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SENATE RULES AND PRECEDENTS APPLICABLE TO  
GOVERNMENT DOCUMENTS IMPEACHMENT TRIALS

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EXECUTIVE SESSION HEARINGS

BEFORE THE

COMMITTEE ON  
RULES AND ADMINISTRATION

AND ITS

SUBCOMMITTEE ON  
STANDING RULES OF THE SENATE

UNITED STATES SENATE

NINETY-THIRD CONGRESS

SECOND SESSION

PURSUANT TO

**S. Res. 370**

DIRECTING THE SENATE COMMITTEE ON RULES AND ADMINISTRATION TO STUDY THE SENATE RULES AND PRECEDENTS APPLICABLE TO IMPEACHMENT TRIALS

AND ON

**S. Res. 371**

TO PERMIT TELEVISION AND RADIO COVERAGE OF ANY IMPEACHMENT TRIAL THAT MAY OCCUR WITH RESPECT TO PRESIDENT RICHARD M. NIXON

AUGUST 5 AND 6, 1974

Printed for the use of the Committee on Rules and Administration



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(II)

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# SENATE RULES AND PRECEDENTS APPLICABLE TO IMPEACHMENT TRIALS

MONDAY, AUGUST 5, 1974

U.S. SENATE,  
COMMITTEE ON RULES AND ADMINISTRATION AND ITS  
SUBCOMMITTEE ON STANDING RULES OF THE SENATE,  
*Washington, D.C.*

The committee and subcommittee met, pursuant to call, at 10:15 a.m., in room 301, Russell Senate Office Building, Hon. Howard W. Cannon (chairman of the full committee), presiding.

Present: Senators Cannon, Robert C. Byrd (chairman of the subcommittee), Allen, Williams, Hugh Scott, Griffin, and Hatfield.

Also present: Senators Ervin, Thurmond, Moss, Metcalf, Stafford, Hathaway, and Helms.

Staff present: William McWhorter Cochrane, staff director; Hugh Q. Alexander, chief counsel; Joseph E. O'Leary, professional staff member (minority); John P. Coder, professional staff member; Jack L. Sapp, professional staff member; James H. Duffy, chief counsel, Subcommittee on Privileges and Elections; James F. Schoener, minority counsel, Subcommittee on Privileges and Elections; Peggy Parrish, assistant chief clerk; and John K. Swearingen, staff director, Subcommittee on Computer Services.

## OPENING STATEMENT OF HON. HOWARD W. CANNON, CHAIRMAN OF THE COMMITTEE ON RULES AND ADMINISTRATION

The CHAIRMAN. The committee will come to order.

This meeting of the Committee on Rules and Administration has been called to hear testimony from Members of the U.S. Senate with respect to certain aspects of any impeachment trial which may occur in the U.S. Senate.

On Monday, July 29, the Senate unanimously approved S. Res. 370, which was introduced and sponsored by the joint leadership of the Senate—Senators Mansfield, Robert C. Byrd, Hugh Scott, Griffin, the majority and minority leaders, and the assistants to the majority and minority leaders.

Pursuant to S. Res. 370 this committee has been directed to study the Senate rules and precedents applicable to impeachment trials. In respect to this investigation the committee is instructed to report back to the Senate no later than September 1, 1974, or on such earlier date as the majority and minority leaders may designate. It has further been directed by the Senate that such review by this committee shall be held entirely in executive sessions.

The committee commenced immediately on its work under those directives and held the first of four executive sessions on Wednesday, July 31, thus initiating its provision-by-provision review of the existing rules and of a proposal for changes.

Today we are hearing testimony from Members of the Senate, and we welcome both oral and written statements from our colleagues, all of which will, without objection, be made a part of this hearing record. Any written statements submitted by Senators on or before August 9 will be printed in the record.

My colleagues on the Rules Committee share with me the determination that the rules which will govern this most solemn of all proceedings provided for under the Constitution of the United States shall be in all respects fair and just.

In conjunction with that major responsibility the committee also has had referred to it S. Res. 371, which would permit television and radio coverage of any impeachment trial, if it occurs.

Without objection, at the conclusion of my opening statement, I would like to insert copies of S. Res. 370 and S. Res. 371 into the hearing record.

Also, without objection, I would like to insert in the record the present "Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials."

Because of its importance, I would like to read into the record the provisions of the Constitution of the United States relating to an impeachment trial in the Senate.

Article I, section 3 of the Constitution provides in pertinent part as follows:

The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States: but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

[The texts of S. Res. 370 and S. Res. 371, and the "Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials" are as follows:]

**S. RES. 370**

---

IN THE SENATE OF THE UNITED STATES

JULY 29, 1974

Mr. MANSFIELD (for himself, Mr. HUGH SCOTT, Mr. ROBERT C. BYRD, and Mr. GRIFFIN) submitted the following resolution; which was considered and agreed to

---

**RESOLUTION**

Directing the Senate Committee on Rules and Administration to study the Senate rules and precedents applicable to impeachment trials.

1       *Resolved*, That the Committee on Rules and Administra-  
2       tion is directed to review any and all existing rules and  
3       precedents that apply to impeachment trials with a view to  
4       recommending any revisions, if necessary, which may be  
5       required if the Senate is called upon to conduct such a trial.

6       *Resolved further*, That the Committee on Rules and Ad-  
7       ministration is instructed to report back no later than Septem-  
8       ber 1, 1974, or on such earlier date as the majority and  
9       minority leaders may designate.

10       *Resolved further*, That such review by that committee  
11       shall be held entirely in executive sessions.

**S. RES. 371**

## IN THE SENATE OF THE UNITED STATES

JULY 30, 1974

Mr. ROBERT C. BYRD (for himself and Mr. MANSFIELD) submitted the following resolution; which was referred to the Committee on Rules and Administration

**RESOLUTION**

To permit television and radio coverage of any impeachment trial that may occur with respect to President Richard M. Nixon.

- 1        *Resolved*, That, in the event that the House of Repre-  
2        sentatives should impeach President Richard M. Nixon, the  
3        proceedings of the Senate with respect to the trial of im-  
4        peachment of the President may be broadcast.

## Y

RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON  
IMPEACHMENT TRIALS

I. Whensoever the Senate shall receive notice from the House of Representatives that managers are appointed on their part to conduct an impeachment against any person and are directed to carry articles of impeachment to the Senate, the Secretary of the Senate shall immediately inform the House of Representatives that the Senate is ready to receive the managers for the purpose of exhibiting such articles of impeachment, agreeably to such notice.

II. When the managers of an impeachment shall be introduced at the bar of the Senate and shall signify that they are ready to exhibit articles of impeachment against any person, the Presiding Officer of the Senate shall direct the Sergeant at Arms to make proclamation, who shall, after making proclamation, repeat the following words, viz: "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 against \_\_\_\_\_"; after which the articles shall be exhibited, and then the Presiding Officer of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

III. Upon such articles being presented to the Senate, the Senate shall, at 1 o'clock afternoon of the day (Sunday excepted) following such presentation, or sooner if ordered by the Senate, proceed to the consideration of such articles and shall continue in session from day to day (Sundays excepted) after the trial shall commence (unless otherwise ordered by the Senate) until final judgment shall be rendered, and so much longer as may, in its judgment, be needful. Before proceeding to the consideration of the articles of impeachment, the Presiding Officer shall administer the oath hereinafter provided to the members of the Senate then present and to the other members of the Senate as they shall appear, whose duty it shall be to take the same.

IV. When the President of the United States or the Vice President of the United States, upon whom the powers and duties of the office of President shall have devolved, shall be impeached, the Chief Justice of the Supreme Court of the United States shall preside; and in a case requiring the said Chief Justice to preside notice shall be given to him by the Presiding Officer of the Senate of the time and place fixed for the consideration of the articles of impeachment, as aforesaid, with a request to attend; and the said Chief Justice shall preside over the Senate during the consideration of said articles and upon the trial of the person impeached therein.

V. The Presiding Officer shall have power to make and issue, by himself or by the Secretary of the Senate, all orders, mandates, writs, and precepts authorized by these rules or by the Senate, and to make and enforce such other regulations and orders in the premises as the Senate may authorize or provide.

VI. The Senate shall have power to compel the attendance of witnesses, to enforce obedience to its orders, mandates, writs, precepts, and judgments, to preserve order, and to punish in a summary way contempts of, and disobedience to, its authority, orders, mandates, writs, precepts, or judgments, and to make all lawful orders, rules, and regulations which it may deem essential or conducive to the ends of justice. And the Sergeant at Arms, under the direction of the Senate, may employ such aid and assistance as may be necessary to enforce, execute, and carry into effect the lawful orders, mandates, writs, and precepts of the Senate.

VII. The Presiding Officer of the Senate shall direct all necessary preparations in the Senate Chamber, and the Presiding Officer on the trial shall direct all the forms of proceedings while the Senate is sitting for the purpose of trying an impeachment, and all forms during the trial not otherwise specially provided for. And the Presiding Officer on the trial may rule all questions of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may at his option, in the first instance, submit any such question to a vote of the members of the Senate. Upon all such questions the vote shall be without a division, unless the yeas and nays be demanded by one-fifth of the members present, when the same shall be taken.

VIII. Upon the presentation of articles of impeachment and the organization of the Senate as hereinbefore provided, a writ of summons shall issue to the accused, reciting said articles, and notifying him to appear before the Senate upon a day and at a place to be fixed by the Senate and named in such writ, and file his answer to said articles of impeachment, and to stand to and abide the orders and judgments of the Senate thereon; which writ shall be served by such officer or person as shall be named in the precept thereof, such number of days prior to the day fixed for such appearance as shall be named in such precept, either by the delivery of an attested copy thereof to the person accused, or if that can not conveniently be done, by leaving such copy at the last known place of abode of such person, or at his usual place of business in some conspicuous place therein; or if such service shall be, in the judgment of the Senate, impracticable, notice to the accused to appear shall be given in such other manner, by publication or otherwise, as shall be deemed just; and if the writ aforesaid shall fail of service in the manner aforesaid, the proceedings shall not thereby abate, but further service may be made in such manner as the Senate shall direct. If the accused, after service, shall fail to appear, either in person or by attorney, on the day so fixed therefor as aforesaid, or, appearing, shall fail to file his answer to such articles of impeachment, the trial shall proceed, nevertheless, as upon a plea of not guilty. If a plea of guilty shall be entered, judgment may be entered thereon without further proceedings.

IX. At 12:30 o'clock afternoon of the day appointed for the return of the summons against the person impeached, the legislative and executive business of the Senate shall be suspended, and the Secretary of the Senate shall administer an oath to the returning officer in the form following, viz: "I, \_\_\_\_\_, do solemnly swear that the return made by me upon the process issued on the \_\_\_\_\_ day of \_\_\_\_\_, by the Senate of the United States, against \_\_\_\_\_, is truly made, and that I have performed such service as therein described: So help me God." Which oath shall be entered at large on the records.

X. The person impeached shall then be called to appear and answer the articles of impeachment against him. If he appears, or any person for him, the appearance shall be recorded, stating particularly if by himself, or by agent or attorney, naming the person appearing and the capacity in which he appears. If he do not appear, either personally or by agent or attorney, the same shall be recorded.

XI. That in the trial of any impeachment the Presiding Officer of the Senate, upon the order of the Senate, shall appoint a committee of twelve Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

XII. At 12:30 o'clock afternoon of the day appointed for the trial of an impeachment, the legislative and executive business of the Senate shall be suspended, and the Secretary shall give notice to the House of Representatives that the Senate is ready to proceed upon the impeachment of \_\_\_\_\_, in the Senate Chamber, which chamber is prepared with accommodations for the reception of the House of Representatives.

XIII. The hour of the day at which the Senate shall sit upon the trial of an impeachment shall be (unless otherwise ordered) 12 o'clock m.; and when the hour for such thing shall arrive, the Presiding Officer of the Senate shall so announce; and thereupon the Presiding Officer upon such trial shall cause proclamation to be made, and the business of the trial shall proceed. The adjournment of the Senate sitting in said trial shall not operate as an adjournment of the Senate; but on such adjournment the Senate shall resume the consideration of its legislative and executive business.

XIV. The Secretary of the Senate shall record the proceedings in cases of impeachment as in the case of legislative proceedings, and the same shall be reported in the same manner as the legislative proceedings of the Senate.

XV. Counsel for the parties shall be admitted to appear and be heard upon an impeachment.

XVI. All motions made by the parties or their counsel shall be addressed to the Presiding Officer, and if he, or any Senator, shall require it, they shall be committed to writing, and read at the Secretary's table.

XVII. Witnesses shall be examined by one person on behalf of the party producing them, and then cross-examined by one person on the other side.

XVIII. If a Senator is called as a witness, he shall be sworn, and give his testimony standing in his place.

XIX. If a Senator wishes a question to be put to a witness, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing, and put by the Presiding Officer.

XX. At all times while the Senate is sitting upon the trial of an impeachment the doors of the Senate shall be kept open, unless the Senate shall direct the doors to be closed while deliberating upon its decisions.

XXI. All preliminary or interlocutory questions, and all motions, shall be argued for not exceeding one hour on each side, unless the Senate shall, by order, extend the time.

XXII. The case, on each side, shall be opened by one person. The final argument on the merits may be made by two persons on each side (unless otherwise ordered by the Senate upon application for that purpose), and the argument shall be opened and closed on the part of the House of Representatives.

XXIII. On the final question whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately; and if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the members present, a judgment of acquittal shall be entered; but if the person accused in such articles of impeachment shall be convicted upon any of said articles by the votes of two-thirds of the members present, the Senate shall proceed to pronounce judgment, and a certified copy of such judgment shall be deposited in the office of the Secretary of State.

XXIV. All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of Rule VII, except when the doors shall be closed for deliberation, and in that case no member shall speak more than once on one question, and for not more than ten minutes on an interlocutory question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate; but a motion to adjourn may be decided without the yeas and nays, unless they be demanded by one-fifth of the members present. The fifteen minutes herein allowed shall be for the whole deliberation on the final question, and not on the final question on each article of impeachment.

XXV. Witnesses shall be sworn in the following form, viz: "You, \_\_\_\_\_, do swear (or affirm, as the case may be) that the evidence you shall give in the case now pending between the United States and \_\_\_\_\_, shall be the truth, the whole truth, and nothing but the truth: So help you God." Which oath shall be administered by the Secretary, or any other duly authorized person.

*Form of a subpoena de issued on the application of the managers of the impeachment, or of the party impeached, or of his counsel.*

To \_\_\_\_\_, greeting:

You and each of you are hereby commanded to appear before the Senate of the United States, on the \_\_\_\_\_ day of \_\_\_\_\_, at the Senate Chamber in the city of Washington, then and there to testify your knowledge in the cause which is before the Senate in which the House of Representatives have impeached \_\_\_\_\_.

Fail not.

Witness \_\_\_\_\_, and Presiding Officer of the Senate, at the city of Washington, this \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord \_\_\_\_\_, and of the Independence of the United States the \_\_\_\_\_.

\_\_\_\_\_,  
Presiding Officer of the Senate.

*Form of direction for the service of said subpoena*

The Senate of the United States to \_\_\_\_\_, greeting:

You are hereby commanded to serve and return the within subpoena according to law.

Dated at Washington, this \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord \_\_\_\_\_, and of the Independence of the United States the \_\_\_\_\_.

\_\_\_\_\_,  
Secretary of the Senate.

*Form of oath to be administered to the members of the Senate sitting in the trial of impeachments*

"I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of \_\_\_\_\_, now pending, I will do impartial justice according to the Constitution and laws: So help me God."

*Form of summons to be issued and served upon the person impeached*

THE UNITED STATES OF AMERICA, ss :

The Senate of the United States to \_\_\_\_\_, greeting :

Whereas the House of Representatives of the United States of America did, on the \_\_\_\_\_ day of \_\_\_\_\_, exhibit to the Senate articles of impeachment against you, the said \_\_\_\_\_, in the words following :

[Here insert the articles]

And demand that you, the said \_\_\_\_\_, should be put to answer the accusations as set forth in said articles, and that such proceedings, examinations, trials, and judgments might be thereupon had as are agreeable to law and justice.

You, the said \_\_\_\_\_, are therefore hereby summoned to be and appear before the Senate of the United States of America, at their Chamber in the city of Washington, on the \_\_\_\_\_ day of \_\_\_\_\_, at 12:30 o'clock afternoon, then and there to answer to the said articles of impeachment, and then and there to abide by, obey, and perform such orders, directions, and judgments as the Senate of the United States shall make in the premises according to the Constitution and laws of the United States.

Hereof you are not to fail.

Witness \_\_\_\_\_, and Presiding Officer of the said Senate, at the city of Washington, this \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord \_\_\_\_\_, and of the Independence of the United States the \_\_\_\_\_.

\_\_\_\_\_  
Presiding Officer of the Senate.

*Form of precept to be indorsed on said writ of summons*

THE UNITED STATES OF AMERICA, ss :

The Senate of the United States to \_\_\_\_\_, greeting :

You are hereby commanded to deliver to and leave with \_\_\_\_\_, if conveniently to be found, or if not, to leave at his usual place of abode, or at his usual place of business in some conspicuous place, a true and attested copy of the within writ of summons, together with a like copy of this precept; and in whichsoever way you perform the service, let it be done at least \_\_\_\_\_ days before the appearance day mentioned in the said writ of summons.

Fail not, and make return of this writ of summons and precept, with your proceedings thereon indorsed, on or before the appearance day mentioned in the said writ of summons.

Witness \_\_\_\_\_, and Presiding Officer of the Senate, at the city of Washington, this \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord \_\_\_\_\_, and of the Independence of the United States the \_\_\_\_\_.

\_\_\_\_\_  
Presiding Officer of the Senate.

All process shall be served by the Sergeant at Arms of the Senate, unless otherwise ordered by the court.

XXVI. If the Senate shall at any time fail to sit for the consideration of articles of impeachment on the day or hour fixed therefor, the Senate may, by an order to be adopted without debate, fix a day and hour for resuming such consideration.

The CHAIRMAN. Gentlemen, we're delighted to have you, and Senator Ervin, if you would, proceed.

**STATEMENT OF HON. SAM J. ERVIN, JR., A U.S. SENATOR FROM  
THE STATE OF NORTH CAROLINA**

Senator ERVIN. We have an expression in North Carolina, "the short-horse is soon curbed," and I would like to say that my statement will be very brief.

I have grave misgivings about the wisdom of rewriting the rules of the Senate governing impeachment at this time. My misgivings are based on two reasons.

In the first place, the Constitution says that no *ex post facto* laws

can be passed. While that provision of the Constitution would have no specific application, I would point out that if the House should impeach the President and if the Senate should be called upon to try that impeachment, and if the Senate should change the rules at this stage the Senate would be trying the impeachment upon rules which were not in existence at the time the alleged impeachable offenses were committed and would thus defeat or violate the spirit of the prohibition on *ex post facto* laws.

Another misgiving I have is to the effect that the Senate is attempting to rewrite the rules in the Senate so they can effectuate the impeachment of the President. I have already read a newspaper column expressing this view.

The people of the country have been in a state of division for a long time on this subject. They are not going to bother reading the new rules. The ones that do may not understand them and some of them would be prone to accept the statement because this columnist said their Senate is engaged in the rewriting of the rules to accomplish particular results in this case.

I think that the question of what the burden of proof should be is more or less a subjective question. I think it is going to be a question of whether each Senator is satisfied in his conscience of the truth of the charges or not.

As far as I am personally concerned, in a case of this kind if we are called upon to try an impeachment I would not vote for conviction on any charge unless I was satisfied beyond a reasonable doubt of the truth of the charge. I would not be willing to remove any public official from office if I had reason to doubt about his guilt, and for that reason if you are going to adopt any rule about the degree of proof that has to be offered, I would suggest that you require proof beyond a reasonable doubt.

However, since it is a subjective matter for each Senator I think that it would be of no great value to write this in rule form.

Now, with respect to questions of evidence, I think the Senate ought not to apply inflexibly the body of rules of evidence for this trial. We ought to accept any evidence which appears to be credible or worthy of consideration which tends to prove or disprove any article of impeachment, on any specification in any articles of impeachment.

Some would like to say no hearsay be required. The Senate Select Committee on Presidential Campaign Activities is accused in some quarters of receiving hearsay testimony in the public hearings that were televised. In a sense we did, but I would say that 99 percent of all the evidence received by the select committee would have been receivable in a court of law to establish the charge of conspiracy.

And there is a rule of evidence which obtains in all jurisdictions in the United States, so far as I have been able to learn, that the acts or declarations of one coconspirator in furtherance of the objects of a conspiracy are admissible against all the conspirators, and so the big trouble about the rules of evidence is you just give more grounds to haggle and argue and debate and to postpone. We have got enough things to argue about on facts without having to get a lot of rules of evidence to dispute about.

So my preference would be not to rewrite the rules in any respect, but if you do attempt to rewrite the rule about the degree of proof

that is necessary to establish guilt, it ought to be beyond a reasonable doubt, and I would certainly advise against the adoption, even by reference, of a lot of rules of evidence because the last time I looked at the last edition of "Wigmore on Evidence." I think there were about twelve or fourteen volumes, big thick volumes, and there could be an awful lot of argument about that, and maybe the arguments will last until, as I frequently say, until the last lingering echo of Gabriel's horn trembles into a awesome silence that we have never reached a conclusion, and I thank the committee.

The CHAIRMAN. Thank you, Senator Ervin, for giving us the benefit of your judgment.

I may say that the committee did make the determination last week that we would proceed on the existing rules rather than attempt to bring forth a new body of rules, and we would then attempt to determine whether there ought to be any changes or additions to those rules, for example, in the areas where the rules may be soft. We went through them quite carefully from beginning to end, with the advice and the assistance of the Parliamentarian because many of the areas where existing rules are soft have been covered by precedent in the past. So, we did find that they are not as lacking as some people might assume.

We touched on two of the very important points that will be, of course, considered by the committee, and that is, are we going to try to define what the burden of proof would be, and if you say that you are asking for each Senator to make a determination on it in his own mind.

We are not going to have a judge to issue instructions to the Congress and Senate as security, as a normal child would say, this is the proof which you must find. A lot of the evidence must be held to the strict rules of evidence that have been established over the years.

Of course, if the Chief Justice should make a ruling upon an evidentiary matter, then the Senate still has the right to uphold or override rulings on appeal.

Senator HUGH SCOTT. Thank you, Mr. Chairman.

I must apologize for not being here for the statement of Senator Ervin, but I have one question.

You are aware, I assume, in view of your testimony here, that such precedent that exists in prior cases tried has reverted to standard of evidence as being "beyond a reasonable doubt," and that is also your view?

Senator ERVIN. Yes. I do not think any civil officer of the United States, especially somebody who is elected by the people, should be removed from office by the Senate, if the Senate has reasonable doubt of the truth of the charges against him.

Senator HUGH SCOTT. In other words, should a doubt exist he should not be removed?

Senator ERVIN. A reasonable doubt.

Senator HUGH SCOTT. Yes; a reasonable doubt—

Senator ERVIN. Yes.

Senator HUGH SCOTT [continuing]. He should not be removed. Thank you.

The CHAIRMAN. Senator Byrd.

Senator ROBERT C. BYRD. Senator Ervin, as I understand it, however, you are suggesting that as a standard of proof to which you

would adhere as a Senator participating in the voting on articles of impeachment.

You would not suggest that that standard of proof, or any other standard of proof, be written into the impeachment rules; am I correct?

Senator ERVIN. That is right.

Senator ROBERT C. BYRD. Now, a proposal submitted to the committee by Mr. Mansfield suggests, with reference to the admissibility of evidence, the following, and I read:

General: In a trial the testimony of witnesses shall be taken orally in an open session of the court—

Meaning the Senate sitting as a court of impeachment—

unless otherwise provided in accordance with these rules. All evidence shall be admitted in a trial which is admissible under (1) any of these rules, (2) any statute of the United States, (3) any of the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, (4) any of the rules of evidence applied in the courts of general jurisdiction in any of the several states, or (5) any decision thereon by the court upon recommendation of the Chief Judges and the Deputy Chief Judges in the interests of justice.

The reference to Chief Judges and Deputy Chief Judges therein is to the majority and minority leaders and the majority and minority whips.

In any situation, the rule, statute, or decision which favors the reception of the evidence governs, and such evidence shall be presented to the court according to the most convenient method prescribed in any such rule or statute.

This rule sets forth the evidentiary principles that are applicable to the trial of impeachment.

In Mr. Mansfield's analysis which accompanied the bill, which was sent to the various Senators, appears this paragraph, which I shall read:

Subdivision (a) General: This subdivision is derived from Rule 43(a) of the Federal Rules of Civil Procedure. It provides, first, that testimony shall be taken orally in open court, except as provided; and, second, that all evidence shall be admitted which is admissible under any Federal or State law as enumerated. According to one provision therein: "In any situation, the rule, statute, or decision which favors the reception of the evidence governs, and such evidence shall be presented to the court according to the most convenient method prescribed in any such rule or statute."

This subdivision would incorporate by reference the rules contained in the pending Federal Code of Evidence (subject to other provisions in these rules), if that Code is passed by both Houses of Congress and signed into law prior to an impeachment trial in the Senate. This incorporation would occur through the second sentence provision that declares that all evidence is to be admitted "which is admissible under any statute of the United States" since the evidence rules will become statutes of the United States upon enactment.

As pointed out in the analysis—I will continue reading therefrom:

There is no counterpart in the present rules to this subdivision nor are there counterparts to any of the other subdivisions in this rule except to some of the narrow points grouped together in subdivision (b). The trial of an impeachment case should be governed by the same principles and should be conducted with the same latitude to determine the truth as are routinely employed in the courts of the United States to determine truth in civil and criminal proceedings. Inasmuch as a Senate trial is not a jury trial, it should not be governed by evidence limitations that developed historically as a result of doubts as to the capacity of jury members to sift and weigh evidence of limited probative value.

What is your comment—

Senator ERVIN. The reason I take this position is I've been sitting on the committee that's been studying these proposed Federal Rules of Evidence, and some of them I consider absolutely abhorrent to the truth, and there is a great deal of difference of opinion about it, and also we found, for example, on just one little question of the admissibility of evidence of prior offenses.

There is a great diversity of differences among States. I found on the committee that a man favors the practice in his State, which in many cases is absolutely inconsistent with the practice in other States, and I think it is better, instead of trying to specify, to use general rules of evidence that all of us are more or less familiar with instead of opening the door for constant disagreement over particular rules. Except where there is a Federal statute specifically prescribing the rules of evidence, you go by the evidence of the 50 States. I think you open the door for a multitude of arguments about the question of what is the rule of evidence in particular cases because there are conflicts in the rules of evidence. The fewer regulations you can have, the less you can have to distract or delay.

