is my writing.

TR - I certainly did argue on the IRS.

TM - Yes, it was somewhat in accordance with the procedure adopted on article I that Friday night, on specificity, where we divided up in different areas.

HF - I don't think we followed this, because I ended up speaking on the second.

TM - No, I don't think we did. I think that was done just at the beginning of the discussion of that.

CB - We really didn't work over article II like we did article I in the committee.

TM - No, not at all. As a matter of fact, the ^{committee} only met once. And I think this group sat down one time, that was Saturday morning, on article II.

JM - But he is talking about publicly; we didn't debate the details of it.

TM - No.

DS - Do you recall Jerry Ziefman's statement about the "eagles and chickens," in which McClory was the key figure in article II? What gave Ziefman the substance to say that?

WF - What is he talking about?

Tape V, p22

SL - I'll read it. This is a speech Ziefman gave at the University of Santa Clara, after he had been there a while.

WF - That is what made Rodino so damn mad.

SL - He divides the Members into "eagles" and "chickens," and he said that "an eagle Republican Congressman, Robert McClory, totally rejected the smoking gun theory, and became one of the principal architects of an article of impeachment based on the President's abuse of power. Mr. McClory was also the draftsman and sponsor of an article based on the President's defiance of the committee's subpoenas. Yet Mr. McClory would have failed in his efforts without the vigorous support of such Democratic eagles as Jack Brooks of Texas and John Conyers of Michigan, both of whom adamantly opposed any Democratic strategy of delay as well as any effort to weaken the subpoena power of the committee."

WC - Could you enlighten us as to what the role of Ziefman was throughout? He was always kind of in the shadows.

TR - I don't know either. What was his role?

WF - A kind of damn court jester, if you ask me.

JM - Ziefman had no substantive input into the articles or into the debate or into the organization of the debate. Rodino might have been consulting with him. Ziefman would give an opinion every now and then, but it was always rather vague.

WC - The press turned to him quite often, in terms of inside information as to what strategy was being used, what the politics were. I was just wondering if he had any real active participation.

JM - No, that I observed.

RT - Well, I think I can concur with what you have expressed. It was not active or in any way anything other than an observer with casual comments about the conduct of the proceedings. I think he was preoccupied with the Edmund Burke impeachment matter, and I think he was of a view that the abuse of power was the central question here, and he was looking for anyone who would support that view. But I'd go one step beyond that and say, without intending to be critical, that I felt that he had his feelings hurt by not being in charge of the staff work, and that many of his actions resulted from that feeling that he had been pushed aside in this very important matter.

TR - I think you are right, without a doubt.

JM - I got the impression that he might have done some advising of Rodino on procedural matters and on publicity matters, but that's about all I could see.

RT - Yes. What's your assessment of Ziefman's role, Walter?

Tape V, p23

WF - Well, one, go back to before that, when Ziefman became general counsel to the committee — I thought that was a miserable choice. He was a nice enough guy, and he was always solicitous of me for some reason or seemed to be, and maybe he was that way with everybody, I don't know. But he never never made a point that made any sense. He never had any input into anything. All the committee work he had any input in or control over, even before impeachment, floundered. He was no aid at all to Rodino. Now perhaps in compiling the works, the documents, he did a helpful thing — you know, the first thing we got from the staff. It was pretty good. But Ziefman was jealous of John Doar from the word "go". He was backbiting every time he could put a barb into the committee staff, he was doing it. He was sowing discontent on our side all the while. This is a terrible thing to say, but I think the guy would have liked nothing better to see the whole thing blow up and made Doar look bad. It was totally sour grapes, I think, that he wasn't in charge of the proposition.

RT - You said that a little more delicately than I would have, Walter.

LAUGHTER.

HF - Wow, outspoken. That takes care of Ziefman. Now do you have the Breslin [sic?] book answered satisfactorily?

WF - Well, what I really got mad about is he didn't list me as a damn eagle in that statement right there.

LAUGHTER.

CB - How do you know?

WF - I just read it. But I'm not a chicken either. That's worse, I come out kind of neuter. None of us have been mentioned. We are neither the eagles nor the chickens. We don't have anything to do with impeachment. That shows how dumb he is.

LAUGHTER.

HF - I think that is basically it. He was too close to a couple of people who didn't know what was happening.

DS - On article II, are there any other matters that any one would want to comment on?