Senator ROBERT C. BYRD. In other words, you would use the present "Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials" as best left alone?

Senator ERVIN. That is right.

Senator ROBERT C. BYRD. You would recommend, as I understand it, Senator, that the committee not write into those rules any code of rules in respect to the admissibility of evidence, for example, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, or any of the rules of evidence heretofore assigned in the courts of the United States in hearing of suits in equity, any of the rules of evidence applied in the courts of general jurisdiction in any of the several States; am I correct?

Senator ERVIN. That is right. I think the essential rules of evidence are pretty well understood. For example, normally a witness must know, have personal knowledge of what he testifies to, unless his evidence is admissible under some reasonable exception, or the admission of a party is admissible in evidence. If you find evidence of a conspiracy then the declaration of coconspiracies would be admissible, and I think these rules are very simple, but you go into all of the rules and apply all of the rules of the States and the Federal rules, then you have just gotten so much more to argue about that is unnecessary and delaying.

Senator GRIFFIN. Will the Senator from West Virginia yield?

Senator ROBERT C. BYRD. Yes.

Senator GRIFFIN. I just wonder if we might take note in the record at this point, and I am not necessarily advocating it, but Commissioners on Uniform State Laws have adopted a model code of evidence— if we are going to specify some evidentiary code, would that be a possibility?

Senator ERVIN. Yes; it has not been adopted by very many States thus far.

Senator GRIFFIN. I see.

The CHAIRMAN. Senator Ervin, would you have any objections to the televising and broadcasting of the proceedings in an impeachment

trial, consistent with the present rules governing impeachment with respect to debate, and probably statements on the parts of Senators, and so on?

Senator ERVIN. I have the conviction on a matter of this nature, that the American people are entitled to know what has happened, what the President has done, if anything. I think they are entitled to know it by any media of communication which is willing to inform them. I think the television is the most potent method of revealing the truth, I know, for this simple reason—you take testimony of Ananias and that of George Washington and put them down on a piece of paper, you can scarcely tell the difference between the two, but if you see Ananias or George Washington testify, have a chance to observe his conduct and demeanor and appearance, I think you could make a pretty good deduction as to whether his testimony is true or not.

Senator GRIFFIN. Assuming we allowed televising or broadcasting of the proceedings, would you have any suggestions as to limitations?

Senator ERVIN. I would just as soon have the whole thing televised. Since they have a limitation on the amount of time that a Senator can speak, why you could do that very safely.

The CHAIRMAN. Senator Ervin, there has been some question as to whether or not the Chief Justice who will preside should be allowed to cast a vote for the breakup of a tie.

The Chief Justice in the Johnson trial cast a vote twice when procedural incidents took place, such as whether or not the Senate should retire in closed session, and also whether Senate should adjourn. At least two votes occurred thereafter on the question, and the vote of the Senate upheld the Chief Justice's authority to cast a vote to break a tie. Sir, in that type of matter what are your observations in that regard?

Senator ERVIN. Of course, the only reason that the Constitution provides that the Chief Justice shall preside in the case of impeachment of the President is because the Constitution provides that the office of Vice President has a conflict of interest and therefore he is disqualified. I think that when the Chief Justice steps into the Vice President's position as presiding officer of the impeachment trial of the President that he steps into the shoes of the Vice President, and for that reason the Constitution gives the Vice President the power to break a tie. In cases of a tie I think the Chief Justice should have that power.

Senator ROBERT C. BYRD. Would you prescribe certain limitations thereon, for example, limit that only to procedural matters or a vote to break a tie on, let us say, an evidentiary matter, let us say even on substantive matters?

Suppose the Senate voted to convict the respondent and thereafter conducted a vote on whether or not it disqualified the respondent from ever again holding and enjoying an office of honor, trust or profit in the United States; would you allow the Presiding Officer, the Chief Justice of the United States, to vote to break a tie in that very solemn and serious substantive matter?

Senator ERVIN. No; I don't think so in that case, because I think that the Constitution impliedly restricts that power to the Members of the Senate.

Our Vice President really has no substantive powers as Presiding Officer of the Senate, except to break the tie on a tie vote.

Senator ROBERT C. BYRD. In his case he could break the tie on any substantive matter.

Senator ERVIN. Well, that is—

Senator ROBERT C. BYRD. I am talking about a vote in which there would be a tie and in which the decision of the Senate would be determined on a simple majority vote.

Senator ERVIN [continuing]. Of course, you come down to the question whether under the Constitution, where a conviction automatically carries the prescribed punishment.

The only benefit you hold, rather, ineligibility to hold any other office.

Senator ROBERT C. BYRD. Well, in previous trials that has not been thought of in that regard. The Senate has taken separate vote, determined by the majority vote on that question, so what I am seeking here is your opinion as to whether or not the presiding—let me put it this way—in my own mind I have a feeling, and I may be changing my viewpoint on this.

I started out with you that the Chief Justice should not be given a vote, and I may still approve that, I am not absolutely sure of it; what I was seeking was your advice as to whether or not in your opinion the Chief Justice should be allowed to vote to break a tie, incidental—on any incidental questions.

Senator ERVIN. I think that the Vice President now has the authority to break the tie only on matters of legislation. I do not think he has it on anything other than that, and if the Constitution gives the Chief Justice the power to break the tie, we can not take it away from him by rule.

Senator GRIFFIN. The Vice President can break a tie on any matter, on a tie vote, it does not make any difference, he has authority under the Constitution to vote to break a tie.

How far should we go in allowing the Chief Justice to vote to break a tie?

Senator ERVIN. Well, if he has the power under the Constitution to break a tie, I do not think you can take it away from him by rules of the Senate, and so I would ignore the question until it arises.

Senator ROBERT C. BYRD. I do not think it is clear that he does have that power under the Constitution.

Senator ERVIN. I do not think so. I do not think he does.

Senator ROBERT C. BYRD. When the President of the United States is tried the Chief Justice shall prove it up, that is all. He does not go beyond that point, and going a little further, no person shall be convicted without the formal concurrence of two-thirds of the Members present, referring to that conviction.

Senator ERVIN. Yes.

The CHAIRMAN. This goes on to say judgment in cases of impeachment shall not extend further than to removal from office and disqualification from holding and enjoying an office of honor, trust or profit in the United States, implying, I believe, that it could be less but it cannot go beyond that, so I think Senator Byrd raised a very good point there as to what proposal—suppose it were a substantive matter, after the conviction, required by two-thirds majority the Presiding Officer would have the opportunity to resolve—

Senator ERVIN. I do not believe that the Vice President has the power to break a tie except in the case of legislation or procedural matter. I do not know of anything else he can break a tie on.

Senator HUGH SCOTT. If the chairman would yield, I would say that I agree with Senator Ervin that the Presiding Officer of the trial should be vested with those duties which the Senate's Presiding Officer has had for 200 years. If the powers of a Presiding Officer in one of the Senate's actions be reduced beyond those possessed for 200 years, it would restrict the rights available to the respondent over and beyond that which appears to be provided for in the Constitution, this being a Presiding Officer with all the functions that are desired; a Presiding Officer, no more, no less.

Senator ERVIN. That is my view of it.

Of course, this position that the punishment shall not extend—and this is susceptible to the stricture which the distinguished Senator from West Virginia, who is a very keen student of these matters puts on it. In England when the House of Commons impeached and a House of Lords tried, they not only removed a man from office and rendered him ineligible to hold other office, but they also imposed very drastic criminal punishment on him, and that is the reason they got this provision that in effect impeachment shall not bar prosecution.

I do not think that thing will arise. I do not think it will get that close to it. I think it is a substantive matter that I personally do not believe the Chief Justice should be allowed to vote on, and so that I would let sleeping dogs lie, because when he started barking—

Senator HUGH SCOTT. Well, it is not a sleeping dog that we had better leave lie in this case. We are going to be confronted with it head-on. The very first time the Chief Justice casts a vote there is going to be some question raised about it. I think we ought to try to anticipate it. I know this question will be raised, and it seems to me that if he is allowed to vote that it very definitely ought to be limited. If he is allowed to vote at all, very definitely, he should be limited to certain incidental questions.

I would be very concerned if he were allowed to cast a vote on the final judgment or settlement in connection with disqualification of a respondent to hold office of honor, trust or profit in the United States.

It seems to me there that the question would be best decided by letting a majority rule on the final vote rather than have the Chief Justice cast the deciding vote.

Senator ERVIN. Well, I think the mathematical probability of that question arising is extremely remote. It could arise, if he has that power under the Constitution you cannot take it away from him, and if he does not have that power under the Constitution, why, he cannot exercise it.

Senator HUGH SCOTT. I think the Senate should be the sole judge of whether or not he has that power.

Senator ERVIN. Well, I would have said that before the *Pyle* case, undoubtedly. But, under the *Pyle* case it opened the door to a whole lot of things we never anticipated. In the *Pyle* case they said that if a man possessed the three qualifications for membership in the House of Representatives he could not be denied a seat, and the court could take jurisdiction when there was one and already had given emolument to the office.

Now, by the same process of reason, if the House of Representatives cannot deny a seat to a person who is elected and possesses only three qualifications for membership, as set forth in the Constitution, a serious question may arise whether you can remove a man from an office, from public office, except on the ground specified in the Constitution, and none of them are specified.

Senator ROBERT C. BYRD. Well, in the *McCormick* case, though, there were justiciable standards that were determined—age, residence, and citizenship—and those are the sole qualifications for membership in the House of Representatives. Those were standards, but obviously the House went beyond and a court did make a determination.

I think this is an entirely different question.

Senator ERVIN. Well, suppose the House impeached the President because they did not like the color of his necktie and the Senate was so abhorred by the shocking color of his necktie that two-thirds of them voted to extend it.

I think I would go by the Constitution. The Constitution says what impeachable offenses are and I do not think any impeachable offense is not in the Constitution.

Senator ROBERT C. BYRD. I agree with that, but when you are talking about high crimes and misdemeanors you are not talking about the kind of justiciable standards that you are talking about—the man's age, his residence, and his citizenship.

Senator ERVIN. Well, that is a very interesting point. I know that a very great scholar has written a book to that effect, but I have to believe the Constitution means what it says, and we all know what treason is; in fact, the Constitution defines it.

We know what bribery is, and we know what a crime is. It is an offense against the state which is punishable by death or imprisonment or fine, or some other way.

We know what a misdemeanor is; it is any crime less than a felony. Every lawyer in the thirteen States of the United States had a copy of Black's or some other similar treatise. In a commentary on the law of England he defines what crimes are.

Now, I think you have also got a rule of construction that whenever you have a specific enumeration followed by general or other matters, that the things covered by the other matters have to refer to things like those that are set out specifically, so you have got to have a high crime or a misdemeanor. That means a serious one. You could not impeach a President for walking on the grass in violation of an act of Congress, or driving an automobile beyond the speed limit, or for killing an individual in an automobile.

You have got to have something. Treason and bribery both refer to offenses against the state; treason being an effort to destroy the state, and bribery being an effort to divert the processes of the state, and I think other high crimes and misdemeanors referred to a serious crime which is an offense against the Government as distinguished from an offense against an individual.

Senator ROBERT C. BYRD. Well, we are getting a little afield.

Senator ERVIN. That is true, but we might get into the Supreme Court on this thing.

The CHAIRMAN. I do not think this is quite the place to argue with

you, Senator Ervin. What I am interested in, if I get back to the basic question here, and I will not press you further on it. I think it is a question we are going to have to confront, whether a Chief Justice is to be given a vote for the purpose of breaking a tie.

Senator ERVIN. Of course, you get back to another question—is the punishment determined by a majority or by a two-thirds vote? I think impliedly it is determined by two-thirds vote and also determined by the Senators.

The CHAIRMAN. Well, the final judgment and disqualification would be determined by a jury, if we are going to adhere to custom. That is all I have.

Senator ERVIN. Thank you very much.

I appreciate it.

The CHAIRMAN. Senator Scott.

Senator HUGH SCOTT. Thank you, Mr. Chairman.

I do not want to belabor the point, but I share the concern indicated by Senator Ervin that we ought not needlessly amend the rules in such a way that he could even invite challenge to this obligation of constitutionality of the Supreme Court.

The Constitution says that the Chief Justice shall “preside.” The Supreme Court has used some pretty strong language in this case of the President, *United States v. Nixon*, saying that it is the province of the Supreme Court to decide what the Constitution means. If we assume the role of trying to define what that word “preside” means in the Constitution, the Senate decides that, and we go too far to restrict the Chief Justice. It seems to me that would be another example of an addition to the question of an impeachable offense where we might invite more problems.

We do have the precedents of the Chief Justice casting a vote on an article of impeachment, regardless of what Congress did, and I would like to carry that one step further: If the Senate, sitting in Court of Impeachment, votes to go into executive session, and it does go into executive session. I think the Mansfield proposal did raise the question of whether or not the Chief Justice should preside over that part of the trial. I do not know if you have been asked to comment on that, but I would like to know what your opinion is.

Senator ERVIN. Well, I think that is part of the problem itself. I think the word “trial” embraces everything from the start—from the time the House presents the articles of impeachment until the Senate reaches a conclusion.

Senator HUGH SCOTT. There again I understand that the Chief Justice in the Johnson trial presided over executive sessions, so there is a precedent we feel we might be changing. But whether or not we will be able to use that as part of the Chief Justice’s responsibility as Presiding Officer, I don’t know.

Thank you, Mr. Chairman.

The CHAIRMAN. On that one point, I think perhaps a decision could be made with respect to the power of the Vice President and the power of the Chief Justice. The Constitution says the Vice President of the United States shall be President of the Senate but shall have no vote unless they be equally divided. Now, it does not say he shall be the Presiding Officer, it says he shall be President of the Senate and have

no vote unless they are equally divided. Now, the Constitution does not say that the Chief Justice shall be President of the Senate, nor that he shall step into the shoes of the Vice President. It just says that he shall be the Presiding Officer in the event of an impeachment trial, so I think there may be—

Senator ERVIN. Well, I think that is a possibility of quite a distinction there.

The CHAIRMAN. We do have as a precedent in the *Johnson* case where the Vice President was permitted to vote, and I think no contest arose.

Senator ROBERT C. BYRD. If the chairman would yield, I wonder if there is not another precedent in that language. As I recall, in the *Johnson* case where the Chief Justice as the Presiding Officer asserted his right to preside over closed sessions—closed executive sessions.

The CHAIRMAN. I thank you for that. I see no problem with that in that department.

Senator Allen.

Senator ALLEN. Senator Ervin, I am delighted that you have come before our committee to give us the benefit of your views. I regard you as the outstanding Constitution authority not only in the Senate but the entire country, and appreciate the testimony that you have given.

I am not surprised to find you with both feet on the ground and that you recommend that we retain the present rules insofar as we can, rather than to adopt a procedurally different view of the present rules.

I am interested in your comment about the requirement of the new rules for a measure of proof to sustain a conviction, putting in the clear and convincing proof standards.

Well, actually there is nothing in the rules themselves now about the measure of proof required, there is nothing—

Senator ERVIN. Oh, I think the rules are solid on that point.

Senator ALLEN [continuing]. Based on his conscience and his feeling of whether guilt has or has not been established. And the best way we can confuse things is to spell out in too much detail these substantive matters.

Is that your view?

Senator ERVIN. That is what I think. And I say the same thing about the procedures. You don't want to get so many procedural rules that you get all tangled up in your rules.

Senator ALLEN. Well, as long as the Senate maintains its right to decide these questions in the ultimate, there is no possibility of the ends of justice not being served, as the Senators feel that they should be served.

Senator ERVIN. I agree with you on that fully.

Senator ALLEN. As long as they retain their power, how can the ends of justice be damaged, as the Senators see those ends?

Even though, as the chairman stated at the outset, we have decided to use the present rules as a basis for further consideration and determination of where and if they should be amended, I think that each one of the suggestions made in the Mansfield resolution will receive consideration.

And for that reason I would like to get your comment on the apparent change in the final rendering of the verdict by the individual Senators. As I understand, though there is nothing in the rules, the

Chief Justice would ask each Senator "How find you as to such and such an article, guilty or not guilty?"

Is that your understanding?

Senator ERVIN. That is what I understand the precedent to be.

Senator ALLEN. Yet I notice in the rules, the proposed rules, that individual verdict of each Senator is changed to "sustain" as to the article, "sustain" or "reject."

Well, would you see a justification for a radical change like that?

Senator ERVIN. Well, the articles of impeachment constitute charges of impeachable offenses. And since the Constitution speaks about a conviction, I think in a conviction the body is going to find the man either guilty or not guilty.

Senator ALLEN. You wouldn't feel that using sustained and rejected would be an improvement over the present system?

Would you have any idea why such a suggestion was made?

Senator ERVIN. Well, I think that the majority leader performed a real service in making these recommendations, in that he brings these things up for discussion. And I think it is important for us to discuss them so we will have such study as we can in the event the House prefers articles of impeachment. We will be prepared, at least in our own minds, to discharge our respective functions in accordance with the Constitution.

I think that would be an unfortunate change myself, of course, because the word "conviction" that is used in the Constitution implies that a man is either guilty or not guilty. And I think that the Senate should go by the old precedents on that point.

Senator ALLEN. That brings up this point in my mind. Do you regard this as being a civil procedure, a criminal procedure or a procedure that is different from—

Senator ERVIN. Well, I think it is an impeachment procedure or proceeding and neither civil nor criminal in the technical sense. I happen to hold the view that an impeachable offense has to be a crime—and a serious crime—that affects Government.

And, to add a little to that, I would claim that as the administration of justice is one of the primary functions of Government, that an obstruction of justice is to my mind a fairly impeachable offense. And I would go a little further than some other people, since the Government can't exist unless people pay taxes, I would say that a criminal failure to pay taxes is an impeachable offense, because it is a crime directed toward Government.

This is a very intriguing question, because on so many points we have no precedents. Therefore, it is one of these delightful things that you could discuss intellectually—

Senator ALLEN. There are certain places in the Constitution where the word "impeachment" is used in such a way as to indicate that it is treated as a crime.

Senator ERVIN [continuing]. Well, it says in another place in the Constitution, article 3, that the trial of all crimes, except in cases of impeachment, shall be by jury.

So I think that adds a corroboration to my viewpoint that it has to be a crime.

Senator ALLEN. Another point that the distinguished Deputy Chief Judge [laughter] mentions here—he read it, but he didn't put too

much emphasis on it—on the matter of evidence. Item 5 of rule 8(a), which says “In the trial the testimony of witnesses shall be taken orally in open session of the court, unless otherwise provided in accordance with these rules. All evidence which is offered in the trial shall be admitted if such evidence is or would be admissible under”—and then 1, 2, 3, 4—and then 5—“Any order issued by the court, upon recommendation of the Chief Judges and the Deputy Chief Judges, in the interest of \* \* \*”—indicate that the Chief Judges would take over the function of ruling on testimony—that would come as a departure from the way trials are generally handled, wouldn't it?

Senator ERVIN. I never heard of the Chief Judges in these proceedings before, it is a new term for me.

Senator ALLEN. Senator Ervin, I agree with you that television should be employed in connection with this impeachment trial, provided it is handled in such a way as to avoid a circus atmosphere.

And I understood you to indicate that you would be in favor of having television, full and complete coverage by television.

If the Members of the Senate—or the Judges, so called, under the new rules—if the Members of the Senate, or the Judges, have the opportunity, every time the Senate wanted to overrule the Chief Justice and getting up and making a speech on it, don't you think we could unnecessarily prolong this proceeding?—and this becomes something of a debating society rather than a calm deliberative body?

Senator ERVIN. I don't believe you can debate very long, though. Of course, by analogy to a court making a verdict, that is, a conference of appellate court, you could go secret then. Or, by analogy to a jury, you could go secret when the Senate deliberates, but I believe the American people would rather see it all right out in the open.

Senator GRIFFIN. If you would allow me to ask a question right here.

Senator ALLEN. Yes, sir; for the sake of continuity I will yield for that purpose.

Senator GRIFFIN. It fits the subject you are talking about. Senator Ervin, I wonder if you have thought about the question—the 14th amendment—is the President in this proceeding entitled to the due process?

Senator ERVIN. Well, I think it is fundamental. He is entitled to have notice, an opportunity to be heard and an opportunity to present evidence in his behalf and to cross-examine adverse witnesses through his counsel, or in person if he wants to.

Senator GRIFFIN. Does he have the benefit of the protection of the due process clause of the 14th amendment. Maybe you don't want to answer, but would like to think about it.

Senator ERVIN. No, I don't mind answering, but I think it is fundamental to everything in the American Government that due process be afforded.

Senator GRIFFIN. Going back to the question that you were discussing before—with regard to television, I just want to call your attention to this case—you may be already aware of it.

In the case of *Estes v. Texas*, 381 U.S. 532, the Supreme Court held that televising over the petitioner's objection a courtroom proceeding—was inherently incompatible with the intrinsic fundamental

right of a fair trial—by the due process of law of the 14th amendment.

And the Supreme Court on that ground set aside the conviction of Billy Sol Estes.

Senator ERVIN. Well, I can go along with that, because in a criminal trial in a criminal court, the only people you have any right to make an appeal to, an intellectual appeal to, is the judge and the jury. And when you go make an appeal to what may be considered the general public, I think that is a violation of right.

But I think it is different in an impeachment trial, because I think that the validity of an impeachment trial—is very important to the country and that the people after all are in an impeachment trial through their representatives.

Senator GRIFFIN. It comes down to what is due process.

Senator ERVIN. Well, due process in one circumstance is different from due process in another. The fifth amendment due process clause applies to the Federal Government and I think it applies to every agency of the Federal Government, and I think that it applies to the Senate. But I don't think that it applies in exactly the same way to the Senate as it does in a criminal trial, because one is an appeal to the country and the other is an appeal to a jury.

Senator GRIFFIN. I thank the Senator for yielding.

Senator ALLEN. There is one other division of the proposed new rules that struck me as being possibly unwise. Under the present rules, a Member of the Senate who wishes to ask a question—and I think that is entirely proper, many cases would arise—and he would put the question.

There seems to be a provision here now in the proposed rules saying that the Chief Judges after the direct and cross-examination was held, then the Chief Judges would put all these questions that all the Senators had asked.

Now, I wonder if that would not put the Chief Judges in the attitude of being a second prosecutor—if that would be advisable to handle it that way or wouldn't it be better to leave it alone?

Senator ERVIN. It also could have been the role of being a chief defender. But I think that that rule in its present form is adopted as a practical matter. And I think it is pretty well to keep it as it is.

Senator ALLEN. You don't see any need to change that rule?

Senator ERVIN. That is one trouble we had on the select committee—and I had seven Senators, I had seven Senators and two lawyers. It was sort of hard to get an examination to end like that. And I think that rule was adopted as a practical matter.

Senator ALLEN. One thing I want to say before leaving, I was kidding my good friend Senator Byrd with the phrase "Deputy Chief Judge."

Senator ERVIN. But I do agree with the Senator from Alabama that if a Chief Judge or a Deputy Chief Judge asks a question which a lot of people thought not only was pertinent but impertinent, it might detract from the feeling of the country as to whether they think everything is according to Hoyle.

Senator ALLEN. It would indicate a lack of impartiality possibly for them to participate in that way.

I was kidding my good friend, Senator Byrd, about Deputy Chief Judge. Actually, Senator Byrd was the first one in the committee that raised the point that that was not a desirable way of handling this matter.

I was merely kidding him about that, I am sure he understands.

Thank you very much, Senator.

The CHAIRMAN. Senator Hatfield.

Senator HATFIELD. Senator Ervin, as the only nonlawyer present, I would like to go back to your point on the type and degree of proof necessary. I know you stated it—perhaps you could restate it to my understanding, in layman's language.

You indicated, I understand, that it has to be beyond reasonable doubt as the standard of proof.

Senator ERVIN. I think that is the proper standard. I think any other standard would be unfortunate, because I don't think anybody ought to ever be removed from office by the Senate on impeachment if the Senate had any reasonable doubt about the truth of the charges.

Senator HATFIELD. Now, does the same standard of evidence apply to all types of proceedings—civil, criminal and, as you would have liked, impeachment?

Senator ERVIN. No. The same type of proof, burden of proof, in all criminal cases is the same, that is that you have to satisfy a jury beyond a reasonable doubt of the truth of the charge against the accused. I think that is uniform throughout the United States.

As a general rule, in civil cases, the person who has the burden of proof, who is ordinarily the plaintiff, has to establish his case by a preponderance or the greater weight of the evidence.

Preponderance and greater weight of the evidence mean the same thing. It outweighs the evidence in opposition.

But there is also in a certain class of civil cases in my State a third burden of proof—and that is a very limited set of civil cases, like where you sue to reform a deed or an instrument, the plaintiff has to establish the case for the reformation by what we call clear, strong and convincing proof.

And I have dealt with burden of proof for a long time. I am able to understand what it means by greater weight of the evidence or preponderance of the evidence. I am also able to understand what it means to be beyond reasonable doubt, but, notwithstanding, I have instructed juries on that point and I never could get a very good mental rule to tell what is clear, strong and convincing evidence, as distinguished from preponderance of the evidence and beyond reasonable doubt.

Senator HATFIELD. Senator, a little while ago, in answer to Senator Allen, you indicated that this is neither a criminal nor a civil proceeding, but a proceeding of impeachment.

Do I understand that you are applying the rule of evidence or the standard of evidence of a criminal proceeding to the trial of an impeachment, because the original rules were silent on the standard of evidence?

Senator ERVIN. I apply it for two reasons, because I have a different opinion from many people of what constitutes an impeachable offense. I think an impeachable offense has to be a serious crime against Government. And therefore it is appropriate to apply the criminal rule.

And also I think it would be a fearful thing for the Senate to remove a President from office or Vice President or any other civil officer if they were not satisfied beyond reasonable doubt he was guilty of what was charged against him.

Senator HATFIELD. But then, Senator, if a person did not hold that thesis as to what constitutes an impeachable crime, he could be then just as justified and just as reasonable in applying, say, another standard of evidence, such as a preponderance of evidence or some other definition of evidence besides that which is held in criminal cases, is that correct?

I mean as a layman I hear the lawyers argue back and forth. I assume that there can be a case made, if one started with a different thesis.

Senator ERVIN. Of course, you can adopt any kind of rule as to the burden of proof—and, in the last analysis, as I stated at the beginning, it is a subjective question whether you are satisfied. And you can prescribe any kind of rule you want to—it comes back to that.

What would be a preponderance of the evidence to some people would be beyond a reasonable doubt to others, as a practical matter.

Senator HATFIELD. Senator, if I were to hold—

Senator ERVIN. I think I agree with the Senator in this respect. I think the Constitution leaves that matter to the conscience of each Senator.

Senator HATFIELD. The conscience of each Senator.

Senator ERVIN. Yes.

Senator HATFIELD. If I were to hypothetically assume that a President would be impeached for omission of acts or political acts not actually defined by criminal code or by civil code, I could hypothetically in that same circumstance apply a different standard of evidence than you have indicated this morning, could I not?

Senator ERVIN. Well, I feel so strongly on this point—I think if you don't accept the constitutional standard of treason, bribery or the high crimes and misdemeanors, you have no standard at all.

And when this article was originally brought—this provision was originally brought before the Constitutional Convention of 1787, it said that impeachable offenses were treason, bribery or maladministration. And Madison objected to the word "maladministration." He said that if you put that in the Constitution, it means that the President shall hold office at the pleasure of the Congress.

And I think if you ever depart from the constitutional standard, I think that that is true. I don't see how anybody could say a crime is not a crime and a misdemeanor is not a misdemeanor.

Senator HATFIELD. Senator, would you agree that there are other schools of thought on constitutional law who hold—for instance, Mr. Raoul Berger and others?

Senator ERVIN. Yes; I do. But I say that one of the great troubles about interpreting a provision of the Constitution is this, that entirely too many people like to interpret it to mean what it would have said if they, instead of the Founding Fathers, had written it.

And I think that is Raoul Berger's trouble. Raoul Berger goes back to the English precedents. I think the Constitution was written in large part to get away from the English precedents. The English precedents satisfy me that they impeached and removed a minister from office over

there for any conduct that was displeasing to the House of Commons, when they impeached him, or the House of Lords, when they convicted him.

And also the House of Lords imposed criminal judgment on them. And they put a whole lot of these things in the Constitution to get rid of the English system.

And Raoul Berger takes the position that they wrote the Constitution to keep the English system. I have a great affection and great respect for Raoul Berger. But I think you would be on sounder ground if you said the Constitution meant what it says.

Senator HATFIELD. Is it possible in a criminal case to be guilty of crime by an act of omission?

Senator ERVIN. It is not. But a man can be guilty of a crime if he encourages another to violate a law. Or if he counsels another to violate the law. He doesn't have to commit the crime himself; if he encourages another to commit the crime, he is just as guilty as the man that commits it.

Or if he enters into conspiracy to commit a crime and somebody else commits the crime pursuant to the conspiracy, he is guilty of the crime.

Senator HATFIELD. Suppose he fails to uphold a constitutional oath of office, would that constitute a crime if you can show evidence that a person has not upheld through an act of omission or only through an act of commission?

Senator ERVIN. I don't think that the mere violation of an oath of office is a crime, because there are too many different opinions as to what the Constitution requires of people.

That is the reason I say that when it has got something specific in it, you better go by it.

Senator HATFIELD. Well, a hypothetical case could be drawn for just a moment to try to draw for me an understanding. What if a man were elected President of the United States, and he decides that he will go to the White House and just sit there, or that he will go fishing on the Potomac, or that he will just ignore the day-to-day activities of his office and take trips and do things. Obviously, he is not undertaking the business of the office and he is not concerned about the day-to-day activities of the office. He is just President in name only.

Now, that circumstance in today's world could lead to great difficulty for this country. Yet, the President had not violated a statute, he had not committed a crime—it was his omission of responsibility of his office that constituted this unbearable situation.

Senator ERVIN. Well, I am not enough of an expert on Federal law to say whether misfeasance—which is doing nothing, he ought to act—is a Federal crime. It is in many States.

Senator HATFIELD. Would it be an impeachable offense?

Senator ERVIN. If it is a crime, a serious crime; yes.

Senator HATFIELD. Well, would the act of omission conceivably be a serious crime?

Senator ERVIN. Well, your question is very intriguing, and from an intellectual plane it is very interesting—but I can't conceive of it ever occurring. I don't think it has ever occurred in connection with any President.

And, to go back to Raoul Berger, he says in effect that an impeachable crime is any course of conduct, whether criminal or not, that shows that a person is unfit for the office that he holds.

Senator HATFIELD. Isn't that pretty much the thesis of Colonel Mason at the Constitutional Convention, too? Impeachment was an opportunity to remove a person from office on a possible conduct that was not codified, that was not set down in specific acts as constituting a criminal or civil action.

Senator ERVIN. Well, there was a great deal of difference of opinion expressed at the Constitutional Convention of 1787 on all subjects practically, just like there are on the floor of the Senate. A lot of us express opinions when we haven't fully studied the subject.

Senator HATFIELD. And the Supreme Court Justices sitting together as a Court.

Senator ERVIN. Yes; and a lot of them use a lot of obiter dicta sometimes that they ought not to use.

Senator HATFIELD. One last question. We were discussing the matter of what constitutes a Presiding Officer, the Vice President being the President of the Senate. As I understood your statement, the Chief Justice would inherit or be vested with those general duties of the Vice President exercised as President of the Senate, is that correct?

Senator ERVIN. That was my opinion. I am given pause by the observation of the chairman that the Constitution in another place makes the distinction between—it says the Vice President is President of the Senate and shall vote only in the case of a tie. And it may be possible to draw a distinction on that point.

Senator HATFIELD. My question is, it takes more than a body in the chair. There has to be some basic legal or written authority and duty ascribed to that person by title or office rather than just a body of the chair, is that correct? Such as, when we preside as Senators, we cannot inherit the powers of the Vice President, but we vote, do we not, when our name is called?

Senator ERVIN. That is true.

Senator HATFIELD. We are not the President of the Senate, we are a Presiding Officer of the Senate, aren't we?

Senator ERVIN. Yes.

Senator HATFIELD. So consequently when we preside in the Senate, we do not inherit nor do we have vested in us the powers of the Vice President.

Senator ERVIN. You don't have the power to break the tie; no.

Senator HATFIELD. That is right. In Senator Mansfield's proposal to divest the Chief Justice of the vote, do you feel that it would in any way inhibit or provide problems for him in his duty of ruling on evidence?

Do you feel there is any relationship to ruling on evidence and having a vote in the case of tie? The presiding officer.

Senator ERVIN. Well, I think I would leave it like it is, because I don't see any great harm on ruling on evidence, because it can all be appealed to the Senate. In fact, the Vice President can ask the Senate to rule on the point instead of ruling on it himself, if he wishes to.

Senator HATFIELD. And the history, of course, or the precedent, is that the Chief Justice voted twice, didn't he, in the *Johnson* case. He voted twice to break a tie and sustain that action by the Senate.

Senator HUGH SCOTT. Three times.

Senator HATFIELD. He only voted twice, it was sustained three times, because I think one time he withheld his vote. Thank you.

Senator ERVIN. The reason I am so strong about this question of using the words of the Constitution as standard—if you don't use those words, you have got no standard.

And it is just like Jerry Ford said when he was trying to impeach Justice Douglas, if you don't take what the Constitution says—an impeachable offense is anything that a particular Congressman or a particular Senator says. I believe they wrote the Constitution to keep it from being that way.

The CHAIRMAN. Just two questions. I have one and Senator Allen has one.

Senator Ervin, one question that has been bothering me—sort of a nagging question—and that is, what is the proper role of a Senator, an individual Senator, in a situation like this?

Now, I have reference to the fact that I have heard accounts of Senators that have said, I am going to demand that certain evidence be produced. And, as I interpret it, the Senator is not a prosecutor. Certainly he has the right to submit questions and the managers on the part of the House act as prosecutors, if there are prosecutors, and the person who is charged has his counsel as defense counsel.

Now, do you see a Senator having any role in either the prosecution or the defense of the case, other than the right to ask questions?

Senator ERVIN. Well, I think it would be entirely proper for Senators to write the managers of the House or the counsel for defense and ask to bring out certain evidence. Otherwise we may get down to the case that we may not get the crucial questions asked.

This old night watchman on the railroad, at a railroad crossing was the main witness in a case where a fellow drove down and crashed into the train, and he sued the railroad. And this old watchman took the stand and he testified how he got out and waved this lantern backwards and forwards when the car was way off at a great distance. And the railroad won the case on his testimony. And the railroad's lawyer was complimenting him on what a fine witness he made. And he said, well, you know, I was scared to death all the time. He said, well, you didn't show it, you seemed to be fully composed. He said, but I was scared to death. He said, what were you scared to death about? He said, I was afraid somebody was going to ask me whether my lantern was lit.

[Laughter.]

And I think if a Senator feels like they might not ask whether the lantern is lit is entitled to ask counsel on either side, by letter, to—

Senator ALLEN. Senator Ervin, I agree with you entirely when you say that you do not think that the Senate should write into its rules a rule or requirement that the measure of proof shall be clear and convincing proof—not write that in, not write guilty beyond a reasonable doubt.

If in fact the Senate can establish a required measure or standard of proof, certainly it could raise it to the heights or it could go down to where it would say that conviction could be had if only a scintilla of evidence of guilt was offered.

There would be nothing to prevent the Senate from doing that. If they can do one, they can do the other, can they not?

Senator ERVIN. Well, I am a little troubled by the overall question, because there is a provision in article I that Congress can pass any laws necessary or proper to assist anybody, any officer, to execute the Con-

stitution or to aid or implement the ability of an officer to fulfill his duty under the Constitution.

However, I think the due process requirement exists. And I think that due process would certainly apply to the Senate sitting as—

Senator ALLEN. Who would determine that due process, to get back to Senator Griffin's question?

Senator ERVIN. I think a very serious question arises since the *Powell* case. Suppose the Senate impeached a President and removed him from office and had no evidence at all. I can't conceive of that standing.

Of course, I don't worry about those things so much, because I think the Senate has got pretty good sense and a pretty good sense of justice.

Senator ROBERT C. BYRD. Let me ask one question on this.

Senator ALLEN. Go ahead.

Senator ROBERT C. BYRD. Raoul Berger raises the question as to whether or not this kind of situation would be appealable. He sort of leaves it hanging. I think he maybe comes down a little on the side that there would be an appeal to the Supreme Court. Professor Black does not. He closes that door. And this is one instance in which I would agree with Professor Black. I don't see any appeal beyond the Senate.

I think the question that the Senator from Alabama has raised here as to a standard of proof—and I agree with Senator Griffin that we ought to do everything we can to avoid any question on down the road as to whether or not there should be, there could be, an appeal—but if the Senate were to write into its impeachment rules a standard of proof, would not the Senate, then, open the door possibly following the decision of the Senate—it would be incredible to me that such an appeal would go to the Supreme Court, absolutely incredible. But to write a standard of proof into those rules—wouldn't it at least be opening the door to an appeal on the basis that the evidence that had been introduced had not been sufficient to uphold that standard of proof—therefore, the decision of the Senate was not in accordance with the standard of proof?

Senator ERVIN. I agree with you. I think the due process clause binds the Senate in this area. It is an agency of the Federal Government.

The *Powell* case—you see, the House had proceeded and the Senate had proceeded. They had interpreted one provision of the Constitution that they should be the judge of the elections qualifications on Members, each House. And they had construed that to give them the power to deny a person membership, a seat, on some basis other than the qualifications prescribed in the Constitution.

And the Supreme Court took jurisdiction—and I think rightly. And I think if the Senate would impeach a President and convict him on an article of impeachment which did not charge an impeachable offense within the purview of the Constitution, the Supreme Court has exactly the same power to say that we had misinterpreted the Constitution and had deprived the President of an office in violation of the very words of the Constitution itself.

And I don't see why they wouldn't have jurisdiction if they had jurisdiction in the *Powell* case.

Senator ROBERT C. BYRD. May I say to the Senator that it was not my intention to rear that question again. I just respectfully disagree entirely with that. But that is not the question.

The question I am suggesting here—and the Senator I think has answered it, and may I say that I agree with the Senator that these rules should not be changed, except in some very minor ways perhaps—I think the Senator raising the question about the standard of proof, raises a question that might be seized upon in order at some future time to then rear this very serious question as to whether or not an appeal would—

Senator ERVIN. I agree. And I think that one of the fundamental purposes of the Constitution was to give the President independence in the area which the Constitution assigns to him. And that is the trouble about not going to the constitutional definition of impeachable offenses or changing the rules. I don't think you can destroy the Constitution by rules.

Senator HUGH SCOTT. May I close with a comment? I have no question. If the Supreme Court has just held that the Executive is not above the law, it is not inconceivable that the Supreme Court would hold that the legislative is not above the law?

Senator ERVIN. That is exactly what they held in the *Powell* case. And I have always had the conviction, if I want to travel from Washington to Baltimore, the wise thing for me to do is to go by the regular highway and by the road signs, instead of trying to find my way through the bushes and brambles and over the hills and the valleys.

Senator ROBERT C. BYRD. I like what the distinguished Senator from North Carolina so wisely said a little while ago, that the Constitution means what it says and says what it means. And it says that the sole power to try impeachment shall lie with the Senate.

Senator HUGH SCOTT. And the sole qualification of Members of the House of Representatives shall be vested in the House, pursuant to the Constitution.

The CHAIRMAN. Thank you very much, Senator Ervin.

Senator ERVIN. Thank you all very much.

The CHAIRMAN. Senator Thurmond?

#### STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Mr. Chairman, and distinguished members of the committee, I appreciate the opportunity to testify before this committee on the question of possible revision of the Senate impeachment trial rules. It is very clear that the recommendations which come down from this committee will have a tremendous impact—not only on the outcome of any possible impeachment trial, but also on public acceptance of the final verdict. And I might say, if it will save you some time, that I have listened attentively to the questions propounded to the distinguished Senator from North Carolina and if similar questions were propounded to me, my answers would be similar.

Mr. Chairman, I cannot emphasize strongly enough that the primary criterion for any changes that are made in the standing rules must be the concept of fundamental fairness. In this connection, I was very relieved to learn that this committee has unanimously rejected adoption of the Mansfield recommendations submitted last week, and has decided to conduct its examination selectively, using the existing impeachment code as a basis.

It appeared to me that the Mansfield recommendations were too heavily weighted in favor of expedition at the cost of fairness. Specifically, I questioned the proposed changes regarding the status and duties of the Chief Justice of the Supreme Court as Presiding Officer, the rules of discovery and the rules of evidence.

Mr. Chairman, I would like to briefly address each of these points.

The Constitution in article 1, section 3, states in part that "When the President of the United States is tried, the Chief Justice shall preside." This language has been expanded by precedent—notably in the *Johnson* trial—and by the Standing Rules of the Senate, to convey to the Chief Justice important powers. These powers include the power to make initial rulings on all questions of evidence and incidental questions, and the power to vote in case of a tie. The Mansfield proposals would remove the latter power from the Chief Justice. Mr. Chairman, I urge that this power be retained.

The Chief Justice of the Supreme Court—regardless of who holds the seat—will be an individual completely removed from the political process and of outstanding ability in determining questions of evidence, due process and fundamental fairness. If the members of this body be equally divided on any impeachment issue other than the final question, simple logic would demand that the tie be broken—and that it be broken by the Presiding Officer, the preeminent jurist in the United States.

A second portion of the Mansfield recommendations that I question are the proposed rules of discovery. As I read these proposed rules, there are no practical limits on their scope. They would permit a wholesale fishing expedition into every aspect of a President's term in office, including areas involving serious questions of national security. While the recent Supreme Court decision in *United States v. Nixon* held that there is no absolute and blanket privilege of executive confidentiality in a criminal proceeding, it clearly reaffirmed the principle of executive privilege in the areas of military and diplomatic secrets. In view of this decision, and my own understanding of the concept of the separation of powers, I must question not only the fundamental fairness of the Mansfield proposal on this point, but also its basic constitutionality. The Mansfield proposals are designed primarily with expediency in mind, and I contend that the questions involved are of too great an importance to the future of our country to be summarily handled.

The final area I would like to address relates to the proposed evidentiary rules, specifically as they relate to hearsay evidence. Although the Mansfield recommendations purported to limit the admissibility of hearsay evidence, it is clear that their general tenor is to admit anything. The reasons for limiting the admissibility of hearsay in normal trials are well known and I see no reason to ignore these sound reasons in an impeachment trial. While I fully agree that the Senate as a body must be the final authority on all questions arising in an impeachment, I strongly urge that the admissibility of hearsay evidence should be the exception and not the rule.

In conclusion, Mr. Chairman, I would like to again emphasize that the primary criterion for any changes that may be made in the standing rules dealing with impeachment must be fairness, not expediency.

Now, a question arose as to the evidence. If a President is being tried for impeachment, the penalty is severe. It is not a criminal penalty.

but I know of no penalty that could be more severe—than to remove a President from office.

And therefore I feel—I believe the distinguished Senator from North Carolina expressed himself likewise—that the evidence should be beyond a reasonable doubt.

Now, with regard to TV coverage, I personally have no objection to TV coverage. I think it would be helpful maybe to the American public. On the other hand, I do feel that if the TV's are to comment after the witness—after the evidence of any witness, that the President or his agent or representative should be allowed to respond to such comments. In my opinion, unless the TV is handled properly it could result in not being fair to the President during an impeachment trial.

Those are a few points that came to my mind and I thought I would present them, if they would be helpful at all.

The CHAIRMAN. Thank you very much, Senator Thurmond.

Senator THURMOND. If there are any questions.

The CHAIRMAN. Are there any questions?

Senator HUGH SCOTT. I have no questions. I am in general agreement with what the distinguished Senator has said. I won't ask any questions.

The CHAIRMAN. Senator Byrd.

Senator ROBERT C. BYRD. The only question I have, that I might be sure that I understood the distinguished Senator from South Carolina, in reference to whether or not the Chief Justice should be given a vote in the event of a tie—I understood from what the Senator said that the Chief Justice should be given a vote in the event of a tie in all matters excepting those affecting the final judgment.

In other words, if the respondent is impeached and therefore mandatorily removed from office—if a further judgment of the Senate with respect to whether or not the respondent should be forever disqualified from holding future office under the United States should come to a vote, then in that event of a tie, the Senator from South Carolina would not go so far as to say that the Chief Justice should be permitted to break that tie.

Senator THURMOND. The Senator is correct. I think the Senate will have to make determinations as to guilt or innocence or as to the substantive question involved—and as I construe the question of the distinguished Senator, this would be a substantive question involved.

As to evidence, I think the Chief Justice could rule on the evidence, if he saw fit, or I think he could refer it to the Senate to rule on, if he preferred to do that.

Senator ROBERT C. BYRD. Another question. Another situation comes to mind. Suppose a Senator asks to be excused from participation in the trial—and under the Senate rules he may be excused if the Senators excuse him. In all of the precedents I have read so far, the Senate excused the Senators when they so requested and explained their reasons therefor.

But suppose the Senate would ask for a vote on the question of excusing a Senator from voting and that was a tie vote—would the Senator suggest that the Presiding Officer be allowed to cast a vote on such a tie vote?

Senator THURMOND. Mr. Chairman, that is a very difficult question, because that one vote might determine the guilt or innocence of the accused. And since it is such—of such a substantive nature, I doubt that the Chief Justice should vote in that case.

Senator ROBERT C. BYRD. I agree with the Senator.

The CHAIRMAN. Senator Hatfield.

Senator HATFIELD. I have no questions. I appreciate your coming to testify.

The CHAIRMAN. Senator Allen.

Senator ALLEN. I questioned Senator Ervin so extensively and Senator Thurmond says he agrees with his comments and his testimony. I only wish to commend the distinguished Senator for his testimony.

The CHAIRMAN. Thank you very much.

Senator THURMOND. Thank you very much.

The CHAIRMAN. Senator Moss.

#### STATEMENT OF HON. FRANK E. MOSS, A U.S. SENATOR FROM THE STATE OF UTAH

Senator Moss. Mr. Chairman and members of the committee, I will try to be brief.

First, perhaps, on the question of the Chief Justice voting, I would not permit him to vote at any time. I think the Members of the Senate take an oath when they sit down as a court of impeachment to hear the matter, try the case and render judgment. As far as I can see, the Chief Justice takes no such oath and I would not have him involved in the process in any place on any substantive matter at all.

Now, the mere housekeeping matters, sort of as the Senator from Oregon indicated, a body in the chair, is practically all I think he would be. I think the reason for having the Chief Justice there is the question that came up before as to whether or not there would be a conflict of interest if the Vice President were left there to preside, and it would put him in an embarrassing place.

But this I volunteer, simply because that is the last matter I heard discussed.

It is a solemn matter on which the committee meets today. I welcome the opportunity to share with you some of my thoughts on impeachment.

In my view of history and precedent, I see a Presidential impeachment trial much as did Hamilton. He said, in Federalist Paper No. 65:

A well constituted court for the trial of impeachment is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or in other words, from the abuse or violation of some public trust. They are of a nature which may, with peculiar propriety be denominated political, as they relate chiefly to injuries done immediately to the society itself. The prosecutions of them for this reason, will seldom fail to agitate the passions of the whole community and to divide it into parties more or less friendly or inimical to the accused.

Hamilton insisted that the Senate was the proper tribunal to consider charges of abuse or violation of some public trust and to render a "political" judgment.

The record of the impeachment process, since the first decade of the Republic, began in well-established English common law tradition.

For the past century, impeachment trial proceedings have groped for more specific standards of judiciousness. We have yet to crystallize such standards into uniform or consistent rules of procedure. At a later date, I may have some suggestions to offer specifically on procedure. One point which comes immediately to mind is whether further evidence should be admitted in the trial with a particular reference to additional tapes delivered to Judge Sirica.

I have been a member of the bar for 37 years and I served it as a judge for 10 years. In my view, nothing endangers the law more than official misuse of it for partisan ends. The impeachment trial, if articles come over to us from the House, must be handled in a judicious manner and without partisanship. Yet, one rather evident reason for the still inchoate definition of impeachable conduct is the very nature of public service itself. The standard to be observed by a public official is a combination of specific legal guidelines—set by the Constitution and the statutes—and our national social ethic. “Social ethic” becomes “political ethic” in the highest philosophical sense. It is not partisan. Politics is the whole fabric and art of government. Partisanship is a division between practitioners of government along emotional and intellectual lines.

So I commend the efforts of this committee in its efforts to develop appropriate rules of trial procedure and to define mode and measure of proof.

One firm principle emerged in the impeachment procedure against Judge Swayne. When the charges amount to allegations of criminal conduct, the prosecution is to be held to the standard of proof “beyond reasonable doubt” that would obtain in a criminal judicial trial. But here we are faced with a broader measure of proof in the trial of a President. Impeachable conduct is measured both as a violation of criminal justice guidelines and of the social ethic.

Clearly the recorded weight of authority accepts the thesis that our constitutional “high crimes and misdemeanors” encompasses noncriminal as well as criminal acts. It is misconduct against the state, including betrayal of public trust. Most surely a President may be impeached for abuse of power or even for abject failure to act when our social ethic demanded action.

Serious political offenses of a fundamental nature, not necessarily constituting an indictable crime, as well as those criminal offenses which do actually subvert the constitutional structure, warrant impeachment and conviction. Criminal evidence guidelines are amenable to well-known procedural formulas for crimes charged; but breaches of the social ethic, in the very nature of things are not so limited, and the ethic may be the essence of the issue from which the impeachment process arises. Standards to be applied and evidentiary guidelines are those that each Senator finally determines subjectively are appropriate in proving allegations of criminal conduct or conduct which is contrary to our national social ethic.

In summary, a Presidential impeachment trial is neither a civil nor a criminal trial. It is *sui generis*. The trial is not a partisan division. Partisanship does not equate with politics. Witness Hamilton’s so carefully chosen use of that term. The trial must be a political trial in the highest ethical sense of that word.

Does the evidence show that this President is unfit to govern?

Has he forfeited his election mandate by reason of his conduct?

Does the evidence show these deficiencies in a manner and to a degree that convinces the mind, in solemn relation to each Senator's oath and in accordance with his subjective judgment of his personal senatorial responsibility?

Rules of evidence framed for ordinary criminal or civil proceedings in our law courts do not apply. If the Senate falls into the trap of attempting to write and apply such limited rules, it will fail in its responsibility to our Nation under our Constitution. Senators must consider all information available, weigh it and test it for veracity—and then render solemn judgment.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Moss. Do you have any view with respect to the broadcasting of the proceeding?

Senator Moss. Yes. I feel strongly that it should be broadcast. I think we may well have regulations to prevent its abuse, but I think that this trial must be brought in the open for the American people to see. I think one of the salutary things that has occurred thus far in this doleful matter that none of us like—but one of the salutary things that has occurred is that the Judiciary Committee of the House had its votes on television, and many people came to comprehend this whole thing for the first time by watching some of those proceedings.

The CHAIRMAN. Senator Hatfield.

Senator HATFIELD. Mr. Chairman, I thank Senator Moss for an excellent statement, and I appreciate the Senator's contribution. I have no questions.

The CHAIRMAN. Senator Byrd.

Senator ROBERT C. BYRD. Mr. Chairman, I share Senator Hatfield's view about Senator Moss's fine statement.

With respect to the televising and broadcasting of the impeachment trial, in the event the House impeaches, does the distinguished Senator from Utah feel that in the event an indictment and trial in a criminal proceeding were to subsequently take place, the respondent through his counsel could claim that the televising of the trial of the impeachment had unduly prejudiced his case—the Senator has been a judge for a long number of years prior to his service in the Senate—does he see any problem in this area?

Senator Moss. Well, I don't see any serious problem in this. I would think that the rules ought to be set that everything would be on the television, everything that happened before the Senate. And consequently if the President were in an impeachment trial, his witnesses would be heard just as fully as any other witnesses presented by the managers of the House.

The President's counsel's argument, if argument were made, would be heard just as much as the argument the other way, and consequently I don't think that it could be prejudicial. Moreover—and I listened to the discussion earlier, which was very interesting, about whether or not this matter might be appealed on to the Supreme Court. I am very doubtful that that can be done. I think the Senate would be acting under the Constitution wholly within the lines provided in the Constitution—and therefore this is the court of final resort.

And consequently I don't see anything to be prejudiced about. A prejudice occurs if later you are going to have to go before a jury or

some other body, which has already been tainted, as it were, whereas we are acting, as I see it, as the last resort on this President, if he is tried before the Senate.

Senator ROBERT C. BYRD. But in the event he were later indicted and brought to trial.

Senator MOSS. For a criminal offense, you mean?