WC - I wanted to put in at one time, as I recall, something on the Judge Byrne case and that was quickly dismissed. There wasn't too much support for it, but one item that had been talked about.

JM - You know, there was a laundry list of maybe eleven areas, but they were quickly cut down. Somewhere along the line, and it will appear from these drafts, a decision was made, or I acquiesced in — I will put it that way immodestly — taking that subparagraph out of article II and letting a third article be drawn. I assume that John Doar drew the third article.

Tape V, p24

RT - I don't think so. It may be so, but I was really concerned when I saw article III as it appeared ready for introduction.

TR - It centered around Frank Polk.

RT - Because it did fail to tie the power of subpoena to an impeachment inquiry, I was concerned. It would have, in original form, as I recall, made the refusal to honor any congressional subpoena any time an impeachable offense, and this was so totally contrary to my views of the thing that I thought it was vital to make the change that we did make before that article was adopted. I would like to say that I did not feel at any time that there was any restraint on me to go ahead and support the theory that I had that this was an impeachable offense and that in no way was there any burden laid upon any of us to retreat or withdraw from any position we felt strongly about.

WF - I think I was more just spent, physically spent, on getting all up for one and two, that I didn't think very hard about three. I really didn't. It just didn't measure up to what we were talking about in one and two in my mind at any time.

WC - What was most offensive to me were McClory's activities all the way through, all the caucuses we had, the closed sessions and so forth, and then have him come out in favor of article III as a major proponent. And Caldwell, we'll go back to that day to the letter, when McClory was opposed to holding him in contempt, and then raised it to a level of an impeachable offense, I thought was just too hypocritical. I did not even give it any consideration other than the debate that you and I had on that day.

TR - I just like to add one thing about article II: as I see our final product, I do feel comfortable that we did have evidence as to all the numbered allegations to support our article.

JM - There is one little point that some of you can help me with. There was a crack in the coalition. And it came on article III. The little problem that developed, and I have not been able to recollect exactly what it was, but Railsback charged that there had been a breach of faith....

TR - On article IV.

RT - Article IV, the war issue, the bombing of Cambodia.

JM - But you raised it before we voted on article III. But as I voted against article III for that reason.

TR - Here is what I said, this is overkill, and in the debate on article III, I said, in all due respect to my esteemed colleague from Illinois, Mr. McClory, this is just overkill, this is not a serious offense. You [JM] didn't make up your mind on article III until the last minute, because as you were walking by, I said, "Jim, how are you going to vote on this, do you know yet?" And you said, "I think I am going to vote against it, but I just made up my mind." That is when you were going to your chair.

Tape V, p25

WC - You're right on the time of that, because when Rails said the coalition was fragile, and it might shatter and so forth, I came back and said as far as this member is concerned, it is not a matter of how we vote on this issue, I am going to stick with articles I and II and the coalition is OK.

TR - But that was on the Cambodia article.

WC - That was after you made the statement about the "fragile coalition." I got recognition as soon as possible.

TR - That is the Conyers article.

WF - When did you make that unfortunate statement about the "fragile coalition," a very poor choice of words?

LAUGHTER.

HF - I think we can all agree on that.

TR - I still like it. It was a threat, I was trying to scare 'em.

WC - You were locked in and we knew it.

WF - Cohen, was that another case when he didn't check it out with you, did he?

LAUGHTER.

HF - Hadn't we already voted on articles I and II?

TR - Let's find where I said it.

WF - Surely you did not say that publicly, did you?

TR - Yeah.

WC - He sure did.

CB - Hell, yes.

TR - I said it to threaten Conyers.

WF - You ought ot use prepared statements.

TR - I thought it was an excellent choice.

CB - I don't think that fragility was ever there, after you all had led us down that jurisdictional path....

TR - It was strictly a threat.

CB - After the procedural resolution, and we lost that, but we survived, I thought fragility was theoretical after that.

HF - I didn't think it was fragile, myself.

Tape V, p26

WF - The only thing that was fragile was our political futures!

LAUGHTER.

JM - I was partially motivated by a feeling that was probably based on Railsback's remark that there was some breach of faith asserted with reference to....

TR - No, I never felt that at all.

RT - I didn't realize that this division had occurred.

TR - I didn't occur.

RT - I didn't think that it was either particularly fragile or for that matter really a coalition. I thought the trouble was the word "coalition." To me it implies a little more wilfulness or intention.

END OF TAPE V.