Senator ROBERT C. BYRD. Yes. Could it be said that the televising—could it validly be said—that the televising of the impeachment trial had so unduly prejudiced people throughout the country that the respondent could not then get a fair trial in a court of law?

Senator MOSS. Well, it might be said—and I am not prepared to be absolutely final on this, but I would be willing to accept the fact that he might then be excused from prosecution in criminal proceeding, provided the American people see this impeachment trial. I think it is absolutely imperative that they be taken into our confidence, because one of the reasons that we are now proceeding toward this point and may come to a criminal trial, is that the American people are now so divided and alienated by what little they do know—or a lot they know—what they know about this, that they need finally to be convinced that justice was done under the Constitution and that they know what went on.

And healing the country that much would certainly be worth the dismissal of a criminal proceeding that might come later.

Senator ROBERT C. BYRD. Couldn't it be just as reasonably argued that the televising of the trial, instead of creating greater prejudicial views among the population of the country, served to clarify and to balance, to inform, so that there would perhaps be even less prejudice than now exists.

Senator MOSS. Yes, perhaps so. And as I tried to respond earlier, by the fact that both sides are heard fully on the television—if you are going to have television, you ought to have the whole thing on. Both sides are exposed fully—may actually have a healing effect; yes.

Senator ROBERT C. BYRD. Thank you.

The CHAIRMAN. Senator Allen.

Senator ALLEN. I had not planned to ask any questions, but Senator MOSS you made a point of possible appeal of the decision of the Senate, and discussion was had between members of the committee and Senator Ervin about the fact that the President or any respondent in an impeachment trial would be entitled to due process.

Is that correct?

Senator MOSS. Well, yes, due process, as Senator Ervin answered, is different under different circumstances; yes.

Senator ALLEN. Who would be the arbiter as to whether due process had been accorded? Would it be the body that should have accorded due process? Obviously the answer would be, yes, due process has been accorded.

Would the Senate properly be the final arbiter of whether it had accorded due process?

Senator MOSS. I think so. Some one might attempt to proceed to see if the Supreme Court would take jurisdiction, but I think that the Constitution says that this is the function of the Senate. It doesn't say anything about an appeal. It does say how the Senate should proceed.

And I think that as long as we abide by the constitutional limitations, that there isn't any appeal from the Senate.

Senator ALLEN. That being true, let's suppose a farfetched hypothetical question. Suppose that articles come over from the House and the Senate, without any trial, votes the conviction on the impeachment charge, who would determine whether that would be a valid conviction or not—the Senate having voted two-thirds for conviction—or who?

That is a flagrant abuse of due process.

Senator MOSS. Yes. Well, I understand, in forming the hypothetical question, you have taken something that is so flagrant that it hardly is imaginable. I suppose that if the Senate left out some major part of the procedure that the Constitution prescribes, that the Supreme Court could, under those circumstances, say that the terms of the Constitution were not observed and therefore set aside whatever the proposed action.

But I feel fairly confident that the Supreme Court, other than the most flagrant abuse, would not be involved in this case. I think the Constitution is quite clear that it was intended that the Senate would be the final point where this matter is determined.

Senator ALLEN. If the Supreme Court could take jurisdiction in a flagrant case, what would prevent the respondent from saying that it was a flagrant case, and take it over there for decision?

Senator MOSS. Well, there is nothing to prevent his seeking to get the jurisdiction—to get the Supreme Court to assert jurisdiction. But I just do not believe that the Supreme Court would take jurisdiction, unless it were so flagrant as your hypothetical indicated.

Senator ALLEN. That is an interesting question.

Senator MOSS. Yes, it is.

Senator ALLEN. Thank you.

The CHAIRMAN. Thank you very much.

Senator HATFIELD. Could I ask one?

The CHAIRMAN. Yes.

Senator HATFIELD. What is your opinion if circumstances develop where the Chief Justice was incapacitated or died?

Senator MOSS. There would be a definite hiatus that would have to be filled there. I suppose there would have to be a recess of the impeachment court until such time as the office of Chief Justice were filled.

Senator HATFIELD. Is there an Acting Chief Justice when the Chief Justice's seat is vacated?

Senator MOSS. Yes.

Senator HATFIELD. Is one of the Associate Judges appointed as the Acting Chief Justice?

Senator MOSS. The senior Associate Justice acts in the interim until another Chief Justice can be appointed.

Senator HATFIELD. You would agree that the precise language of the Constitution excludes the Acting Chief Justice from taking over from the Chief Justice and presiding over the Senate in a trial of impeachment?

Senator MOSS. I think it would be the prudent thing to have a recess and deal with the problem of getting another Chief Justice appointed.

Senator HATFIELD. What if the President doesn't appoint a Chief Justice?

Senator MOSS. Well, he would have us stalled for a while. That

poses a very difficult problem since the Constitution is so specific that the Chief Justice shall preside.

Senator HATFIELD. Thank you.

The CHAIRMAN. Thank you, Senator Moss.

Senator Metcalf.

#### STATEMENT OF HON. LEE METCALF, A U.S. SENATOR FROM THE STATE OF MONTANA

Senator METCALF. Thank you very much, Mr. Chairman.

I appreciate this opportunity to appear before the Committee on Rules and Administration regarding the procedures to be adopted by the Senate in the event of the necessity of an impeachment trial.

As Chairman of the Joint Committee on Congressional Operations, I have been actively interested in ways to improve the broadcast media's access to and coverage of congressional activities.

Earlier this year I had the privilege of chairing a series of hearings in this area. Senator Byrd presented very informative and knowledgeable testimony in that hearing.

While our inquiry did not focus directly upon broadcasting of impeachment proceedings, extensive testimony was received on the general question of coverage of regular proceedings in both Houses of Congress, and I believe certain aspects of our study may be of assistance to this committee.

Initially, it must be recognized that television has, without question, become the most popular and powerful media for dissemination of news about governmental affairs. A recent study by the Senate Subcommittee on Intergovernmental Relations, in conjunction with the Harris polling organization, reported that television is well ahead of newspapers, the second-ranking source of information about Government and politics for our citizens. Radio news is the third-ranking source of such information.

Mr. Chairman, I may have emphasized television here, but radio news is just as important, just as significant. It is completely unobtrusive, and it is certainly a means of informing the public.

With the steady growth of public and educational television and with the increasing acceptance of cable transmission, the broadcast media undoubtedly will attain even greater importance as a conveyor of public affairs information in the future.

Given present public reliance on the broadcast media, what kind of access should the broadcasters have in an impeachment trial? I am convinced that we must permit live radio and television transmission from the Chamber during these extraordinary proceedings.

An impeachment trial in the Senate would be the culmination of the gravest political and governmental crisis our country has faced in this century. To prohibit the vast majority of Americans from observing directly the procedure by which this ultimate check of the democratic process is implemented would be exceedingly unwise.

To deny such access to the electorate would cast doubt on the legitimacy of the impeachment process, a process I find already is only dimly understood by many citizens.

Cynicism and distrust must not be permitted to be interjected into this process of maintaining the delicate equilibrium of powers that is critically important in our Federal system.

The legitimacy of an impeachment trial must be beyond reproach. The public must be able to see that this trial is fairly conducted, and the integrity and veracity of the constitutional process must be accurately portrayed.

Given the fact that the party not in control of the White House is the majority party in the Senate, the need for broadcast media access is even more compelling. Charges of a "kangaroo court," or a "lynch mob proceeding" must not be given an opportunity to gain any credence whatsoever.

Americans must be able to see for themselves what is occurring. An impeachment trial must not be perceived by the public as a mysterious process, filtered through the perceptions of third parties. The procedure whereby the individual elected to the most powerful office in the world can be lawfully removed must command the highest possible level of acceptance from the electorate.

With the resignation of the former Vice President, coupled with the possibility of removal of the President, the need for acceptance of our constitutional form of government by the American electorate will be put to its ultimate test.

Let us remember that in the event of a Senate conviction, neither the President nor the Vice President would have been subjected to the rigors of a national election.

It has been suggested by some of my colleagues and by certain commentators that television will unduly prejudice an individual facing articles of impeachment, and generally disrupt the proceedings.

Both of these arguments, I believe, are without merit.

The proposition that due process guarantees will be sacrificed or limited by broadcast coverage of an impeachment trial is based on an analogy between an impeachment trial and a criminal trial. A review of the origin of article II, section 4 of the Constitution, however, does not support this proposition.

Impeachment must be viewed in the terms of the checks and balances in our constitutional structure. The Framers of the Constitution clearly established a separation or division of powers, with remedial checks intended to establish an equilibrium of power.

Impeachment, the ultimate check on the executive branch, was given by the Framers to the legislative branch, not the judicial branch.

And in the interim this morning, I re-read some of the Federalist Papers. It was early suggested that the power of impeachment be given to the Supreme Court, and only after consideration of this the decision was made to place impeachment in the legislative branch.

Accordingly, a court-oriented judicial process with strict procedural limitations was not to govern. Rather a specialized review was established within the legislative branch. This procedure, initiated by the House, was to operate within certain safeguards, including the requirement of a two-thirds vote for removal, but was not to involve criminal sanctions, as in a judicial proceeding.

Adoption of an article of impeachment in the Senate was not to deprive an official of life, liberty or property.

The phrase, "high crimes and misdemeanors," is a term of art derived from the British impeachment proceedings. Its meaning can best be understood in the context of its underlying purpose, which is not punishment of the individual, but protection of the public against a gross abuse of power.

In Federalist No. 65, Alexander Hamilton, discussing the Senate's role as a forum for trying impeachment, stated:

The subjects of its jurisdiction are those offenses which proceed from the misconduct of the public men, or, in other words, from the abuse or violation of some public trust.

They are of a nature which may, with peculiar propriety, be denominated political, as they relate chiefly to injury done immediately to the society itself.

A review of the history of impeachment in this country reveals that little emphasis has been placed on criminal conduct. Less than one-third of the articles adopted by the House have explicitly charged the violation of a criminal statute, or used the word "criminal" or "crime," and 10 of these were charges that President Andrew Johnson violated the Tenure of Office Act.

Much more common have been articles which charge that an officer has failed to perform his duties, or violated his oath of office. And, it should be noted that the President's reply brief, *United States v. Nixon* (S. Ct. Nos. 73-1766 and 73-1834—July 24, 1974) would seem to reject the proposition that impeachment is a criminal process.

In discussing the special nature of the Presidency, the brief states:

Finally and most important, for present purposes the President may be removed from office by conviction on impeachment, and after he has left office, either through expiration of term or by conviction on impeachment, he is subject to prosecution for crimes that he may have committed.

That is the end of the quote.

Even if we were to accept the proposition that an impeachment trial is a criminal or quasi-criminal proceeding, which I do not, the question of broadcast coverage and potential prejudice is ultimately a decision to be considered by the court—which, in the case of impeachment, would be the Senate itself.

Moreover, the possibility of any prejudice developing against an accused, because of broadcast coverage, is remote, if not nonexistent.

I am confident that no great pressure would be felt by the impeachment "jury," because U.S. Senators are accustomed to being in the public eye. The same response can be made to any argument of adverse impact on the Presiding Officer, the Chief Justice, or the managers or counsel taking part in the proceedings, as they, too, have had substantial experience in public life. And it is very unlikely that any witnesses will be subjected to any added pressure by the presence of cameras, as the importance of the trial itself will undoubtedly generate whatever emotional reaction they may experience.

The televised Watergate hearings certainly provide evidence supporting this point, as no discernible adverse effects were apparent in the demeanor of the witnesses. With regard to broadcast coverage and its impact on the President, as the individual against whom the articles would be brought, I do not believe there would be any adverse effect. The President need not be in the Senate Chamber, and probably would not be present. Andrew Johnson never appeared. He replied through counsel.

Even if the President did choose to appear, however, he certainly is accustomed to television and radio broadcasting, and he has frequently used the facilities of this media to his advantage. In fact, if the necessity of a Senate trial develops, it may well be that the President would

specifically endorse broadcast coverage, given his familiarity with this medium of communication.

Arguing that an impeachment trial is a criminal or quasi-criminal proceeding, however, opponents of direct broadcast media access rely heavily on the Supreme Court decisions in *Estes v. Texas*, 381 U.S. 532 (1965), and *Sheppard v. Maxwell*, 384 U.S. 333 (1966) as authority to demonstrate the potential for prejudice by television and radio coverage of an impeachment trial.

A cursory review of these cases, particularly *Estes*, might support such "due process" arguments. But careful analysis does not support this proposition.

In the *Estes* case, which was a highly publicized case, a financier was charged with the criminal offense of swindling, and was convicted by the trial court. Portions of the proceeding were televised from the courtroom. *Estes* appealed his conviction, alleging he was deprived of his right to due process under the 14th amendment by the televising and broadcasting of the trial.

Appellate courts refused to overturn the conviction on appeal, but the U.S. Supreme Court reversed on a 5-to-4 decision.

First, the *Estes* decision pertained to a proceeding entirely judicial in character, and is thus not applicable as a precedent for a congressional impeachment trial.

Second, it was conceded in the facts of the case that the activities of the television crews and news photographers led to considerable disruption of the proceedings. And if you will read that case, it is replete with comments on that.

The courtroom was a mass of wires—this is in the majority opinion of Justice Clark—the courtroom was a mass of wires, cameras, microphones and photographers.

In the *Warren* opinion, he pointed out that the courtroom was filled with roving photographers, taking pictures, televising, as long as the cameraman stood outside the railing.

This would not occur if the conditions for broadcast coverage I intend to suggest for impeachment proceedings are adopted.

Third, in the *Estes* case, the majority holding of the Court was not the broad proposition that any televising of a criminal proceeding violates due process. The deciding vote in the split decision was cast by Justice Harlan, who emphasized that his opinion was limited to the particular factual situation of *Estes*:

The resolution of those further questions should await an appropriate case; the Court should proceed only step by step in the unplowed field. The opinion of the Court necessarily goes no further, for only the four members of the majority who unreservedly join the Court's opinion would resolve those questions now (381 U.S. 591-2).

Finally, we should not be deterred from making the constitutional judgment which this case demands by the prospect that the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subjected to re-examination in accordance with the traditional workings of the due process clause.

Mr. Justice Clark's opinion also was limited to the circumstances then obtaining, particularly with regard to changes in the technology of broadcasting:

It is said that the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today.

Equally as strong arguments can be made regarding the inapplicability of the *Sheppard* case, as it too was an entirely judicial proceeding, and thus does not properly set a precedent for an impeachment proceeding in the U.S. Senate. Further, in *Sheppard* the central question did not even involve the broadcast of courtroom proceedings.

With regard to the legal questions that might arise during the consideration of this issue, I call to the attention of the committee a very helpful analysis by the Special Committee on the Communications Law of the Association of the Bar of the City of New York, which is entitled "Television Broadcast of Impeachment and Removal Proceedings."

If that is not already in the committee record, I would like to have it entered in the record, as a part of my statement.

Senator CANNON. Without objection, so ordered.

[The material referred to may be found on p. 46 of these hearings.]

Senator METCALF. Now I want to turn to another area of concern, should an impeachment trial prove necessary: The conditions we must insist upon, if the cameras and microphones are to remain unobtrusive—silent spectators rather than disruptive participants—as we listen to the evidence and make our momentous decisions.

As I noted earlier, the Joint Committee on Congressional Operations recently held extensive hearings on Congress and Mass Communications. Much of the testimony we received dealt with the question of opening up regular floor proceedings of the Congress, of the House of Representatives and the Senate, to direct coverage by television and radio.

Throughout the network chief executives assured us that advances in communications technology have made it possible to accommodate broadcasting without intruding upon the proceedings or disturbing the participants. Throughout, they asserted that we in Congress had only to establish the conditions under which broadcasting would be permitted, and they would abide by them.

Now we have an opportunity to test these assurances, to insure that the camera's presence does not interfere with our deliberations, interrupt the proceedings, or otherwise detract from proper Senate dignity and decorum.

Let me suggest for your consideration some of the conditions that I believe are not only appropriate, given the gravity of the issue which we must resolve, but are also sufficiently flexible to permit the broadcasters to convey the actuality of these proceedings to the American people.

The cameras, in my opinion, should be permitted in the Chamber in whatever kind of pooling arrangement is most satisfactory to the broadcasters. This pool "feed" should be provided continuously, except during Senate recesses, for the duration of the proceedings, and should be available to all the broadcast media, public as well as commercial, network and independent alike.

I do not believe that limiting them to one camera, as has been suggested, is either feasible or desirable. It is physically impossible for a single camera to cover the entire floor, and such a limitation might require those intending to speak to move into designated locations, if they are to be shown actually making their presentations.

Broadcasting should record the proceedings faithfully, not force us to stage them.

In my judgment, while permitting more than one camera, we should insist that there be no "panning" for reactions or cutaways for commentary while a presentation is in progress on the floor. The cameras should remain with those who are speaking. But this does not mean that we should preclude variation of the camera angle or "wide" shots, particularly during the opening of each day's proceedings, so that viewers may get an accurate picture of the Senate Chamber.

For example, Mr. Chairman, it seems to me that there should be a camera in the press gallery, so that it could be focused on witnesses that may be testifying, or on tables down there. At the same time there should be a camera in the back of the room, to focus on the Chief Justice or the witness again. The interrogation might come from one direction, the witness from another. And it would seem that at least two cameras would be necessary to get that courtroom procedure without people moving back and forth into place, as I have seen us having to move in front of microphones in committee hearings.

Second, we should not permit the installation of any cameras on the floor itself, nor should we permit the so-called unilateral cameras by individual networks, or other broadcasters, to supplement pool coverage of activities in the Chamber.

If you will recall the *Estes* case, that was one of the complaints, that roving cameramen were in the courtroom and taking pictures without any control or any supervision.

Third, it is essential that we require the use of the most modern, sensitive, electronic cameras, which can transmit perfectly adequate pictures, even in color, with the lighting presently available in the Senate at the present time, or with minimal fill-in light.

We must let the broadcasters know in no uncertain terms that the bright and hot lights normally used in televising committee hearings—used when we came into the corridor this afternoon—are unacceptable. Such lighting would in fact be intolerable with the prolonged periods Senators and others will have to remain on the floor for these proceedings.

I recognize that the necessary low-light level cameras may not now be in use in Washington. The networks may have to acquire them or bring them in from their operations elsewhere.

Thus, we must make this requirement known as soon as possible so they can begin planning to have such cameras available and operational here.

Fourth, we should not permit "anchoring" by either radio or television commentators in the Chamber itself.

Continuity and any necessary explanatory comments can be inserted electronically from remote studio locations.

Additionally, considering the nature of the occasion, broadcasters should forego the usual "man-in-the-corridor" interviews, which in

my experience seldom contribute much by way of understanding of complex questions.

There will be a massive influx of media people from every part of the Nation, and every corner of the globe. The physical facilities of the Capitol will be strained to the limit to accommodate them. Permitting broadcasters to televise interviews at will, in or near the Senate wing of the Capitol, would create a chaotic situation, making it far more difficult to conduct these proceedings in an atmosphere of calm and in an orderly manner.

Accordingly, other than the broadcast "pool" covering activities in the Chamber, all television and radio coverage—live or recorded—should be restricted to existing studios in the radio and television correspondent's galleries. And I urge the committee to consider making the nearby Capitol grounds off-limits to broadcasters for the duration of these proceedings. Interviews can—and should—be conducted in the networks' main Washington studios and in other studio locations.

I am convinced that interviews and commentaries prepared in such locations will tend to be more informed—and informative—than those which would result from a frenzied competition for colorful quotes in the shadow of the Capitol dome.

However, Mr. Chairman, in the course of our hearings, we received a unanimous protest from the broadcast and the radio reporters, that the Senate had failed to provide adequate facilities for their ordinary broadcasts, and ordinary interviews.

We have a room in the Dirksen Senate Office Building, at the far end of the building, and we have a very small room upstairs on the third floor.

They have protested that those rooms are inadequate now. During any impeachment proceedings, it may well be that certain other rooms in the Senate wing of the Capitol should be set aside and assigned to the broadcasters for monitoring and for other purposes that would not interfere with the processes on the floor.

Fifth, we should require that proceedings be presented without commercial interruption. We should also make it abundantly clear that it is our intent not to permit any portion of the video or audio record to be used by anyone in subsequent paid political broadcasts or advertisements of any kind.

And finally, we must make whatever arrangements are necessary to insure that there is available to the Senate and to the Library of Congress a complete video and audio record of these proceedings for the use of historians and others, without copyright limitations.

By establishing appropriate ground rules, we can conduct our proceedings in the presence of cameras and microphones with proper dignity and decorum.

I believe we must allow the broadcasters in, if an impeachment trial becomes necessary. Whatever the outcome of such a trial, we will have failed to discharge our responsibilities properly if our citizens do not understand the constitutionally ordained impeachment process, or question the propriety of our decision.

In short, it is not only essential that we act deliberately and fairly, but we must be seen acting deliberately and fairly by the American people.

Mr. Chairman, I have just this morning received a copy of Senator Mansfield's suggestions for amendment of the rules. I would like to have an opportunity to file a brief on some of the provisions of the rules, such as to the authority of the Chief Justice to vote, which have been discussed here.

Thank you.

The CHAIRMAN. We will be happy to have any supplemental information from you.

Senator METCALF. I will do that within the next 2 or 3 days.

The CHAIRMAN. Fine, thank you very much.

Senator Griffin.

Senator GRIFFIN. No.

The CHAIRMAN. Senator Byrd.

Senator ROBERT C. BYRD. Would you recommend also, Senator Metcalf, that still photography be permitted?

Senator METCALF. Well, I think it would be permitted from the same vantage points in the same areas and under the same control that we have for television.

I would not permit any still photography on the floor. I would keep the photographers away from the Senate just as I would keep interviewers away from the immediate proximity of the Senate Chamber.

Senator ROBERT C. BYRD. But you would allow still photography under conditions, so that newspapers also could portray for their newsprint.

Senator METCALF. If there would not be any disturbance of the Senate procedure.

Senator ROBERT C. BYRD. Thank you.

The CHAIRMAN. Senator Allen.

Senator ALLEN. Senator Metcalf, I agree with you, we ought to have gavel-to-gavel television coverage. There ought to be some restrictions placed, though, on the amount of time that the various Senators could use in speaking, should there not? Or should we just have a blank check there?

Senator METCALF. I think there should be considerable restriction on the amount of time the Senators could use. I can envisage, of course, a debate on an appeal from the rule of the Chief Justice on matters of evidence—and I think we should strictly limit that amount of time. And Senators who are knowledgeable on that question, should be able to present their questions within a very limited amount of time.

I can see that as a delaying tactic, if we don't restrict the amount of time.

Senator ROBERT C. BYRD. Senator Metcalf, under the rules there is no debate on—

Senator METCALF. That is right.

Senator ROBERT C. BYRD [continuing]. You would recommend the rules stay as they are.

Senator METCALF. This is one of the things I would suggest. Mr. Chairman, I think in a matter of this importance, that the precedents we rely on are more important than changing the rule.

But of even greater urgency is determining what the rules are before we go into this proceeding. We must determine whether the Chief Justice will have a vote. I can't imagine any way in which he could cast a deciding vote. But we must make that determination.

And determining how much time a Senator is going to be allowed

to debate on a question of admissibility of evidence, or something of that sort, which is really an extraneous question and should be subject to the ruling of the Chair and subject to the general rules of debate of the Senate.

There are many things, of course, the general rules don't provide for. We have to seriously consider some rule changes that have been advanced. I just saw Senator Mansfield's statement this morning. I certainly applaud the decision of the Rules Committee not to summarily change all the rules of impeachment that have been developed and laid down over the years. I wouldn't change any rule without very serious consideration, because in a matter of this serious consequence, precedence is something we should rely on.

Senator ALLEN. You know, I rather agree with you on your statement that we ought not to limit ourselves to one camera, because I believe that a camera showing the attitude of Senators, whether they are there or not—I think it is important that the Senators be present. And I think if cameras are sweeping around the Chamber there, they are more likely to be present. If you just have the camera trained there on the witness stand, we are not going to let the people see the atmosphere in which this trial is being conducted, and the fairness or the degree of fairness with which it is being conducted.

And I think the Senate is going to be on trial to a certain extent as well as the respondent, in the event there is a trial.

So I agree with you.

Senator METCALF. I don't know how the Senate Chamber is going to be arranged. If it is arranged, Senator Allen, as a courtroom, the interrogators are going to face the witnesses. And if you only have one camera, you either have the camera on the witness or you have the camera on the interrogators and you don't have a fair opportunity to see the trial.

If you had two cameras you could at least see those two things.

You are going to have the board of managers on the part of the House of Representatives and the counsel on the part of the President. And certainly there would need to be another camera to get the proper perspective.

So in this historic proceeding, it would seem to me that restricting it to one camera—which we could do if we were broadcasting close-circuit only for the convenience of Senators—will not work. We have to have better and more thorough coverage.

Senator ALLEN. I thank the Senator.

Senator GRIFFIN. Mr. Chairman, I have a question.

The CHAIRMAN. Senator Griffin.

Senator GRIFFIN. Senator Metcalf has served with such distinction as a member of the State supreme court, I think he is qualified to take a special look at some of these tough legal questions. I am troubled, I must say, as I have indicated, by the implications and the ramifications and the impact of television coverage, and whether it is possible to have a trial and accord the respondent due process.

And I come to another point in this thing, which kind of points up the problem to me, that I can foresee; under the Constitution, of course, if a person were charged and found guilty by the Senate of a serious crime—putting aside the question of whether an impeachable offense has to be a crime—suppose it were a crime, under the Consti-

tution that, of course, does not preclude him from being tried later in a criminal proceeding.

I would assume, without being too unrealistic, that in a Senate impeachment trial there might be the vote of the majority of Senators which will allow in some evidence, perhaps very important evidence, that would not be admissible in a criminal trial.

And with the television coverage of the impeachment trial, what does that do for the defendant's chance for a fair trial later in a criminal proceeding?

Senator METCALF. Well, I would think that any defendant would be able to have a fair trial later in a criminal proceeding. I can only cite you to the recent case of Mr. Mitchell and Mr. Stans, where I think probably everybody in the United States thought they were guilty, except the 12 people that were on the jury. And they listened to the evidence that was presented by the prosecution and then they listened to the evidence that was presented by the defense—and they came to the conclusion that as a result of that conflict of evidence, that they were innocent.

And I think you could find juries all over the United States that, with the proper admonition from the judges and the restriction of evidence adduced as a result of the ordinary rules of evidence, even if there were a criminal case involved in impeachment, it could well result in a different outcome in the criminal trial.

Most of us who are lawyers and who are really worried and angry about what is facing us, would certainly lean over backwards in admissibility of evidence, no matter what the rule laid down by this committee or the rules laid down by the court or any of the other rules.

We are going to be very careful in our decision.

Senator GRIFFIN. That doesn't seem to be the case in the *Andrew Johnson* trial, where the Senate overruled the Chief Justice I think about 40 times.

Senator METCALF. In the *Andrew Johnson* trial, of course, there was a measure of vindictiveness as a result of a very bitter war that I don't think we will be confronted with in this impeachment proceeding.

I would hope that if impeachment is invoked by the House of Representatives, that we, all of us, as Members of the Senate, will just crase, if we can—and I think we can be objective—all the television we have heard and all the newspaper accounts, and sit over there on that Senate floor and listen to the board of managers of the House present their case and vote on that case in the way it is presented and the way the President has defended it.

And if we don't do that, and it is televised, we will have been convicted before the bar of public opinion of partianship or prejudice.

So I think that one way to insure our being objective as possible is to televise these proceedings in their entirety.

Senator GRIFFIN. Well, I want to thank you, Senator Metcalf, for your comments, because they are very important. They come from a rich background in the law.

My own view would be, if we go ahead and televise it, which I feel is going to be the result, we probably are doing it on the same basis that I think Senator Ervin responded when he was asked a question about what if the television at those hearings should prejudice the right of people involved to a fair trial—his response was that he felt that dis-

closure and public awareness of what the committee is doing was more important than whether or not the defendants were later tried and convicted.

In my own mind, that would almost have to be the ground here. An impeachment trial is of such great moment and importance to the people and the acceptability of the judgment is so important that maybe the Senate would go ahead and do it even with the knowledge that it might not be possible to follow through on the—

Senator METCALF. I would certainly acquiesce in that. If subsequently a judge before whom a criminal case is being tried would say, because of the publicity and televised proceedings, President Nixon could not receive a fair trial, I still think it would be worthwhile to televise them.

And I don't think it is important whether he would be convicted or not of any subsequent criminal prosecution.

Senator GRIFFIN. Thank you.

The CHAIRMAN. Thank you very much.

Senator METCALF. Thank you very much, Mr. Chairman.

[Material submitted by Senator Metcalf for the hearing record follows:]

#### MAJOR SOURCES OF GOVERNMENTAL AND POLITICAL INFORMATION

Information sources that people depend on "a great deal" to find out what is going on in government and politics:

	<i>Total (percent)</i>
Television news.....	65
Newspapers.....	52
Radio news.....	39
News magazines.....	25
Talking to friends.....	21
Special reports and publications.....	13
Local church.....	9
Lectures, formal talks.....	7
Lectures and mailings from elected officials.....	6
Business publications.....	6
Union publications.....	5
Private newsletters.....	4
Local political grapevine.....	4
Political party publications.....	3

Congress and Mass Communications: An Institutional Perspective. A study conducted for the Joint Committee on Congressional Operations by the Congressional Research Service, Library of Congress; page 7.

#### TELEVISION BROADCAST OF IMPEACHMENT AND REMOVAL PROCEEDINGS

By The Special Committee on Communications Law of the Association  
of the Bar of the City of New York

The possibility of the impeachment of the President has raised the question whether the proceedings in the House and Senate should be televised.

Proceedings for impeachment and removal are public in the most fundamental sense of the word. The welfare of the people of the United States is directly involved, on both sides of the issue. It is difficult to point to anything Congress may do, short of declaring war, of greater concern to the people than the determination whether the President should stay in office or be removed from office. The way that Congress conducts its proceedings, therefore, and the evidence and argument that lead to the result, are matters on which the public is entitled to the most complete information that can possibly be transmitted. In the hearings held

by the Select Committee on Presidential Campaign Activities (the "Watergate hearings"), television demonstrated both (a) its value as a means of giving full and immediate knowledge of what is transpiring, and (b) the fact that it causes no interference with the orderly and proper conduct of proceedings.

We address ourselves to those aspects of the proceedings which are not secret, those which will be reported in the news media. When the Congress acts in closed session (as, for example, in the hearings thus far held by the House Judiciary Committee), the present question does not arise. But when the proceedings are open—when the press is present and reporting—we have found no persuasive reason why television's more direct communication to the public should not be utilized. There will be visitors in the galleries, and it is unreasonable to permit this miniscule fraction of the population to gain such first-hand knowledge while the public as a whole has its knowledge filtered through the intermediation of reportage.

Particularly if the final result is controversial, the public should have had the opportunity to satisfy itself that the proceedings were conducted fairly and that Congress performed its duties seriously and intelligently. An incidental but important benefit is that a good job done by the House and Senate would serve to strengthen confidence in American political institutions. Most profoundly, impeachment and removal is the public's business and hence the public ought to be as well informed as possible.

Printed transcripts, though indispensable, give incomplete information. They convey only uninflected words, without the qualities of tone, gesture, and expression that are essential elements of meaning. Moreover, few people can be expected to read complete transcripts, while millions can be expected to watch broadcasts of the proceedings (on either a live or a delayed basis). Reporters' accounts in newspapers or on television, illuminating as they may be, are necessarily incomplete. Nuances of demeanor may be decisive evidence for those who are present, and the best reporter cannot be wholly successful in the effort to convey their meaning; television brings these delicate but significant bits of evidence directly to its viewers.

Only one of the twenty-one members of the committee dissents from this report generally. Two other members dissent with respect to the House debate but concur so far as the Senate proceedings are concerned.

Arguments against television broadcast are based on (1) analogies drawn from criminal prosecution and (2) the possibility that television will impede or delay the proceedings.

With respect to the latter, there is general agreement that, consistent with fairness and the need to reach the right result, the impeachment proceedings should be as expeditious as possible. Physical intrusion—the presence and the operation of the television apparatus—has been mentioned as an impeding factor, but the broadcast of Congressional committee hearings has shown that no disturbance is created by the mechanics of television. There is also the suggestion that the mere awareness of their being televised will affect the actions of Representatives and Senators, and that the proceedings will thereby be substantially lengthened. It is said that the publicity value of appearing on television will be so seductive to individual Representatives and Senators that they will seek to participate in the proceedings when they otherwise would not, and that there is an urge, when one is on television, to "ham it up" or "showboat."

We do not consider the suggestion valid. We believe that the Congress can be relied on, in this critical matter, to act responsibly. Indeed, the very fact that the public is watching may afford an additional stimulus to responsible behavior. Moreover, so far as the House is concerned, it will in all likelihood be operating under a Rule limiting debate, as it does on legislation. It may be noted, finally, that if the House should vote against impeachment, the House proceedings would constitute the climax of one of the greatest political crises in our history; the people ought to have full access to the way in which the momentous decision was reached. As for the Senate proceedings, under present Senate Rules they would be handled in the main by a group from the House supporting the impeachment and by counsel for the President in opposition. Individual Senators cannot put questions directly; they must be submitted to the presiding officer (the Chief Justice of the Supreme Court sitting in the Senate for this purpose) who then transmits them. The opportunity for showing off is small. The danger of the imagined sort of misbehavior is in our opinion far outweighed by the need to give the public full and accurate information.

The other argument against television approaches the matter as though it were a criminal prosecution, and draws on criminal precedents. Impeachment by the House has been likened to grand jury indictment, and the proceedings in the Senate to a criminal trial. It is true that the first pair raise charges of misconduct and the second pass on them, but there are significant differences between impeachment proceedings and the operation of our criminal justice system. We believe the analogy is misleading and the precedents not in point.

Impeachment and removal are entrusted by the Constitution to the legislative branch of government, not to the judiciary. The process is political, in the highest sense of the term. This does not mean, of course, that the proceedings by the Constitution are in any sense a "plebiscite." Nor does it mean that the Representatives and Senators should merely vote their political preferences, or merely register the preferences of their constituents. It does mean that it is the welfare of the people that stands on both sides of the issue.

It is in the people's interest that any federal official, including the President, who has committed the transgressions specified in the Constitution should be removed from office. It is equally in the people's interest that an official who has not committed those transgressions should stay in office for his elected or appointed term. Removal is not a criminal penalty. Although the official may have a keen desire to keep his station, his personal well-being is not a relevant consideration. The matter is thus quite different from a criminal prosecution, where the Constitution's concern for the life, liberty and property of the individual imposes a variety of restrictions on the conduct of the trial. The need to protect those who are accused but innocent dominates our criminal prosecutions; the need of the country as a whole should dominate the proceedings for impeachment and removal.<sup>1</sup>

This basic difference must make us extremely cautious in consulting the concepts and precedents of our criminal law. When the specific considerations that have kept television out of most courtrooms are examined, it will be seen that they either (a) are altogether inapplicable here or (b) have much less force in these proceedings than in a criminal jury trial, and are amply overcome by the considerations that favor keeping the public fully informed.

The Supreme Court has dealt with the matter directly only once, in *Estes v. Texas*, 381 U.S. 532 (1965). In that case, the Supreme Court decided by a vote of five to four that the televising of a criminal jury trial violated the defendant's rights under the due process clause, even though no specific prejudice to the defendant had been shown.<sup>2</sup>

The principal opinion in *Estes* was written by Mr. Justice Clark, with whom Chief Justice Warren, Mr. Justice Douglas and Mr. Justice Goldberg joined; the Chief Justice wrote a concurring opinion in which Douglas and Goldberg joined. Mr. Justice Stewart wrote for the dissenters, who included Mr. Justice Black, Mr. Justice Brennan and Mr. Justice White; Brennan and White wrote additional dissents. This four-four split makes the separate concurring opinion of Mr. Justice Harlan the key to the meaning of the case as precedent. (Although Mr. Justice Clark's opinion appears in the reports as "the opinion of the Court," it cannot logically be such, as Mr. Justice Brennan took occasion to point out.)

Mr. Justice Harlan refused to accept the view of the other four Justices voting to reverse the conviction that the televising of any criminal trial would deny due process. He limited his opinion to "what was done in this case," a case he characterized as "a notorious criminal trial." His opinion includes the following:

"\* \* \* The resolution of those further questions should await an appropriate case; the Court should proceed only step by step in this unplowed field. The opinion of the Court necessarily goes no further, for only the four members of the majority who unreservedly join the Court's opinion would resolve those questions now." (381 U.S. 591-2.)

<sup>1</sup> The grounds for removal are prescribed by Article II, Section 4. They are dealt with in a recent Report of this Association's Committee on Federal Legislation and are not dealt with here. "The Law of Presidential Impeachment." THE RECORD 154 (February 1974). The procedure is prescribed in Article I, Sections 2 and 3.

<sup>2</sup> Television is banned by the Federal Rules of Criminal Procedure and by the rules pertaining to most State criminal proceedings. Colorado allows criminal trials to be televised if the defendant consents. The American Bar Association Code of Judicial Conduct (which is, of course, a recommendation of an association and not a matter of law) states that judges should ban television cameras except for purely ceremonial events and proceedings which will be shown only in educational institutions and after the case is over and all direct appeals exhausted.

"Finally, we should not be deterred from making the constitutional judgment which this case demands by the prospect that the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause. \* \* \*" (381 U.S. 596.)

Mr. Justice Clark's opinion also leaves room for change :

"It is said that the ever-advancing techniques of public communication and the adjustment of the public to its presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today." (381 U.S. 551-2.)

The *Estes* trial was held in 1962. Mr. Justice Stewart's opinion summarized the dissenting view :

"What ultimately emerges from this record, therefore, is one bald question—whether the Fourteenth Amendment of the United States Constitution prohibits all television cameras from a state courtroom whenever criminal trial is in progress. In the light of this record and what we now know about the impact of television on a criminal trial, I can find no such prohibition in the Fourteenth Amendment or in any other provision of the Constitution. If what occurred did not deprive the petitioner of his constitutional right to a fair trial, then the fact that the public could view the proceedings on television has no constitutional significance. The Constitution does not make us arbiters of the image that a televised state criminal trial projects to the public.

"While no First Amendment claim is made in this case, there are intimations in the opinions filed by my Brethren in the majority which strike me as disturbingly alien to the First and Fourteenth Amendments guarantees against federal or state interference with the free communication of information and ideas. The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms. See *Speiser v Randall*, 357 US 513, 525. 2 L ed 2d 1460, 1472, 78 S Ct 1332. And the proposition that nonparticipants in a trial might get the 'wrong impression' from unfettered reporting and commentary contains an invitation to censorship which I cannot accept. Where there is no disruption of the 'essential requirement of the fair and orderly administration of justice,' '[f]reedom of discussion should be given the widest range.' \*\*\*\*" (381 U.S. 614-615.)

In any event, the *Estes* case is a judicial, not a Congressional, precedent, and within the judicial system it is limited to criminal prosecutions. For the reasons set forth above, precedents from courtroom criminal prosecution are not controlling in impeachment proceedings. The principal significance of the *Estes* case for present purposes lies in its providing the occasion to weigh, and examine the applicability of, factors that were thought to affect the fairness of a criminal trial. The Clark and Warren opinions marshal the arguments against television in the courtroom. These arguments, which were unconvincing to four members of the Court and only partially convincing to a fifth, will be reviewed to determine the extent, if any, to which they ought to apply to impeachment proceedings.

Mr. Justice Clark, conceding that there was no evidence that the trial in question had been unfair to the defendant, relied on his own knowledge of the nature of criminal trials and on the impact he assumed television would have. This impact, he wrote, would be felt in four ways :

(1) Impact on the jurors. The jurors would be "self-conscious and uneasy." In some states, they could view their performances in the evening. In any event they would "feel the pressures of knowing that friends and neighbors have their eyes upon them." New trials would be "jeopardized in that potential jurors will often have seen and heard the original trial when it was telecast."

In removal proceedings, those who are making the decision—United States Senators—have spent a large part of their professional lives in the public eye.

The Senators involved in the Watergate hearings were not "self-conscious and uneasy." The fact that the Senators may be able to review the day's events by seeing them on television may well be a benefit rather than a detriment. The jeopardy to potential jurors in a new trial is non-existent; if for any reason (not now conceivable) the removal proceedings had to be repeated, the "jury" would be the same (or, even if the two events straddled an election, at least two-thirds of those participating would be the same). Fundamentally, the need to insulate a criminal trial from the pressure of public opinion does not affect the present question. If there is no television broadcast, people will in any event be following the proceedings in other media, and their reactions will be known to Congress. The Representatives and Senators have the ultimate responsibility for considering the evidence and making the decisions the Constitution demands, but it is utterly unrealistic to suppose that, in arriving at these decisions, they will be insensitive to public opinion. Since public opinion will in fact play a role, that opinion should be as fully informed as possible.

(2) Impact on the witness. Mr. Justice Clark asserted that "the knowledge that he is being viewed by a vast audience" would have drastic effects upon the testimony given.

In the Watergate hearings, awareness of being televised produced no discernible effects upon the witnesses. They were at least as much at ease as witnesses generally are in the courtroom. In any event, the very importance of impeachment proceedings in itself is likely to produce whatever emotional strain the witnesses will feel. The fact of television broadcast can hardly add to the awesome nature of the occasion.

(3) Impact on the judge. Mr. Justice Clark felt that "the additional responsibility the presence of television places on the trial judge" would interfere with his making certain "that the accused receives a fair trial." The need to "supervise" the television broadcast would interfere with a task that "requires his undivided attention."

It is difficult to see how the presence of television would impair the functioning of the Representatives and Senators, of counsel who may be participating, or of the presiding Chief Justice. Arrangements can easily be made to avoid the policing that was done by the trial judge in *Estes*.

(4) Impact on the defendant. Mr. Justice Clark felt that the presence of television "is a form of mental—if not physical—harassment, resembling a police line-up or the third degree."

For one thing, the President need not be present in the Senate, and probably will not be. It is a matter of his choice. Moreover, the President is thoroughly accustomed to television, and has frequently commanded its facilities when he has wanted to be in touch with the people. Finally, for him as well, of course, the event is so momentous that the fact of television broadcast would add nothing to such tension as he might feel.

Chief Justice Warren summarized his objections as follows:

"(1) that the televising of trials diverts the trial from its proper purpose in that it has an inevitable impact on all the trial participants;

"(2) that it gives the public the wrong impression about the purpose of trials, thereby detracting from the dignity of court proceedings and lessening the reliability of trials; and

"(3) that it singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others."

The first point has been dealt with in connection with Mr. Justice Clark's arguments. As to the second, television can hardly give a "wrong impression about the purpose of" the impeachment proceedings; its effect will be to the contrary—to give a better-informed impression. As to the third point, impeachment of a President is so rare an occurrence in our history that it cannot be "singled out" by television. As to all three points, it should be noted that the Chief Justice was focusing carefully on courtroom criminal trials.

We conclude that the fairness of the proceedings for impeachment and removal will not be diminished by their being televised. On the contrary, the fact that the public—the real party in interest—is watching closely will be a force that impels toward fairness. Accordingly, the proposition that television may do harm seems to us to lack substance. And, to return to what was said at the outset of this report, we believe that the need that the public be fully informed makes an overwhelming affirmative case for television coverage. The citizen will have a valid desire to be "present" at the impeachment proceedings, and to form an

opinion on whether the President should or should not be removed from office. Televising the proceedings will effect a considerable advance toward that proper goal.

SPECIAL COMMITTEE ON COMMUNICATIONS LAW

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DISSENTING VIEWS OF THE HONORABLE BEATRICE SHAINSWIT AND ALVIN DEUTSCH

We fully agree with the majority report insofar as it espouses televised broadcasts of any impeachment trial in the Senate. But we are constrained to dissent with respect to so much of the majority report as equates the impeachment debates in the House, which pragmatically are governable only by the self-restraint of the members, with trial in the Senate, which is conducted under the aegis of the Chief Justice of the United States.

We do not believe that two such wholly dissimilar proceedings should be so readily treated as identical halves of the same coin. Analysis of external procedures to be superimposed upon the internal procedures of either branch of the Congress, especially where such external procedures take the form of televised broadcasts, should pay due heed to the basic difference between the respective functions of both Houses of Congress.

The Senate proceedings are a trial, of the greatest public importance and interest. There will be witnesses and evidence, the Chief Justice of the United States will preside, strict rules requiring, *inter alia*, that (a) all debate be behind closed doors and (b) all motions and questions be submitted in writing in advance, have already been announced, and the entire affair will be—like the Ervin Committee hearings last summer—one at which there should be the broadest citizen participation by proxy. On the other hand, the House proceedings, as presently foreshadowed, will differ in no way from debate on any other committee report, except for the momentous character of the subject matter. [Indeed, it should be noted that, had the House wished, it could have voted impeachment without a preliminary committee report of any kind.] There will be no witnesses or testimony—such trial procedures are reserved for the proceedings in the Senate.

Debates in the House have never been the fodder for televised broadcasting, not merely because of their intrinsic nature, but because such broadcasting would turn the House into a stage where Congressmen would act as performers for their constituents.

Nor is television needed to lift any veil of secrecy from the House debates. We are not living in an era of Star Chamber proceedings. Speeches are made on the floor of the House before assembled members of the press and public, are fully reproduced in the Congressional Record, and will receive microscopic coverage and analysis in the *New York Times* and other news organs. We can also reasonably anticipate that the TV media will still be vicariously present through the extensive reporting and overview of the TV news channels.

On the other hand, full televised broadcasting of the debate might well encourage far more speeches, many of them unnecessary, a great proportion highly acrimonious, and the whole possibly threatening constructive action. This is an election year—it would be a very secure Congressman indeed who could resist the free exposure provided by nationwide TV for the fifteen minutes of his speech allowed by the House rules. And what local station is going to be able to resist the overtures from its local Congressman that his golden words be shown to the folks at home? Thus, there is the real possibility that almost every one of the

\*Robert Rifkind dissents. Hon. Beatrice Shainswit, with whom Alvin Deutsch joins, dissents with respect to the televising of the House debate.

435 Congressmen will feel called upon to participate in the debate—and in addition, of course, there are points of personal privilege, requests for information, demands for rulings from the chair, and the other joys permitted by *Roberts Rules of Order*. The result could easily delay the proceedings for months—and, moreover, turn the whole affair into a highly undignified circus.

And if this were not enough, to permit televised broadcasting would open up the Pandora's Box of the fairness doctrine in uncharted areas. Can incumbents be permitted a free ride on the air waves, while challengers are relegated to watching the screen and gnashing their teeth? Who is to draw the line, and by what measuring rod, to determine when and how a particular speech on the floor has become an election harangue? What becomes comparable free time? [Note that this problem is almost nonexistent as to the Senate trial, since only one-third of 100 members, instead of all 435 Congressmen, are up for election, and since, in any event, debates are required to be behind closed doors.]

In the final analysis, with all due deference, we do not believe that it is appropriate for this Committee to concern itself beyond the specific question as to whether proceedings in the Senate should be televised. That question was properly meant for our Committee's function, because of the *Estes* decision to which the majority report alludes. The competing interests in broadcasting the non-judicial and non-trial speeches in the House are scarcely warranted in enlisting the Association of the Bar of the City of New York as a proponent. On the contrary, to the extent that this Committee, and the Bar Association as a whole, are concerned that due process be respected in the House, the interests of due process can be best fostered by the absence of the intruding TV lens.

#### DISSENTING VIEWS OF ROBERT S. RIFKIND

It has long been the prevailing view in this country that broadcasting facilities should be excluded from courts during the trial of civil and criminal cases. That view is reflected in Canon 35 of the Canons of Judicial Ethics, which was adopted by the American Bar Association in 1937 in the wake of the Hauptmann kidnapping trial. It is reflected in Rule 53 of the Federal Rules of Criminal Procedure adopted in 1946. It is reflected in resolutions of the Judicial Conference of the United States adopted in 1962 and 1968. It is reflected in Rule 5 of the General Rules of the Administrative Board of the Judicial Conference of the State of New York, in Section 52 of the New York Civil Rights Law, and in the rules or practice of the courts in virtually every other state. *See*, The Special Committee on Radio and Television of the Association of the Bar of the City of New York, *Radio, Television and the Administration of Justice: A Documented Survey of Material*, 144-92 (1965); C. Wright & A. Miller, *3 Federal Practice & Procedure (Criminal)* § 861 (1969). Moreover, that policy, as applied to criminal trials, has been held to have a constitutional footing in the due process clause of the Fourteenth Amendment. *Estes v. Texas*, 381 U.S. 532 (1965).\*

In short, there is abundant testimony for the proposition that televising trials is unwise. Although the basis for that conclusion has been variously expressed, the common theme has been the conviction that the presence of cameras "undercut the reliability of the trial process." *Estes v. Texas*, U.S. 381 at 570 (Chief Justice Warren concurring). The acceptance of that view by responsible bodies after careful consideration, while certainly not dispositive of the matter, at very least places the burden of proof on those who urge that the televising of a trial is not merely permissible but is affirmatively desirable. And, where the trial in question is as important to the nation as the trial of the President of the United States upon articles of impeachment, the burden is a heavy one indeed. I fail to find in the Report of the Committee any persuasive ground for departure

\* Although the Supreme Court in *Estes* was divided on whether the televising of criminal trials in state courts is prohibited by the Fourteenth Amendment in the absence of a specific showing of prejudice to the defendant, not even the dissenters suggested that televising trials was affirmatively desirable. On the contrary, Mr. Justice Stewart (with whom Justices Black, Brennan and White joined) wrote:

"I think that the introduction of television into a courtroom is, at least in the present state of the art, an extremely unwise policy." 381 U.S. at 601.  
Mr. Justice Harlan, concurring on a limited basis with the opinion of the Court, expressed his view that:

"... at least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment." (381 U.S. at 587.)

from a policy that has been thought important in protecting the integrity of the trial as a mechanism for the ascertainment of truth and the administration of justice.

It is important to recognize at the outset that the trial of an impeachment, although novel in some respects, is nonetheless a trial. The Senate is constituted as a court. As required by Article I, Section 3 of the Constitution, each Senator takes an oath "that in all things appertaining to the trial of the impeachment of \_\_\_\_\_, now pending, I will do impartial justice according to the Constitution and laws." House Committee on the Judiciary (93rd Cong. 1st Sess.), *Impeachment: Selected Materials*, 218 (1973). The final judgment is of conviction or acquittal. There is nothing in the language of the Constitution or the records of the Constitutional Convention that would indicate that the Senate, when organized as a court of impeachment, was not expected to conduct itself in a manner consistent with the norms of judicial behavior. In discussing the wisdom of allocating to the Senate in its "judicial character" the duties of "a court for the trial of impeachments," Hamilton wrote in *The Federalist*:

"Where else, than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel *confidence enough in its own situation*, to preserve unawed and uninfluenced the necessary impartiality between an *individual accused*, and the *representatives of the people, his accusers*?" *The Federalist* (Cooke, ed. 1961), 439, 441 (italics in original).

The Committee's Report urges that the trial of an impeachment is political in nature, that it is not a criminal trial and that it constitutes "the public's business." None of these distinctions appears to justify the conclusion that it should be televised. The trial of an impeachment has been said to be political in the sense that the subjects of the Senate's jurisdiction are "those offenses which proceed from the misconduct of public men, or . . . from the abuse or violation of some public trust." *The Federalist*, 439. The fact that Senators are elected does not affect the analysis; in most states judges are also elected, and that has been thought to be an additional reason for excluding television from courtrooms. The fact that the President is elected likewise does not distinguish the impeachment process. Elected officials have been brought to book in Article 3 courts; and, conversely, ten of the twelve impeachments that have been tried before the Senate have involved nonelected officers—nine of them federal judges. While the proceedings may not be criminal in that the only sanction that can be imposed is removal and exclusion from office, the nature of the penalty should not diminish our concern for achieving a just judgment. It is said that "impeachment and removal is the public's business"; legislation is also the public's business, yet cameras are also excluded from the Senate Chamber while legislation is under consideration. Similarly, courts and executive officers regularly pursue the public's business untelevised.

It is undoubtedly true that an impeachment trial will be a subject of passionate interest. The intensity of public interest will differ in degree but not in kind from that which has attended many historic judicial trials. The radio or television broadcast of the trials of Sacco and Venzetti, Hiss, the Rosenbergs, Angela Davis, Ellsberg, or Mitchell and Stans would certainly have attracted enormous audiences, but it is hard to believe that it would have served the interests of justice. Similarly, I fail to see that justice would have been better served had we broadcast the proceedings in such celebrated civil actions as *Brown v. Board of Education* or the Pentagon Papers case.

The gist of the Committee's argument appears to be this: "Since public opinion will in fact play a role, that opinion should be as fully informed as possible." Hence, "the need to give the public full and accurate information" is said to outweigh the adverse effect that the intrusion of television might have on the proceedings. The public should not get "its knowledge filtered through the intermediation of reportage"; nor should it be satisfied with the "incomplete information" supplied by mere transcripts.

It is hard to know whether the Committee's view as to the role of public opinion is a counsel of despair or a paean to participatory democracy. In either case, one cannot doubt that television would vastly magnify the impact of public opinion on the trial. I dissent from the Committee's conclusion because I believe that an impeachment trial is not a plebiscite and that the Senators should attend to the evidence and not the electorate. Senators do not live in a political vacuum, but no good can come from gratuitously increasing the pressures to which they

would be subject in their adjudicatory function. Ultimately, the Committee's position seems hard to distinguish from Mr. Ford's unhappy pronouncement that an impeachable offense is whatever Congress says it is. If that view is encouraged to take hold we will, I fear, do grave and lasting injury to our political processes.

Even if mass participation in an impeachment trial were desirable, the notion that television would supply the attentive viewer with all that is needed to reach a sound judgment is a serious mistake. The impression that the television viewer receives knowledge unfiltered and without intermediation is simply an illusion. For good or ill, the television camera is controlled by the journalistic judgment and skill of the broadcaster. The eye of the camera is selective. It can focus on the witness, on counsel, on the presiding officer, and it can turn even the spectators in the gallery into actors. It can close up on a whispered conversation with counsel or on the witness's hands or it can pan the chamber. It is continuously guiding the viewer's attention.

Furthermore, there is no assurance that, at least after the first few days, stations throughout the country would continue to give gavel-to-gavel coverage rather than select the high points of the day's proceedings. Then too the television viewer will be excluded from evidence received in executive session and from the documentary exhibits. Perhaps most important, to follow intelligently the course of a trial requires, as every trial lawyer knows, strenuous concentration. Outside the world of Perry Mason, cases are made of endless details with few dramatic interludes. It does not denigrate the television audience to doubt that, at the end of the day's labors, even those most enthralled with the proceedings will bring to our home television sets the sort of patient attention required to form a responsible judgment on the evidence.

Nevertheless, in part because of the subtle transmutation that television works on the material it transmits, it will inevitably affect the actors before the camera and introduce factors wholly irrelevant to the legitimate function of the proceedings. Will not the participants become concerned if the direct examination of a witness is broadcast from 9:00 p.m. to midnight while the cross-examination stretches on to 3 o'clock in the morning. Will it be fair if a prosecution witness is heard in prime time and a rebuttal witness in a less favored part of the day? Can we expect the Senate wholly to ignore the relative Neilson ratings achieved by the prosecution and the defense? As the trial proceeds from week to week and the public's attention flags, will pressure mount to speed things up or, worse, to jazz them up?

An unseen audience of tens of millions will inevitably exert a gravitational pull on the participants. Sooner or later they will be drawn into the service of the camera and away from an undivided fealty to the serious business at hand. Moreover, one side or the other, sensing that it is losing before the constitutional tribunal, might well seek to rescue its case by appealing for popular support.

The impeachment of the President necessarily implies an extraordinary crisis in our political affairs. It will require all of the wisdom and dedication we can muster if we are to emerge from that crisis with our political system unimpaired. The intrusion of television into the trial of the President would involve the risk of seriously undermining "the reliability of the trial process" and, hence, the only proper grounds for public confidence in its result.

ROBERT S. RIFKIND

MEMORANDUM OF SENATOR LEE METCALF  
TO THE SENATE COMMITTEE ON RULES AND  
ADMINISTRATION  
August 5, 1974

RE: IMPEACHMENT PROCEDURE AND PRACTICE IN THE SENATE

I. NATURE OF THE PROCEEDING

Precedent comes down heavily against the argument that the Constitutional check of impeachment is a criminal or strict judicial proceeding.<sup>1</sup> The Framers of the Constitution specifically rejected a proposal that the impeachment process be vested in the Judicial branch.<sup>2</sup> What they envisioned was a specialized review process that had both legislative and judicial elements. Impeachment was to include both political and legal aspects and operate as the ultimate check on excesses alleged to have been committed by the Executive.<sup>3</sup> The procedure of impeachment was not envisioned to impose criminal sanctions or render civil judgement for damages against an individual. The only remedy provided was removal from office after a two-thirds vote for an article of impeachment.<sup>4</sup> Therefore, I am in agreement with Senator Mansfield's proposal that in considering an article of impeachment each Judge shall vote to "sustain" or "reject" an article, rather than vote "guilty" or "not guilty" (Proposed Rule 4(d)(2)). I also am in agreement with Senator Mansfield's proposed change in the Senate Rules to define any person impeached by the House as a "respondent," instead of an "accused" (Proposed Rule 2(16)).

I have difficulty, however, with two other proposals submitted by Senator Mansfield - Proposed Rule 3, "Organization of Court" and amendments involving the Senate leadership in impeachment proceedings. I also question provisions of the current Rules requiring closed debate.

Proposed Rule 3 would refer to Senate impeachment proceedings as judicial in character and insert the term "Court of Impeachment" into the current rules. Nowhere in the Senate Rules is this, or similar judicial terminology found at present. This terminology was specifically rejected by the Senate in 1868 prior to the impeachment proceedings against President Andrew Johnson.<sup>5</sup> Arguably, impeachment proceedings could be determined to be quasi-judicial in nature I concede, but I do not see the necessity, or desirability, of such a change in the current Senate Rules.

The proposed amendments to the Senate Rules to formally involve the Senate leadership, majority and minority, in impeachment proceedings as "Chief Judges" and "Deputy Chief Judges" presents potential difficulties. While I am cognizant of the reasons that Senator Mansfield submitted this proposal, I question not only whether the proceedings would be significantly expedited, but also whether it is advisable to involve these political posts formally in this specialized Constitutional procedure. Undoubtedly the majority and minority leaders can be of considerable assistance to the Presiding Officer in scheduling and other related practical matters connected with a Senate trial. Questions might arise, however, as to partisan considerations becoming involved by this procedure,

especially with regard to Proposed Rule 8(b)(2) permitting the Senate Leadership, not the Presiding Officer, to question witnesses. The leadership positions in the Congress are essentially political in nature, and necessarily quite often responsive to partisan considerations. Such considerations should not be involved, or preceived to be involved in any degree in impeachment proceedings. The conduct of the Senate must be consistent with the intent of the Framers who designated the Chief Justice of the Supreme Court as the impartial Presiding Officer when the respondent was to be the President.<sup>6</sup> In the event of the necessity of Senate impeachment proceedings an informal relationship between the leadership and the Presiding Officer for scheduling, and other related matters, would much better serve the intent and objectives of this Constitutional provision.

Current Senate Rules on impeachment prohibit debate on any issue by Senators, unless the Senate is willing to go into closed session.<sup>7</sup> As Senators Hart, Kennedy, Javits, and Mathias point out in their memorandum to this Committee<sup>8</sup> many difficult and practical problems are posed by this procedure. For example, undoubtedly, there will be strong reluctance to interrupt a Senate impeachment proceeding for an executive session on specific objections to evidence. Further, problems are posed as to the degree of involvement counsel to the respondent and the managers of the House should have in these executive sessions, especially when objections they have raised are being debated.

Past precedent indicates these parties were not permitted to attend closed sessions.<sup>9</sup> What role should the Presiding Officer have in closed proceedings? The answer is unclear.<sup>10</sup> What type of record should be kept of closed sessions? Certainly some transcript must be available for Senators and parties to the proceedings to review and study.<sup>11</sup> What about leaks of information from such proceedings? Will the American public receive an accurate and fair analysis of this important aspect of Senate impeachment proceedings? I think not. As I stated in my oral remarks to this Committee, I believe it is crucial that the citizens of this Nation have an opportunity to observe for themselves the decisional process involved in the ultimate Constitutional check of impeachment. I can see no merit in keeping debate closed. Certainly, United States Senators have sufficient maturity and reverence for our Constitutional form of government to consider questions involved in an impeachment proceeding in a dignified and intelligent manner. Furthermore, for the reasons I outlined in my statement to this Committee on access of the broadcast media, I do not believe a respondent's rights would be sacrificed or infringed upon. I urge this Committee to amend current Senate Rules pertaining to debate to permit open public consideration of all aspects of impeachment proceedings, including the access of the broadcast media. At the very minimum Senate Rules regarding impeachment proceedings should be modified or amended to permit open public access to final deliberations before voting commences on articles of impeachment. To fail to grant such access to the Nation, I submit, would cast doubt on the legitimacy of the impeachment process itself, and be exceedingly unwise.

## PRESIDENTIAL IMPEACHMENT PROCEEDINGS

## II. THE ROLE OF THE PRESIDING OFFICER

Article I, Section 3, Clause 6, of the Constitution states:

The Senate shall have the sole Power to try all impeachments...When the president is tried the Chief Justice shall preside...

Current Senate rules permit the Chief Justice to question witnesses and generally preside over impeachment proceeding. Rule VII provides that Presiding Officer "may rule all question of evidence and incidental questions" or "at his option, in the first instance" submit the question directly to the Senate without first ruling on it. One-fifth of the Senators present can require the Senate to review the Chief Justice's rulings under Rule VII.

Outside of these guidelines, however, there is ambiguity as to the precise role and duties of the Chief Justice.<sup>12</sup> Three particular areas I believe deserve attention of the Committee: one, the role of the Chief Justice in tie vote situations; two, the involvement of the Chief Justice in closed sessions; and, three, submission of questions to witnesses.

Present Senate Rule VII is silent on the question whether the Chief Justice shall vote to break a tie. During the impeachment trial of President Andrew Johnson in 1868, however, the Chief Justice did vote to break ties.<sup>13</sup> I endorse this procedure to the extent such tie-breaking votes would only be cast on evidentiary-procedural matters. For example on a question put to the Senate whether a particular piece of evidence should be permitted to be

introduced, the Chief Justice should be given the opportunity to cast a vote in the event of a tie. This function would be within the framework established by the Constitution of permitting the third branch of government, the Judiciary, more than just a passive role in Senate impeachment proceedings. The Chief Justice should not, however, cast a tie-breaking vote on substantive questions such as whether an article was sustained or rejected. This procedure would parallel existing Senate Rules under which the Vice President as President of the Senate can vote to break ties.<sup>14</sup> This approach would also serve as a proper balance between the Constitutional mandate that the "Senate shall have the sole Power to try all Impeachments,"<sup>15</sup> and the Constitutional provision previously quoted requiring the Chief Justice to preside when the President is being tried. Accordingly, I do not concur with Senator Mansfield's proposed rule that would prohibit the Chief Justice from voting on any question.<sup>16</sup>

If the practice of closed sessions under Senate Rules XX and XXIV is continued, which, as I previously stated I hope this is not the case, I would urge that the Chief Justice be granted complete access and the authority to preside during such sessions. To insure an orderly direction of the debate, such a procedure would not only be desirable, but also perhaps necessary. Further, such involvement of the Chief Justice would lend an added element of impartiality, and would be so perceived by the electorate. Of course,

if the Senate Rules were amended to permit debate to be public, this question could more easily be resolved with essentially a continuation of procedures adopted for open sessions.

Current Senate Rule XIX requires Senators to reduce questions to writing and forward them to the Presiding Officer. This rule is entirely logical as it would be difficult and disruptive to permit each Senator to personally question witnesses. Further, this procedure would guard against unnecessary or undue involvement by any Senator in the interrogation process and would permit a neutral party that does not vote on the ultimate question of sustaining or rejecting articles of impeachment to question witnesses. Senator Mansfield's proposal to vest interrogation authority of witnesses solely with the Senate leadership, I believe, is unsound and is subject to the objections I stated in Part I.

## III. PROCEDURAL AND EVIDENTIARY QUESTIONS

The intent of the Framers of the Constitution was not to make impeachment a strict judicial proceeding. Accordingly, the Senate should not be bound by strict rules of procedure, whether they be criminal or civil. Guidelines such as the Federal Rules of Civil Procedure (FRCP) can certainly be helpful on procedural questions, but I question the advisability of formally incorporating a set of rigid procedural rules. Senator Mansfield's memorandum and proposed rule changes rely heavily on the FRCP and I believe certain of his suggestions merit comment.

I endorse the basics in proposed Rule 5, pertaining to pleadings, submitted by Senator Mansfield. As I understand this provision, it would provide for only two forms of pleadings in a case of impeachment: the articles of impeachment and the answer to the articles. Although no similar provision is to be found explicitly in the existing Rules, in substance it incorporates the intent of the Senate Rules and accepts the modern concept of simplified pleadings. This Rule provides a reasonable period for answer by the respondent and permits sufficient flexibility for amendment and supplemental pleading. Further, this Rule would prevent impeachment proceedings from becoming bogged down in legal and judicial technicalities and arguments as to "specificity."

I also generally endorse Senator Mansfield's proposed Rule 7 pertaining to discovery. This proposed Rule applies the basic elements of Rules 26-37 of the FRCP to impeachment proceedings in the Senate, including such basic elements as that of protection of an attorney's work product. I would, however, vest supervision of discovery procedures in the Chief Justice rather than the Senate leadership.

With regard to the standard of proof that is necessary to sustain an article of impeachment, I am in general agreement with Senator Mansfield that the standard should lie somewhere between the criminal standard of "beyond a reasonable doubt" and the civil law standard of "by preponderance of the evidence." Great caution must be exercised, however, so as to not have this question become entangled in legal technicalities. Senator Mansfield, and members of the House Judiciary Committee have suggested a standard of "clear and convincing evidence." Theoretically, this standard would fall somewhere between the criminal and civil standards of proof. While I personally would be comfortable in applying such a standard, I question the advisability of specifically incorporating it, or any other standard, into the Senate Rules as Senator Mansfield has suggested in proposed Rule 2(4).<sup>17</sup> It would be preferable for no standard to be included, as is the case in the present Rules, thus permitting each Senator an opportunity to make an individual decision as to the quantum of proof required to sustain an article. Undoubtedly, this would be the practical result even if "clear

and convincing evidence" (or any other standard for that matter) was adopted as Senators would subject it to their own individual interpretations.

With regard to the question of the rules of evidence to be applied, I also would not recommend that any strict set of standards be adopted. General reference, however, to the pending Federal Code of Evidence as a guideline suggested by Senator Mansfield in his proposed Rule 8 pertaining to evidence has merit. I am troubled, though, by this proposed rule in that it would not only apply Federal Standards, but also the "rules of evidence applied in the courts of general jurisdiction of any of the several states." I can visualize a Senate impeachment proceeding becoming entangled in numerous technical legal questions as to the applicable rules of evidence, or what exceptions, or limitations would be appropriate. An impeachment trial in the Senate should not be placed in this position, as it is not a formal legal proceeding. As Senator Mansfield states in his memorandum to this Committee, "It would be inconsistent with the magnitude and enormity of such a responsibility to deny the Members of the Senate the opportunity to hear all the evidence, regardless of the impediments imposed in ordinary legal proceedings.<sup>18</sup> I concur with this premise as the Senate should not be limited in obtaining and reviewing evidence in such an important Constitutional procedure. Accordingly, I would think a Senate impeachment proceeding could best proceed with freedom for the respondent and the House Managers to offer any evidence they thought relevant subject to a ruling by the Chief Justice under present Rule VII. A vote on the admission of such evidence can be required by the Chief Justice, or by one-fifth of the Senators present under the same Rule.

## FOOTNOTES

1. See House of Representatives, Committee on the Judiciary Report, 93rd Congress, Second Session, February 22, 1974 - "Constitutional Grounds for Presidential Impeachment."
2. See pp. 691-692, Documents Illustrative of the Formation of the Union of the American States, House Document No. 398, 69th Congress, First Session, Government Printing Office, Washington, D.C., (1965).

Mr. Madison, objected to a trial of the President by the Senate, especially as he was to be impeached by the other branch of the Legislature, and for any act which might be called a misdemeanor. The President under these circumstances was made improperly dependent. He would prefer the Supreme Court for the trial of impeachments, or rather a tribunal of which that should form a part.

Mr. Governor Morris thought no other tribunal than the Senate could be trusted. The Supreme Court were too few in number and might be warped or corrupted. He was against a dependence of the Executive on the Legislature, considering the

Legislative tyranny the great danger to be apprehended; but there could be no danger that the Senate would say untruly on their oaths that the President was guilty of crimes or facts, especially as in four years he can be turned out.

Mr. Pinkney disapproved of making the Senate the Court of Impeachments, as rendering the President too dependent on the Legislature. If he opposes a favorite law, the two Houses will combine against him, and under the influence of heat and faction throw him out of office.

Mr. Williamson thought there was more danger of too much lenity than too much rigour towards the President, considering the number of cases in which the Senate was associated with the President.

Mr. Sherman regarded the Supreme Court as improper to try the President, because the Judges would be appointed by him.

(Emphasis Supplied)

On motion by Mr. Madison to strike out the words -  
"by the Senate" after the word "conviction."

N.H. no. Mas. no. Ct. no. N.J. no. Pa. ay. Del.  
no. Md. no. Va. ay. N.C. no. S.C. no. Geo. no.

(By a vote of 9-2 the motion by Mr. Madison failed.)

3. See vol. 2, p. 17., The Federalist, The Central Law Journal Co., St. Louis, 1914.

The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL as they relate chiefly to injuries done immediately to the society itself.

4. Article I, Section 3, Clause VI.

The Senate shall have the sole Power to try all Impeachments...And no Person shall be convicted without the Concurrence of two-thirds of the Members present.

5. In 1868, prior to Senate impeachment proceedings against Andrew Johnson, a select Committee proposed to incorporate into the Senate Rules the terminology "High Court of Impeachment" - Senate Report No. 59, 40th Congress, Second Session (1868).

This proposal was rejected by the Senate and the "Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials" - Senate Procedure by Floyd M. Riddick, Senate Document 93-21, 93rd Congress, First Session, Government Printing Office, Washington, D.C., (1974) - have remained unchanged with the exception of the adoption of Rule XI by the Senate in 1935.

See also pp. 7-10, "Proposed Rules of the Senate of the United States When Sitting As A Court Of Impeachment," Rule-by-Rule Analysis submitted by Senator Mike Mansfield to the Senate Rules and Administration Committee, July 30, 1974.

6. Article I, Section 3, Clause VI.

The Senate shall have the sole Power to try all Impeachments...When the President of the United States is tried the Chief Justice shall preside...

7. Id., No. 5 - Senate Procedure, Rules XX and XXIV.

8. "Senate Organization and Procedure for an Impeachment Trial of the President: Preliminary Study of Question for Senate Consideration," submitted to the Senate Committee on Rules and Administration, July 24, 1974.

9. Id., p. 11.
10. Id., p. 31.
11. Id., pp. 39-40.
12. Id., pp. 28-32.
13. See Vol. I, pp. 185,276, Trial of Andrew Johnson on Impeachment, Da Capo Press, New York, N.Y., (1970), for instances where the Chief Justice cast the tie breaking vote.

Also see pp. 185 and 187, where a proposal similar to Senator Mansfield's was specifically rejected during the trial of Andrew Johnson.

Senator Charles Sumner of Massachusetts on March 30, 1868, introduced the following:

Mr. Sumner moved to amend the resolution by striking out all after the word "Resolved," and inserting:

That the Chief Justice of the United States, presiding in the Senate on the trial of the President of the United States, is not a member of the Senate,

and has no authority, under the Constitution, to vote on any question during the trial, and he can pronounce decision only as the organ of the Senate, with its assent.

After debate, Mr. Sumner called for the yeas and nays on his amendment, and they were ordered; and being taken resulted--yeas 22, nays 26; the amendment was rejected.

On April 1, 1868, Senator Sumner offered a similar resolution:

It appearing from the reading of the journal of yesterday that on a question where the Senate were equally divided the Chief Justice, presiding on the trial of the President, gave a casting vote, it is hereby declared that, in the judgment of the Senate, such vote was without authority under the Constitution of the United States.

Mr. Sumner. On that question I ask for the yeas and nays.

The yeas and nays were ordered; and being taken, resulted--yeas 21, nays 27; the amendment was rejected.

14. Article I, Section 3, Clause IV.

The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they are equally divided.

See also pp. 703-5, Senate Procedure, Id. at No. 5.

15. Article I, Section 3, Clause VI.

16. Pp. 33-34, Mansfield Analysis, Id. at No. 5, Proposed Rule 8(b)(2).

17. Proposed Mansfield Rule 2(4):

'Conviction' means a finding by two-thirds of the Judges present that any article is sustained by clear and convincing evidence.

18. P. 33, Mansfield Analysis, Id. at No. 5.

The CHAIRMAN. Senator Stafford.

**STATEMENT OF HON. ROBERT T. STAFFORD, A U.S. SENATOR FROM  
THE STATE OF VERMONT**

Senator STAFFORD. Thank you very much, Mr. Chairman. I appreciate the opportunity to appear before the Rules Committee on these very important deliberations concerning the present rules and proposed changes in connection with a possible impeachment trial.

I will be very brief, Mr. Chairman, in view of the hour and the learned discussions that have already occurred here. Indeed, I feel rather presumptuous to be here at all after listening to our colleagues who are learned in the law, who served as jurists before coming to the Senate.

The only reason I am here, I guess, is that I was an active lawyer from 1938 until 1958, and during that period I served at various times as a local, county and finally the chief prosecutor in my State as attorney general. And I didn't give up practice of the law until I was elected Governor, and I have not practiced since 1958, so I am looking back through the dim recesses of musty recollection of what the criminal law was possibly almost 20 years ago.

Having said that, let me also say that I take very seriously the admonition of Calvin Coolidge when he became Lieutenant Governor of the Commonwealth of Massachusetts, and in his advice to the senate of that great Commonwealth, he said, "gentlemen, in all things be brief—above all else, be brief."

So I will come right to the point of my being here, and that is to agree with those who preceded me in saying that an impeachment trial, in the opinion of this Senator, is not a criminal proceeding nor a civil proceeding, but a unique impeachment court, very similar to a trial in our judicial system.

But it is not strictly a trial in the sense that word is used either in our criminal or our civil courts, in my opinion.

I want to underscore what other witnesses have said, and that is that a trial, if we call it that, must be eminently fair, fair to the President of the United States, if he be tried—obviously fair to the American public, if they watch it, as they will, over television and through the other news media—it must be fair in their eyes. As Senator Allen suggested a minute ago, I think not only will the public judge the fairness of the verdict, so far as the President is concerned, but it will judge us as a quasi-judicial body in the fairness of whatever verdict we reach in the course of an impeachment proceeding.

I can't think of any weightier decision that the Senate could make as a body, any single decision that could be heavier than an impeachment decision and its impact upon the President, upon the American public, upon the American Government and, indeed, upon the reputation of this Senate and the attitude of the American public toward it.

And that brings me to the point—and I shall be done with it in a minute. That is that for hundreds of years the thought has grown and

become established in the common law that weighty decisions of civilized man should not be made upon hearsay evidence. And I would simply, in conclusion, very briefly, suggest to this committee that it consider the possibility of a rule, without disturbing most of the rules that already exist in the area of what types of evidence might be admissible before the Senate if trial comes.

And I would personally feel that as a general proposition hearsay evidence before the Senate should be excluded. And that as a general proposition we might be wise to follow the rules on evidence in cases of civil procedure in the Federal courts.

Mr. Chairman, members of the committee, I appreciate this opportunity to appear in front of you.

The CHAIRMAN. Thank you very much for a very fine statement. Senator Griffin.

Senator GRIFFIN. I don't have any question. I think Senator Stafford is very modest about his credentials for appearing before us. He served as Governor of the State and also as a Member of the House. We certainly value your opinions and the contribution you made to the record. I think it is getting so far past the noon hour that I won't prolong the proceedings.

The CHAIRMAN. Senator Byrd.

Senator ROBERT C. BYRD. I only wish to compliment Senator Stafford on his fine statement.

The CHAIRMAN. Senator Allen.

Senator ALLEN. Senator Stafford, I, too, wish to commend you on your fine statement. As I see it, on the hearsay matter, if we seek to rule out hearsay, it makes us write in the rules what hearsay is, and we are going to have to establish rules for the admissibility of evidence.

And, in the final analysis, the Senate itself is going to be the judge. And I don't know but what the better procedure is to leave it like it is and then have the Chief Justice rule on it, under the general rules of evidence, with the Senate being the final arbiter by the appeal route.

If we try to write in a hearsay rule or no-hearsay rule—and I feel just as you do in that connection—I am afraid that it will create more complications than it will solve. That is just my own judgment on it. I am not seeking to bind any members of the committee, but I think your ultimate goal is very commendable, and I would certainly approve of it.

Senator ROBERT C. BYRD. Mr. Chairman, if the Senator would yield.

Senator ALLEN. Yes.

Senator ROBERT C. BYRD. I would like to associate myself with the remarks of the distinguished Senator from Alabama with respect to hearsay. I think it would be impossible to sequester this jury from hearsay. We are exposed to hearsay every day in the newspapers, in television and on the radio. Whereas the jury in a criminal trial could be sequestered, this jury cannot.

And I think also that this jury, composed of 70 lawyers out of 100 Members, and the additional 30 Members who by their unique experi-

ence and having served in legislative bodies and various other offices throughout the land, would make all 100 perfectly capable of giving due weight to whatever evidence may be in question.

It seems to me that the rule that we ought to apply in this situation, whether it be written or not, would be one that would allow any material relevant, pertinent, not unduly prejudicial evidence, to be admitted.

SENATOR STAFFORD. Well, I would say to the distinguished Senator, Mr. Chairman, that I didn't suggest as high a level of evidence as might be required in a criminal trial. I suggested the rules of evidence for civil suits, which is pretty relaxed as I read it in the Federal statutes.

Then I would also comment, of course, that while the distinguished Senator is quite right, we are exposed to hearsay evidence all day every day, we seldom ever—in fact, this will be the only time in our lifetimes, have we ever been involved in an impeachment proceeding which may affect the Presidency of the United States. I trust it will never happen again, if it comes to pass this time.

But I won't belabor the matter further, because I am reminded of one of the last arguments I had as attorney general of my State in front of our supreme court. It involved the constitutionality of the sale of beer in nonreturnable bottles. And after a while, noting that I was losing an argument with the chief justice, who was from my own home town and a neighbor of mine, I said "Mr. Chief Justice, I won't pursue this line of argument any further, because obviously there is no use butting my head into a stone wall." He said "No, Mr. Attorney General, there isn't, but I know of no one who could do so with less fear of personal injury than you."

[Laughter.]

SENATOR ALLEN. One further comment I would like to make about Senator Stafford's testimony, on the advisability of seeking to rule out hearsay testimony. We not only have a court and jury of 100, 101, as the case might be, if the Chief Justice is taken in in any manner, but we do have the American people that might not be as discriminating in the matter of being able to discard testimony as the Members of the Senate might be. That is another justification for the Senator's plea on—

SENATOR GRIFFIN. If I may, I would like to comment on the same point, because I think maybe Senator Byrd and I have some differences. I think he would advocate a very broad rule that would allow, I take it, hearsay evidence to come in.

If we want the verdict and judgment to be acceptable to the American people—that is one of the reasons we are televising it—it seems to me that it puts the Senate in the impossible position to have the proceedings televised—if we do have some rule against hearsay evidence and that evidence comes out in response to a question and the Chief Justice says, well, that is inadmissible and it shouldn't have been said—and he will then instruct the Senators to disregard it. I think it is impractical, naive, to think that 220 million Americans are going to disregard it.

If the Senators are really going to make up their minds on the basis of the evidence that was admissible, they are put in an impossible

position with the pressure that would be exerted against them generated by the television coverage.

I don't know if you have anything to add to that, but just an elaboration, I think, on the point that the Senator from Alabama was making, the difficulties that come about as a result of the television.

Senator STAFFORD. Mr. Chairman, the distinguished Senator from Alabama and the distinguished Senator from Michigan have stated my case more eloquently than I could have.

The CHAIRMAN. Thank you very much.

Senator Hathaway.

#### STATEMENT OF HON. WILLIAM D. HATHAWAY, A U.S. SENATOR FROM THE STATE OF MAINE

Senator HATHAWAY. Mr. Chairman, I appreciate the opportunity to appear before the committee today to comment on some of the difficult procedural problems which the Senate faces should articles of impeachment be forwarded to us from the other body. The main portion of my remarks will be directed to the issue of television coverage of impeachment proceedings; but before getting into this subject, I would like to simply outline some questions which occurred to me while studying the existing rules.

The first point I noted is the question, implicit in rule VII, of whether the Chief Justice—in his capacity as Presiding Officer—can vote to break a tie on a procedural ruling. I would hope that the committee would repudiate the precedent established in the *Johnson* trial and not allow such a vote. It seems incongruous to me to allow someone not a member of this body to participate in its decisions. It is my understanding that the practice in the British House of Lords, which provided the model for our impeachment mechanism—was that their Presiding Officer could not vote in an impeachment trial under any circumstances, in his capacity as Presiding Officer. I feel we should return to this practice.

The second point I wish to mention concerns the committee of 12 Senators called for under rule XI. I would assume that the strong public interest in this case would call for the entire trial to take place in the open Senate. On the other hand, I would call to the committee's attention the fact that a reference to such a committee to receive the evidence might obviate the problem of the trial extending beyond January 3, 1975. If a committee received the evidence and reported to the Senate after January 3, 1975, this would at least mitigate the argument against Senators who did not hear the evidence voting on the "final questions." Determination of this question would depend, I would think, on realistic projections of the duration of a Senate trial and I merely raise the question to bring it to your attention.

Next, I note that under rule XIX, it is unclear whether the Chief Justice must put questions submitted to him by Senators. It appears that the putting of the questions would be mandatory, which makes sense, but this also raises the issue of possible delay. It seems to me that there are multiple possibilities for delay throughout these rules and that the problem of the overall length of the trial is a matter of which the committee should take special cognizance.

Finally, there are several rules applying to the debate which deserve a careful look. Under the present rule XXIV, each Senator is allowed

15 minutes on the "final question" which is defined as not meaning 15 minutes on each article of impeachment, but on the whole question. I am not sure that this is adequate and would suggest something similar to that proposed by Senator Mansfield—that is, 10 minutes per article. Also, it is unclear under the rules whether the Senators will be able to yield time and engage in colloquies. I would hope this would be allowed in the interests of the fullness of the debate.

I would like to turn now to the difficult questions involved in determining the extent to which the trial and our final deliberations shall be open to the public. The rules seem to distinguish between the trial—which it is clear should be open, and the deliberations after the trial—which may be closed. I should note here that a careful reading of rules XX and XXIV could support an interpretation that the deliberations must be kept closed. Certainly rule XXIV lends itself to that interpretation. The language in rule XX appearing to contradict this conclusion—" . . . unless the Senate shall direct the doors to be closed while deliberating upon its decisions"—might well be referring to deliberations on disputed procedural questions arising in the course of a trial, not deliberations on the "final question." In either case, I hope the committee will be able to clarify this problem, particularly the language of the first sentence of rule XXIV.

I would think that the public interest would demand that our final deliberations be kept open. Otherwise, the inference that deals or the like were being made would be almost irresistible. And because of the rather severe limitations on debate during this period, I would not object to these sessions being televised. This proceeding would be somewhat analogous to the recent televised sessions of the House Judiciary Committee, which all agree were useful and instructive to the Nation.

Of course, one must be troubled by the obvious analogy to the invasion of the jury room. In this particular case, however, I think the public must have a first hand opportunity to learn how we come to whatever decision emerges. As will be clear from the remainder of my remarks, however, these sentiments do not apply to the question of televising the trial itself.

All of us are aware of the tremendous public interest in this subject; certainly public pressure in favor of opening an impeachment trial to television is both inevitable and understandable. Further, the example recently set by the House Judiciary Committee indicates that Congressmen—and I would hope Senators—can act judiciously and with restraint in the presence of live cameras. But in spite of the many benefits of such coverage, I feel there are strong arguments on the other side which compel us to give this decision the most serious consideration and have, in fact, led me to the conclusion that the proposed coverage would not be in the best interests of the Nation.

A logical place to start an analysis of this question is with a look at the practice in our courts and the policies underlying that practice. I realize, of course, that an impeachment trial is not strictly analogous to a criminal action; there are, however, enough similarities to make the experience of the courts at least somewhat relevant.

The first similarity is that both procedures have the same goal—the goal defined by Justice Clark in the *Billie Sol Estes* case: "to ascertain the truth." The Senate does not decide on a political basis whether the President should be removed; rather our role will be to determine guilt or innocence of certain specifically enumerated

charges. And this determination will turn on our collective judgment as to the state of a series of objective facts. Although there will undoubtedly be considerable debate on legal questions—what constitutes an impeachable offense and what standard of proof should be required are examples—the final deliberations will be on such questions as whether or not the President was in fact involved in the Watergate coverup or the misuse of Government agencies. Simply put, our role will be to decide as best we can what the truth is, based upon the evidence submitted to us. And as the Court concluded in the *Estes* case: "The use of television, however, cannot be said to contribute materially to this objective."

I do not see how anyone can argue with this conclusion. While there may be good reasons for providing coverage, I have yet to hear anyone assert that such coverage would materially assist us in determining the objective truth. If this be the case, then, we must turn to other reasons television might be justified for an impeachment proceeding and not for a criminal trial.

The fundamental argument of those in favor of such coverage seems to be that impeachment is really a political—not judicial—process and that the people need to actually see the proceedings to retain their confidence in that process. Senator Mansfield has put it this way:

Most important would be the confidence reposed by the people in the integrity of the process. Either way, the result must be perceived as having been justified by the evidence and argumentation, otherwise the basic constitutional structure of the nation will suffer still another blow.

He continues:

There is no other way other than by television to permit the formulation of a fully acceptable public judgment of the integrity by which the constitutional responsibility is discharged.

In other words, we must not only arrive at the truth, but because the nature of the proceeding places it at the heart of our governmental system, the people must go down the road we travel with us so they will come away convinced that we acted fairly and judiciously.

I must admit that I find this a very strong argument. But, ultimately, it does not convince me for two reasons:

First, I am not entirely sure of the validity of its basic premise: that is, that the people must actually see the trial to have confidence in our verdict. Secondly, this argument ignores certain negative factors which are not immediately apparent but are nonetheless inherent in the television proposal. Taken together, these two reservations persuade me that permitting full television coverage would be a mistake.

I should note that the prohibition of television does not imply an effort to hide the proceedings from the people. On the contrary, I am sure that coverage by the media will be extensive and exhaustive. And of course, the public will be allowed in the galleries, albeit in limited numbers. It is important to remember here that the policy underlying the requirement that criminal trials take place in public is not to appease the curiosity of the people or even to respond to their need to develop confidence in the judicial system.

But the purpose is to insure that the accused is given a fair trial and is not subjected to a Star-Chamber proceeding. Thus, the admission of any representative group of the public, especially when such

a group contains members of the press, amply meets the objectives of this policy.

But basically, I feel that this "they have to see it to believe it" argument does a disservice to both the media and to the people themselves. The media can report fairly and accurately the events that transpire here. And the people, whose capacity to understand, have patience with and just plain live through the events of the past 2 years has been consistently underrated, can absorb and decipher the flavor and thrust of the proceedings without viewing them directly. Granted, reading or seeing press accounts is not the same as actually seeing or participating in the event, but on the occasions I have done both, I am always amazed at how a complicated and fast moving subject can be captured in its essential features in print.

In spite of this, however, I think if the analysis ended here, I would have to concede that the argument for coverage should prevail. But I believe there are several additional factors which must be considered which indicate that such coverage could well result in a serious denigration of both the rights of the President and the integrity of the process itself.

The basic point to be considered in this context is the fact that the Constitution calls for the decision on removal to be made by the Senate—acting as a judge and jury—and not by the people themselves in the form of some kind of plebescite. Although public opinion will inevitably play a significant role in the proceedings, I would submit that television coverage will just as inevitably magnify that role immensely. Senators are only human, especially so in the sense that their jobs depend on what the public thinks of them. To deny that public opinion will have an influence on at least some of us in considering this matter is to fly in the face of commonsense and our own common experience. It seems to me that once this concession is made, we should begin to consider ways to minimize this effect rather than take steps which will magnify it. As former Federal Judge Robert Rifkind has put it, "the Senators should attend to the evidence and not the electorate." The rights and interests of the President—and the people—demand no less.

This position does not imply any lack of respect for the ability of the public to assess the evidence and reach a judicious decision. Obviously our jury system is based on the premise that ordinary people can perform this task. But when a group of 12 ordinary citizens are convened as a jury, certain restrictions come into play, restrictions which have developed over hundreds of years of the common law experience to insure that the jury serves effectively as an instrument for the discovery of truth. Needless to say, none of these restrictions would apply to the millions of viewers who, through the process of television and their relationship to their Senator, will inevitably become at least some part of the jury in this case.

A small example can make my point: one of the obvious requirements of any juror is that he sit through the entire case. A juror who misses any part of the proceedings would be immediately barred from sitting in final judgment. But can we expect our television jury to hold themselves to this standard? Isn't it more likely that the press of business or personal matters will take viewers away for significant

segments of the evidence or argument? Even so, television coverage will give everyone the illusion of having gotten their information directly and in all of its relevant parts. And this, I suggest, would then encourage a more active role in attempting to influence the outcome than would otherwise be the case. In addition, the viewer who does watch the whole proceeding will undoubtedly feel that he has a strong right to second-guess our decision.

This point raises a second aspect which must be considered—the journalistic nature of television broadcasting, even of so-called gavel-to-gavel coverage. No matter how well done, television just is not the same as being there. Others have made the point that the camera inevitably controls the viewer's attention and can be very effective at conveying impressions outside the scope of relevant evidence. The wringing hands of a reluctant witness or the agonized expression on the face of his wife can, when isolated on the screen, produce an impact out of all proportion to their probative significance. But beyond this, what about excerpts rebroadcast on the evening news or on a nightly recap of the days events? Here, selectivity and its enormous power is obviously at work. And I would submit that after the first few days of what will certainly be a protracted process, these clips will be all the vast majority of the people will see.

I do not think it is fair to the President that his case be judged by the people on evidence parceled out to them by the news staff—no matter how fair or impartial—of only the three giant networks. Granted, the public will get the evidence in selective form with or without television coverage. But a prohibition of live television would put all the media in the same basis and produce for the public a multiplicity of sources of information which will be evenly balanced in impact. Television, if allowed, will dominate the coverage by its very nature.

Finally on this point, isn't it likely that one side of the debate or the other will attempt to play games with public opinion by manipulating the coverage? All of us who have participated in national political conventions have seen how television has come to dominate the event itself. The temptation to both the prosecution and the defense to gear the trial schedule to present their side of the case in prime time would be tremendous. And if one side sensed itself losing in the Senate, a strategy of playing to the galleries would become almost inevitable. Any lawyer knows what can be done with leading questions and references to inadmissible evidence to prejudice a layman. While the official jury—the Senators—can be instructed to ignore such evidence, is it reasonable to assume that the viewing jury will do likewise? In this sense rather than helping the public to understand our decision, live coverage of the trial could have precisely the opposite result.

I suppose the resolution of this matter comes down to how we view our roles and responsibilities to the people who elect us. And this debate is as old as the representative form of government. For myself, I must side with Edmond Burke and some of the anguished members of the House Judiciary Committee, who took the position that their responsibility was not necessarily to vote as their constituents wanted, but to vote as the constituents would have voted if all the facts were known to them. In the last analysis, I believe that the people send us

here not as errand boys but as independent individuals, individuals who must exercise our own intelligence, judgment, and finally, our conscience.

Television coverage would certainly be supported by a majority of the people and it would clearly serve to educate and prepare them for whatever judgment is ultimately rendered. But it would not contribute to our search for truth. And I find the danger that it could hinder this, which is our essential mission, a grave and unacceptable risk.

In conclusion, Mr. Chairman, we must realize that impeachment is, by nature, an emotional issue, an issue heavily tinged by political considerations. We should strive, then, to lessen the effect of those considerations as much as possible rather than increase them through the allowance of this kind of coverage.

Lincoln once said that "There is no grievance which is a fit object for redress by mob law." While I would not characterize the present situation as "mob law," I feel we must be extremely careful of any action which moves us at all in this direction. Realizing that our job is to find the truth, much as a jury, we should consider this picture of the Ellsberg, Mitchell, or Hiss jurors hearing their cases—and deliberating—in Yankee Stadium. There is a long tradition against such practice and we should carefully weigh the consequences of departing from it.

And finally, we must ponder the fate of those now obscure men who braved the censure of their colleagues and certain political death to oppose the impeachment of Andrew Johnson. History has judged them right and many think they saved our form of government. Could all of them—and there were only seven—have withstood the onslaught which could be generated today through television and instant communications? I would remind the committee that all that was required was for one to falter.

Mr. Chairman, I must repeat that I understand why the public desires this coverage and, indeed, why it might be desirable. But in all conscience, I must fear the consequences. Our Constitution and traditions require a public trial; but history and experience warn against trial by the public.

Thank you very much, Mr. Chairman.

The CHAIRMAN: Senator Griffin.

Senator GRIFFIN. I want to commend Senator Hathaway on his excellent statement. Although I have the privilege of withholding my vote on this matter until I hear all the arguments and so forth on this matter, I already indicated that I tend to agree with the position that Senator Hathaway has taken on the matter of televising the trial.

Like him, I am painfully aware that I am on the wrong side of this political issue, there is no question about that. The overwhelming majority of the people would like to have it televised.

But I must say that I am impressed by the arguments that you have made. I referred earlier to the Supreme Court decision in *Estes v. Texas*, which I think is something that the Senate ought to be conscious of and take a close look at.

Because of the very well-reasoned opinion there, the Supreme Court came down against and set aside the conviction of Billy Sol Estes because his trial was televised.

Prof. Charles Black of Yale University has written a book on impeachment. He is not particularly a friend of President Nixon, but he also says that:

I would most strenuously advocate that radio-television cameras have no more place in this solemn business than they have in any other trial, and for the same reason.

At one point, he said:

Above all, television acts upon that which it purports to observe. What one sees and hears is not what would have occurred if these modern means of communication were not there.

I rather suspect there is an awful lot of truth to that.

If there was any way of putting a television camera somewhere and hide it, it would be inconspicuous, everybody would forget it was there and go ahead with the trial. That would be one thing.

But I think that the experience, I am afraid, of all of us, once that camera is there, it makes a difference on what happens to those who are participating. I don't have any particular objection to the excellent education that the public got from the House Judiciary Committee hearings. I think in many ways it probably was a very good thing.

When each one of them had a certain amount of time, each one of them used it—they didn't use it all, they used some of it. It is almost impossible for an elected official under those circumstances, with his constituents watching, not to try to play an equal role.

With a hundred Senators, if there is going to be an opportunity at all to participate before the cameras—I suppose, whatever it is, 5 minutes, 3 minutes, 10 minutes, every one of the 100 Senators is going to give his 5-, 3- or 10-minute speech. It certainly wouldn't be the way it would have occurred if television cameras were not there.

Thank you.

The CHAIRMAN. Thank you very much.

Senator Helms.

#### STATEMENT OF HON. JESSE HELMS, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator HELMS. Mr. Chairman, Senator Griffin. I know it's lunch time and I am not going to read this statement, I just ask you to put it in.

The CHAIRMAN. Without objection, it will be made a part of the record in full and you may summarize from it.

[The written statement of Senator Helms follows:]

#### STATEMENT OF HON. JESSE HELMS, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Mr. Chairman, I appreciate this opportunity to comment on the adequacy of the present Senate Rules on impeachment trials. Inasmuch as I am not a lawyer I confess that I was somewhat hesitant in making the decision to offer these comments. On the other hand, there was the reality that the proposals of some to amend the rules anticipate the possibility that the Senate may shortly be faced with the necessity of conducting a trial in which I, as a non-lawyer, would appear in the role of a Judge.

I am not alone, of course, in being a non-lawyer; in fact, not even all of the distinguished members of the Rules Committee, which will report any changes to the Floor, are members of the legal profession. Needless to say, I hope that my comments will be relevant.

Each one of us will take an oath that in all things pertaining to such a trial we will do impartial justice, faithful to both the Constitution and the law. If we depart from the high standards of the present rules, history is bound to question whether impartial justice was done in this awesome responsibility which may confront us.

I hope that the rejection of the *en bloc* changes will foreclose any further consideration of the proposals contained in that draft. Those proposals represented a dangerous politicalization of the trial procedure, opening the door to the manipulation of evidence, and the alteration of the charges against the respondent while the trial is in progress. It would be foolish to ignore the probability that a significant segment of the American people would feel justified in concluding that such a trial was a mere political show trial conducted for the purpose of a purge. Such a trauma would be extremely divisive and threaten the fabric of the body politic.

Indeed, the proposed changes would fly in the face of our oath to do impartial justice, according to law. Mr. Chairman, the Senator from North Carolina has deep feelings that the Senate should not violate that oath, and I, for one, shall not consent to its doing so.

The changes which were proposed would have made it impossible to conduct fair trials in the future. You will note that I said "trials" in the plural, even though the general assumption is that we are preparing for a single trial. But surely the rules are not to be changed ad hoc, to suit the particular case at hand. That would be a very negation of impartial justice. And yet, if we change the rules now in the midst of an emotional confrontation, it will be very clear that politics is ruling, instead of justice.

The point is this: any respondent in an impeachment proceeding should be able to get a fair trial in the United States Senate. It is almost equally important that it should *appear to the public* to be a fair trial. The Senate must be particularly scrupulous about removing all political considerations from its judgment.

I wish to say at this point that I intend to remove all political considerations from my mind if the President is impeached by the House of Representatives. From a purely political and philosophical standpoint, Mr. Chairman, I am frank to say that the President has often failed to provide a quality of political leadership to match his undeserved image as a political conservative; moreover, a distressing number of his promises have fallen unfilled into a chasm of default.

It is a matter of record that I have been critical of the President's performance in both foreign and domestic affairs. I do not wish to catalogue here the concessions by his Administration to nations avowedly hostile to the principles and best interests of the United States, resulting in the alienation of our allies and friends. Frankly, Mr. Chairman, I have been dismayed that the United States has not regained a position of strength and influence in this world.

Nor has there been consistent leadership, in my judgment, in bringing our fiscal policies under control, in reducing Federal spending; or in minimizing Federal control over the policies of the States and the lives of our citizens. In all candor, I have been discouraged, as have many others in the Senate, by the President's failure—indeed, his refusal—to appoint people to countless positions in the federal bureaucracy who would have executed the policies promised to the American people.

The record will show that I have not shrunk from voting against the nominations of some of the President's highest officers, including Secretaries of State and Labor. I have seen him, or certainly his agents, default on what I considered to be clear and important assurances to members of this body and the House of Representatives.

In short, if impeachment and trial were intended to be conducted on the basis of disappointment with political or philosophical grounds, the President would have little to expect from this Senator from North Carolina. But I reiterate, Mr. Chairman, that this is the very point: I reject the argument of political necessity. I have known the President personally for over twenty years. I like him personally, I am devoted to his family. Yet he seems to be in many ways, a tragic figure who has allowed himself to be buffeted by hostile winds. But the point remains, Mr. Chairman, the President deserves a fair trial—on the evidence, without any political consideration at all. He deserves no more and no less than any other citizen of the United States under our laws.

That is why I am deeply disturbed by the trend of thinking which was exhibited in the draft rule changes which were circulated to the Senators. And

even though the draft resolution has apparently been rejected by this subcommittee, I hope that Senators will further resist any changes whatsoever which adopt in whole or in part the direction of that rejected proposal. Accordingly, I will address myself to some of those key points at this time.

I might say that the current Senate rules of procedure for impeachment trials have been in effect for 106 years. They were adopted by the Senate in preparation for the impeachment trial of President Andrew Johnson in 1868. These rules of procedure, when adopted, reflected previously existing precedents. They have been only slightly modified since their adoption. Six impeachment trials have been conducted under them, and numerous historical precedents have developed during such trials to supplement them.

The changes which were proposed would have substantially altered historical precedent in favor of the prosecution. For example, in the impeachment trial of President Andrew Johnson, it was held that ordinary rules of evidence apply and their strictness should not be relaxed. This holding serves as a reaffirmation of the American principle that a person, any person, should be tried only on relevant, competent fact, and not on innuendo, hearsay, and implication. Under the proposals which were offered there would have been a substantial relaxation in the evidence rules. I urge that the Committee not consider any changes which would relax the ordinary rules of evidence.

But the concepts put forth in the draft resolution adopted an equity court standard, or an administrative law standard, as the basis for the admission of evidence. Under this standard, the Senate can allow virtually anything into evidence; in essence, the Senate need only decide that such evidence will further what the proponents of this change view to be the "interests of justice." In other words, the admissibility of evidence would be determined by each Senator based upon his personal determination of what constitutes the "interests of justice," rather than by the standards which have governed the admissibility of evidence in trials at law throughout our history.

Mr. Chairman, I would also like to point out that other changes which were proposed adopted the loose standards of procedure that are allowed in purely civil proceedings. Let me quote from one rule which was proposed, relating to the amendment of pleadings and the admission of evidence on issues not raised in the pleadings, as well as subsequent alteration of the pleadings to conform to the evidence. The proposal was this: "If evidence is objected to at the trial on the grounds that it is not within the issues made by the pleadings, the Court (Senate) may allow the pleadings to be amended, and shall do so freely when the presentation of the merits of the action will be served thereby."

The proposed rule change I have just quoted is based on concepts and language to be found in the Federal Rules of Civil Procedure. In plain language it would allow the Articles of Impeachment drawn by the House to be amended by 51 Senators in the midst of the trial. Thus, if evidence is not admissible, it is only necessary to change the indictment so that the said evidence will be admissible. This is not only a travesty on impartial justice; it is probably unconstitutional.

Mr. Chairman, let us look at another one of the proposals. Under the changes, the traditional role of the Chief Justice of the United States will be substantially curtailed. He will be denied the right to vote in order to break a tie vote of the Senators on procedural or evidentiary matters. Historically, the Chief Justice has been allowed to vote in such cases. Furthermore, the Chief Justice may make rulings from the chair regarding these questions. His decisions carry moral weight, but they can be overridden by the majority of the Senate.

Two times in 1868, attempts were made by Senator Sumner of Massachusetts to prohibit the Chief Justice from voting on any question during the impeachment trial. In both cases, Sumner's motions to this effect were rejected. On at least two occasions, therefore, Chief Justice Case cast votes to break ties. At the conclusion of the trial, the Chief Justice was called upon to perform the most critical task of all, the phrasing of the final question.

But what is important is that the Chief Justice is a nonpolitical figure. The proposed rules would have made another significant change which must be taken together with the stripping of the Chief Justice's functions. Under this proposal, the Senate Majority and Minority Leaders would be designated as Chief Judges, with the Assistant Majority and Minority leaders designated as Deputy Chief Judges. The establishment of such positions is unprecedented. Under the proposed rule changes, these newly created Chief Judges and their Deputies would have functions that are many and varied, including the determination of the "order of trial, and other relevant matters." In my view, this is an

improper usurpation of the role and functions of the Chief Justice of the United States as contained in the present rules of procedure.

Surely it is no derogation of the character and ability of the Majority and Minority leadership to point out that by the very nature of their offices, they are political leaders. Indeed, they hold their offices by virtue of the political judgment of their peers. The distinctions between Majority and Minority are on the basis of party distinctions. Thus no matter how scrupulous and how fair their decisions, their acts would carry the coloration of political decisions. The powers proposed are based upon the analogy of legislative activity not upon judicial impartiality. It is in fact the very essence of partisanship, in the very best sense, that these men embody. Therefore, instead of having a non-political figure, the Chief Justice of the United States, chosen ex-officio because he is the highest symbol of impartial justice in the land, we would have the political leadership of the Senate in the decision-making role. And the results would be very unfortunate in winning acceptance from the American people.

Let me give an example of what might happen, since the designation of Chief Judges ties right in with another proposed change, a change also lifted from the Federal Rules of Civil Procedure. I will quote what was proposed: "With the approval of the Court upon recommendation of the Chief Judges and the Deputy Chief Judges, either of the parties (the managers, or prosecutors, from the House of Representatives and the President) may obtain discovery (of information) by any method that is authorized by the rules governing the procedure in suits of a civil nature in courts of the United States . . ."

Furthermore, it is provided in these proposals that "It is not grounds for objection that the information sought may not be admitted at trial, if the discovery sought appears reasonably calculated to lead to the discovery of admissible evidence." The breadth of this provision is such that it will allow vast fishing expeditions by the prosecution in order to find evidence that they hope will benefit their case.

Under these loose provisions, taken right from the Federal Rules of Civil Procedure, the prosecution may discover irrelevant information, put this irrelevant information into evidence at the trial, and then amend the articles of impeachment to conform to the otherwise irrelevant evidence.

Mr. Chairman, where will it end? How can the President be expected to prepare a defense when he has no way of knowing what the charges against him will be from one day to the next? This is contrary to historical precedent, which requires that the evidence be limited to specific issues raised by the pleadings, that is, the articles of impeachment, and the respondent's answer.

Such proceedings, under political auspices, even though of the highest character and austerity, will never bring about the reconciliation that our nation needs today. No matter which way the decision goes, the bitter feeling will remain that politics, not justice, decided the result.

In the proposed rule changes, the definitions of "conviction" would have been strikingly different. The proposal reads as follows: "Conviction means a finding by two-thirds of the Judges present that any article is sustained by clear and convincing evidence."

Now the present rules do not contain any standard regarding the burden of proof that must be carried by the managers (or prosecutors) from the House of Representatives in order to justify a conviction. Each Senator will have to set up his own standard. But I believe that every Senator has the moral obligation to use the highest standard in a case which involves the highest office in the land. As I indicated before, I am not a lawyer. Most Americans are not lawyers either, and they may not understand the distinctions which constitute a kindergarten primer to such distinguished members of the bar as we have in the Senate.

But my understanding is as follows: Burden of proof is, in essence, the standard by which a person who alleges a proposition must establish its truth. If that person fails to establish the truth of his proposition in accordance with the requirements of the applicable standard, his case fails.

In American law there are three different types of burdens of proof. In other words, there are three different standards of proof. They are entirely separate and unrelated to one another. Each standard is applied in a particular type of trial, and no other.

The first and most lenient standard is known as "preponderance of the evidence." Under this standard, the party asserting allegations need only tip the mythical scales of justice slightly in his favor in order to prevail in the trial. This standard applies in most civil law suits.

The second, and somewhat more strict, standard is known as "clear and convincing proof." Under this standard the party making allegations must tip the scales substantially in his favor in order to prevail in the trial. This standard applies only in a very limited range of civil cases. Examples include an action to set aside a deceased person's Will, or to modify a written transaction.

The third standard is known as "beyond a reasonable doubt." Under this standard the party making the allegations must tip the scales so completely to one side (in his favor) that the triers of fact (the jury) can determine to a moral certainty that the matters alleged are true, or the party cannot prevail. This standard applies in all criminal trials.

Our precedents have always treated an impeachment trial as though it were a criminal proceeding. Jefferson, in his Manual, considers it as such, and cites many precedents in Anglo-Saxon law. For example, Jefferson cites the following: "This trial, though it varies in external ceremony, yet differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments prevailed; for impeachments are not framed to alter the law, but to carry it into more effectual execution against two powerful delinquents."

Let us look at that proposal carefully, Mr. Chairman. First of all we are dealing with a proceeding which by precedent, is analogous to a criminal proceeding. For the respondent, the issue is one of transcending value. In such a case, the consequences of the decision are so grave that the prosecutor must be held to the highest burden of proof in establishing the truth of the matters alleged. If a mistake is made, it should be made on the side of the defendant. Society has long ago agreed that it is far better for a guilty man to go free than for an innocent man to be judged guilty.

Yet the standard of "Clear and Convincing proof" is far less strict. In civil cases, a lawsuit is essentially a search for probabilities. In the view of society, a mistaken judgment for the plaintiff in a civil case is no worse than a mistaken judgment for the defendant. In a criminal proceeding—and an impeachment trial is analogous to a criminal proceeding—the consequences of a mistake would be so grave that we cannot in all conscience adopt a lesser standard than "beyond a reasonable doubt."

Mr. Chairman, I seek for the President of the United States that which I would, with equal persistence, solicit for every American—a fair trial, a trial as fair as human frail will permit. I hope—indeed, I pray—that my colleagues in the Senate will unite in setting for themselves the higher standard. I shall urge them to use as their guideline the standard of proof of beyond a reasonable doubt.

The Constitution, Article III, Section 2, recognizes that an impeachment trial is a criminal trial when it states that "The trial of crimes, except in cases of impeachment, shall be by jury." As such, the burden of proof used in a criminal trial is the standard that must be used. Thus, the standard "beyond a reasonable doubt" is the proper standard.

Finally, Mr. Chairman, let me point to just one more proposal which was made in the draft resolution. The Secretary of the Senate would be required to "forthwith prepare, sign, and enter the *maximum judgment* authorized by the Constitution of the United States, without awaiting any direction by the Senate, upon conviction of the respondent on any count."

Only when the Senate otherwise orders it will this procedure be abated pending the Senate's final determination of the judgment.

In other words, the Senate does not, by the very judgment procedures it sets up, give the respondent the presumption of a judgment which may be less than the maximum required by the Constitution. In essence, this raises the presumption of removal from office in the very procedures themselves, without giving the Senate the opportunity to make this decision itself. Mitigating circumstances cannot be taken into account. Rather, the Senate by its vote for conviction automatically requires the strongest penalty the Constitution allows.

Under procedures now in use, "if the person accused in such articles of impeachment shall be convicted upon any of said articles by the votes of two-thirds of the members present, the Senate shall proceed to pronounce judgment . . ." Here the Senate must determine what judgment it shall pronounce. It must determine whether its judgment will be "removal from office and disqualification to hold and enjoy any Office of Honor, Trust, or Profit under the United States," or whether it will be a lesser judgment, which the Senate, in its discretion, may decide upon.

Mr. Chairman, what we have here is a pre-judgment, in part, of the outcome, before the trial has even begun. It is a judgment that there can be no mitigating circumstances. It is also a circumstance that will be taken into account by many Senators, and it will doubtless affect the outcome of their decisions. For many of them will never vote to convict, if such a conviction means a maximum summary judgment.

Mr. Chairman, if we are going to have a political trial, then so be it: let it be a blot upon American justice. It should be sobering that the only precedent we have for the impeachment of the President is a trial which, by the standards of universal contemporary judgment, was a politically motivated power struggle of the most sordid kind.

The present rules were devised by the enemies of President Andrew Johnson as the minimum required by both precedent and a decent facade of justice. They represented the outer limits beyond which even those men felt they could not go. But today we are being asked to go further, a circumstance which greatly beclouds the prospects of a fair trial. And in the end, they were fair enough to prevent the conviction of Andrew Johnson by one vote.

Any other President deserves the same. Let any conviction that may be forthcoming be based upon the traditional American standards of criminal justice. Those standards are presently embodied in the Senate rules and precedents for an impeachment trial. Let us not subvert those rules one by one, and distort the outcome of history. If justice is to be impartial, and the Constitution and the laws upheld, the rules must not be changed.

Senator HELMS. If I might do that, Senator, I am largely trying to make six points. No. 1, under the draft proposal, to which I addressed myself primarily in this statement—No. 1, the ordinary rules of evidence are set aside for a lesser standard. The standard for the admissibility of evidence at the trial of President Johnson was the ordinary standard of competent fact, ruling out innuendo, hearsay and implication. The draft rules would allow an equity court standard or an administrative law standard instead of the standard of a court of law, thereby permitting the Senate to admit anything in evidence that furthers the alleged interests of justice.

The second point to which I addressed myself in the statement—the draft rules would allow the amendment of pleadings, that is to say, the articles of impeachment as drawn by the House, so as to allow the admission of evidence on new issues.

Now, this sets aside criminal court standards for standards based upon the Federal Civil Rules of Procedure and it allows the Senate to alter the work of the House. And, in my judgment, is therefore probably unconstitutional. In effect, the charges against the President could be changed in the midst of the trial.

Point three, the role of the Chief Justice appears to me under this proposal, to be sharply curtailed and political leadership substituted therefor.

The constitutional role of the Chief Justice is to preside over the trial. The rules and historical precedent have allowed him to rule on procedural matters, although he can be overruled by a majority of the Senate—to break a tie vote on procedural matters, and even to frame the wording of the final question.

Under the draft rules, the Chief Justice would preside only and all other duties would fall upon newly designated Chief Judges, that is, the majority and minority leaders and their deputies.

The American public would perceive that the nonpolitical leader, that is to say, the Chief Justice, had been removed from a basic judicial capacity and that the ex officio political leaders of the Senate, the majority and minority leaders, had been put in his place.

The fourth point, the Chief Judges would specifically be allowed to recommend the discovery of evidence based upon the Rules of Civil Procedure, permitting fishing expeditions and amendment of the pleadings.

Now, any evidence would be admissible if reasonably calculated to lead to the discovery of admissible evidence. In connection with the power to amend pleadings while the trial is in progress, such fishing expedition would result in the President never knowing from one day to the next what he is being tried for.

The fifth point, a lesser burden of proof is officially established based upon civil proceedings. Now, the present rules are silent on burden of proof, but precedent shows that impeachment trials are analogous to criminal proceedings. There are two levels of proof in civil proceedings—preponderance of the evidence, requiring the mythical scales of justice to tip only slightly in one direction, and clear and convincing proof used in a limited range of civil cases, in which the scales must tip substantially.

In criminal proceedings guilt must be beyond a reasonable doubt with the prosecutor tipping the scales so completely that the jury can determine to a moral certainty that the matters alleged are true.

Every Senator ought to feel the moral obligation to use "beyond a reasonable doubt" in his personal determination, yet these proposed changes would define conviction as a finding by two-thirds of the Senators, that any article is sustained by clear and convincing evidence.

And the sixth and final point that I allude to in my statement, Mr. Chairman, the draft rules would require a summary maximum judgment without considering mitigating circumstances. The clerk is directed to enter a maximum judgment under the Constitution without waiting for direction from the Senate. The present rules require that the Senate enter the judgment, implicitly allowing the Senate to shape the judgment to suit the circumstances. The draft rules are based upon a presumption that there can be no mitigating circumstances.

Many Senators might be dissuaded from voting to convict if conviction means the maximum summary judgment.

In conclusion, Mr. Chairman, the present rules were devised by the enemies of President Andrew Johnson, who happened to be a native of my hometown, Senator Griffin. These were devised as the minimum required by precedent and a decent facade of justice. They represented the outer limits beyond which even those men felt they could not go.

But I feel today that we are being asked to go further, a circumstance which greatly beclouds the prospect of a fair trial. And I know that the Senate wants to avoid that position.

Thank you for your time.

The CHAIRMAN. Thank you very much for a fine statement. I look forward to reading it.

Senator Griffin.

Senator GRIFFIN. I just want to underscore the point that you made at the end there. The fact that the existing rules were fashioned by a Senate that certainly was not exactly fair and objective with regard to Andrew Johnson—at least that is the way history has judged that, the majority of the Senate at that time.

And I suppose that if I were to be trying to guide or direct the defense of President Nixon, I might welcome the Senate throwing out the old rules and bringing in a whole new set of rules in the middle of the impeachment proceeding. It would certainly give me the opportunity to cry foul and to make a lot of appeals on the basis of the unfairness of the proceeding.

Whether it would or would not have any actual effect on the outcome of the trial, in my own mind I doubt that it would—I imagine that whether you call it “clear and convincing” or “beyond a reasonable doubt,” that is probably not likely to change how an individual Senator might vote. I could be wrong on that.

But what it will do, it seems to me, is plant in the mind of the public a very real ground for saying that the Senate has changed the rules for this particular defendant in this particular, and they have rigged it against him.

I don't know why the Senate would want to do that. I think it would be a very, very unfortunate thing for the Senate to do.

Because whether we have or we don't have television, which is another question by itself, it certainly is important to history and to the Senate that the judgment that we arrive at is going to be one that the public will accept. I am glad that this committee has seen the wisdom of proceeding from the existing rules rather than throwing them out and adopting new ones. I think we should make as few changes in them as we can.

Maybe there are some changes that should be made, but I would think they ought to be kept to a minimum, and use the existing rules as a precedent for this particular trial.

Senator HELMS. I thank the Senator. I personally hope that there will be no changes in the rules, unless there is something so absolutely essential that I can't think of at the moment. I am alarmed at the division that I read in my people back home, people who are Democrats, Mr. Chairman, and who have been Democrats all their lives, have a distrust of the Congress—and I think it is so imperative that we not only be fair but that we appear to be fair.

And I thank you very much.

The CHAIRMAN. The committee has received statements from Senators Inouye, Bayh, Mondale, and William L. Scott, and a letter from Harry F. Byrd, Jr. These statements and the letter will be printed in the hearing record at the end of the testimony of the Senators who appeared before the committee today.

[The written statements and the letter referred to above follow:]

STATEMENT OF HON. DANIEL K. INOUE, A U.S. SENATOR FROM THE STATE OF HAWAII

Mr. Chairman, it would appear highly possible that the House of Representatives will adopt one or more articles of impeachment charging the President of the United States with high crimes and misdemeanors. Although there is still much uncertainty as to the final Articles of Impeachment, there appears to be consensus in our Nation's Capital that the House of Representatives will face the painful moment and will decide to impeach President Nixon. The United States Senate, after a few weeks of preparation by both the prosecution and the defense, will then convene itself as the highest judicial tribunal in the land.

We have had several impeachment trials in the past, most involving lesser governmental officials—judges, cabinet members or others in the executive branch. Only one involved a President. The impeachment of President Johnson

was, without question, a political vendetta—a politically-inspired kangaroo court. It was conceived by those legislators who wanted to force the South into total submission after the Civil War. It was, very simply, an act of vengeance.

This trial, in 1974, results from many months of painstaking and tedious investigation and work. It has resulted in much anguish for all Americans. It was that which everyone wanted to avoid, but that which circumstances have forced upon us.

The conduct of this trial will long affect our domestic politics and our political institutions. It will affect our relationship with other nations—perhaps even the question of war or peace in some part of the globe. Most important, it will test our Constitution like it has not been tested since the Civil War.

Although the trial will have a presiding judge—Chief Justice Warren Earl Burger—and one hundred jurors—the members of the United States Senate—the trial will be essentially a political trial—a people's trial. There will be no appeal from this "court's" decision. The decision will ultimately be that made by the people of the United States acting through their elected representatives, and that is, I believe, as it should be, for the people elected the President and it is essential that they share in any decision to remove him from office.

Any decision to approve the impeachment of the President will not be made by judges and jurors selected from the community and sequestered from outside public pressures. The public reaction to the evidence presented will affect the members of this senatorial jury. Indeed, I fully expect, and want to hear from my constituents, to learn how they perceive the facts. The procedure may be judicial in nature, but we must clearly keep in mind that the decision ultimately will be a political one.

For that very reason, it is absolutely essential that every care be taken to assure the fairest, most just, and most equitable and objective trial possible. The procedure and the outcome must be respected and broadly accepted by the People of the United States as reflecting fairness and judiciousness. If ever the proceedings degenerate to a point where many will view it as nothing more than a kangaroo court, the damage to our political structure might be irreparable.

To assure that objective, I very strongly believe that every step of the proceedings, from gavel to gavel, must be televised by all networks.

The proceeding will be public in the sense that the Senate gallery will be filled with people, people who are fortunate enough to receive a very precious pass. Also, there will be members of the working press, TV commentators and reporters.

During this past year, as a participant in the Watergate hearings, and as an observer of the scene, I have come to the conclusion, reached by many other Americans, that a significant number of the working press find it extremely difficult to be objective about President Nixon. Prejudices, whether of long standing, or developed in recent months, show through some of their comments and writings.

If the people of the United States are required to rely upon the writings, commentaries, and political cartoons of men and women of the press as their only source of information, the all-important objectivity and fairness which must be our goal may not be achieved.

Some of my colleagues oppose televising the proceedings because they fear that a "circus attitude" may evolve—that political posturing and demagoguery will dominate the impeachment trial. Others have suggested that there is no precedence. However, I personally feel strongly that it is extremely important that the public be given the opportunity to hear and observe all of the evidence presented to the United States Senate. This includes the tone of voice, the physical posture, the hesitations, the anguish, the relaxed smiles as shown by both the President's lawyers or even by the President himself, should he choose to appear. All of us will have to judge the sincerity of the evidence presented, and in my experience, there is no substitute for direct observation.

Most Americans get their news from television. Even if all of each night's half-hour of national news was devoted to the impeachment trial, it would fill but half a page of the New York Times. Few newspapers would print in total the transcript of the days' proceedings, or have the capacity to do so. Even if it were possible, artists' sketches, interviews with members of the Senate jury and commentaries or analysis by noted news personalities are no substitute for viewing the actual on-camera event.

History demands that every one of us, every citizen of the United States, be given the opportunity to follow this trial step-by-step. The President, like all of

us, like all citizens of the United States, is entitled to a fair trial. It is, therefore, extremely important that the full jury, that all of our citizens, be given the opportunity to evaluate all of the evidence. If we wish to grant our President, as we do to any other citizen, his "day in court", we must make certain that he will be able to present his case to the people of the United States fully, without censoring and without distortion. Only gavel-to-gavel TV coverage will assure our President his "day in court".

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STATEMENT OF HON. BIRCH BAYH, A U.S. SENATOR FROM THE STATE OF INDIANA

Mr. Chairman, I greatly appreciate the opportunity which this Committee has afforded to the other members of the Senate to present their views on the procedures which should be followed by the Senate if it should be called upon by the House of Representatives to conduct an Impeachment Trial of the President of the United States. As a general matter, I favor retaining the broad outlines of the present "Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials." I have carefully reviewed these rules and the precedents of the twelve trials that the Senate has conducted since 1799 which overlie them, and have concluded that with the one major exception which I would like to address today, a convincing case cannot be made for their wholesale revision or abandonment.

The overriding goal which I believe should guide those of us who may be called upon to perform this unique and difficult task must be to assure the broadest possible public acceptance of the legitimacy and fairness of both the process and the ultimate result. To embark on the course of developing a wholly new procedure for arriving at our ultimate collective judgment might well undermine the confidence of the American people that long-standing constitutional principles were being applied to this President, as they would be applied to any other occupant of that office. Thus, although I would place a strong burden of justification on those who would depart from previous practice, I do believe that carefully considered modifications in a few areas are called for. The most important of these concerns the present provisions of Rules XX and XXIV, providing for secret debate.

XX. At all times while the Senate is sitting upon the trial of an impeachment the doors of the Senate shall be kept open, unless the Senate shall direct the doors to be closed while deliberating upon its decisions.

XXIV. All the orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of Rule VII, except when the doors shall be closed for deliberation, and in that case no member shall speak more than once on one question, and for not more than ten minutes on an interlocutory question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate; but a motion to adjourn may be decided without the yeas and nays, unless they be demanded by one-fifth of the members present. The fifteen minutes herein allowed shall be for the whole deliberation on the final question, and not to the final question on each article of impeachment.

These rules have been uniformly interpreted since adoption in their present form in 1868 as requiring that the doors be closed in all instances before debate may occur among Senators either on interlocutory or final questions.

I would like to review for the Committee first what the earlier with regard to secret sessions in Impeachment trials appears to have been, and second why I believe that public policy requires that all stages of a trial be open to public scrutiny.

#### PRIOR TRIALS

The first impeachment trial to be conducted by the Senate was that of Senator William Blount of Tennessee who was accused of involving himself with certain Indian tribes on behalf of British interests. Blount was acquitted when the Senate decided that Congress had no jurisdiction to impeach a Senator who was subject to removal by the Senate itself. The rules adopted on that occasion provided that "all questions, arising in the course of the trial, shall be decided with closed doors." (Hinds', *Precedents*, #2309). It should be noted that the practice of secret deliberations of the Senate was common at this time. Indeed, in the first three Congresses, all sessions of the Senate were held behind closed doors, and the practice continued to be common throughout the 19th and early 20th cen-

turies. (See e.g. Gilfrey, *Precedents in the United States Senate*, pp. 247-259). In modern times, however, such sessions have become increasingly rare. The Pickering trial in 1803 adopted by reference and without debate the same practice as had been followed in Blount. (Hinds' #2327) In the trial of Justice Chase a year later, however, the Senate in adopting the first comprehensive standing procedural rules for an impeachment trial determined "At all times, whilst the Senate is sitting upon the trial of an impeachment the doors of the Senate Chamber shall be kept open." (Hinds', #2348) This practice of open debate and deliberation was followed in the trial of Judge Peck in 1850 (Hinds', #2372) and that of Judge Humphreys in 1862 (Hinds', #2389) although one Senator in the Humphreys trial suggested that the rules providing for open sessions did not apply to formal deliberations (Hinds', #2397).

In the Johnson trial a select committee of seven members was named to review the procedural rules of the Chase trial and recommended some changes, the most significant of which was the present provision for closed-door deliberation and debate (Hinds', #2414). This was the first time that extensive debate on procedural rules was recorded in the Senate and although the debate lasted two days and covers some 60 pages in the *Congressional Globe*, surprisingly no mention was made of the reason for returning to the old practice of secret sessions. (See *Globe*, pp. 1515-1535, 1568-1603). During the course of the Johnson trial the Senate under these new rules retired on several occasions to its "conference chamber" to discuss interlocutory questions which had arisen. Although the debates during these proceedings were recorded and published in the *Senate Journal* and *Globe*, no outsider attended (Hinds', #2430). Final deliberations were conducted in secret and a motion that the debate be recorded was rejected, although a statement of the actions taken in the sessions was reported in the *Globe* and the *Journal* (Hinds', #2435). In the Belknap trial in 1876 a motion was made just prior to the final deliberations that the provisions requiring secrecy be amended to return to the Chase precedent of open session, but this was rejected by a vote of 23-32 (Hinds', #2466) without debate.

In the subsequent trials of Judges Swayne (1904-1905), Archibald (1912), Louderback (1933), and Ritter (1936) deliberations on both incidental and final questions continued to be behind closed doors, although the practice was not entirely uniform (See Hinds', #2485; Cannon's, #508, #524; Senate Journal, 74th Congress 2nd Session 506 (1936)).

#### THE ANALOGY TO A PETIT JURY

The principal justification for secret deliberations by the Senate lies in the fact that civil and criminal jury trials are conducted in this manner. It cannot be emphasized too often, however, that a Senate trial on Articles of Impeachment is *sui generis*. The practices and procedures of our courts should not be automatically applied to a Senate trial unless the policy reasons which underlie them are opposite in this forum as well. I believe that if one analyzes the reasons why jury deliberations are conducted behind closed doors, it becomes apparent that the same goals would not be served if secrecy were applied to a Senate trial and, moreover, that the entire process would be very seriously undermined. The secrecy of jury deliberations rests on the following policy arguments:

- (1) To prevent influence by outsiders;
- (2) To prevent access to any facts or conclusions other than those presented on the record in open court;
- (3) To make discussions as uninhibited as possible;
- (4) To protect the juror's privacy and not subject him to community approbation for his rationale and decision; and
- (5) To protect the process by making it more likely that the community will defer to the jury's decision.

As for the problem of outside influence, unless the Senate is prepared to sequester itself during these discussions, which in closely contested past trials have lasted several days, it will be impossible for a Senator to avoid being exposed to the views of others. In addition, in a normal jury trial the *voir dire* process is used to eliminate from the jury any individuals who may have a predisposition to one side or the other. Such a screening process is, of course, not possible in this case.

The second goal of limiting the exposure of the fact-finders to the issues presented in the trial itself has, of course, long since been made impossible by the criminal proceedings and legislative hearings on the same subjects over the past 18 months in which several members of the Senate directly participated.

As to the free flow of debate, the Senate as a body always conducts its discussions in an open, public manner under the scrutiny of the news media. Unlike the average citizen, a Senator is familiar and comfortable with the process of open, collective decision-making. There is no reason to believe that the nature of the debate would change appreciably behind closed doors.

Further, a community judgment of the outcome in this case is not only inevitable but desirable. Unlike a juror, the public will know how each Senator has voted, and certainly every Senator will feel obligated to fully explain his actions. It is greatly in the interests of the Senate as an institution that the public hear a collective explanation of the outcome at the time of the event, as well as a later explanation of why their own Senators acted as they did.

Finally, the faith of most Americans in the jury system is well ingrained, and it is hard to imagine a particular case where general public support of the legal system will turn upon the outcome. In the present case, virtually every American will have an opinion as to the proper outcome by the end of a Senate trial, so public deference to the Senate's conclusions because the decision-makers are seen as knowing more about the facts will be non-existent.

#### THE PUBLIC POLICY INTEREST IN OPEN DEBATE

Overriding even the final result in the case of a Presidential impeachment trial must be the need for a public perception of the proceedings as a product of fair and open-minded procedures. In this sense, an examination of the aftermath of prior impeachment trials, with the exception of Johnson, is not particularly helpful since they involved primarily judges who are non-political figures where the public had no generalized or societal interest in the outcome. In the only other Presidential impeachment, although historians have differed on whether the charges were constitutionally justified, there is no question that the process failed to generate a broad consensus as to its fairness and even-handedness. Indeed it can be argued that the frequent discussions behind closed doors that took place in the Johnson trial were a significant factor in discrediting the process. Recognizing this, several Senators felt constrained to file formal opinions explaining their actions.

More importantly, the American people are entitled to the fullest exposition of the actions of individual Senators who are acting in their public and representative capacity. Conversely, no present member of the Senate is ever likely to decide a more important and fundamental question. He is entitled to the opportunity to directly explain his actions to the people in the context of the proceeding itself.

Finally, it should be clear to all of us that the events of the last two years following on the heels of the great strain on the American political fabric caused by the Viet Nam War has raised general public cynicism about the political process to an unprecedented level. The root cause of this cynicism and of Watergate itself lies in governmental secrecy—the belief that actions and motives could be concealed and misrepresented. The great cost involved to our political system of such acts has now become fully apparent. As we in the Congress consider these great abuses, I would urge that we do so in full view of the American people.

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#### STATEMENT OF HON. WALTER F. MONDALE, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Mr. Chairman and Members of the Rules Committee, I am indeed grateful for this opportunity to express my views before you today as this Committee begins its consideration of possible changes in the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials.

There could not be a better forum for the consideration of this important task. Many times over the past months, the Senate Rules Committee—with the Campaign Reform Bill, with the Budget Committee Bill, and with the nomination of a new Vice President—has shown the Senate and the American people its outstanding ability to do careful and conscientious work under difficult time pressures.

Once again this Committee is faced with a monumental task, and I am confident that once again this Committee will acquit itself admirably. I am proud to have this chance to participate in the Committee's work.

Mr. Chairman, I wish at the outset to reject any notion that this Committee or the Senate as a whole is acting precipitously or unfairly in anticipating the

possibility of a Senate impeachment trial. As this Committee meets, the House Judiciary Committee is preparing to file its final report to the full House on its investigation into impeachment of the President. As we all know, the Committee will report three proposed Articles of Impeachment to the full House. Under these circumstances, I feel it both necessary and appropriate that the Senate act immediately to prepare to exercise its constitutional functions *should* the full House vote to impeach the President.

I also reject the notion that, by considering the exercise of our constitutional functions under these circumstances, we are in any way prejudging the President's guilt or innocence of possible impeachment charges. We are merely acting to insure that the President will—if brought to trial before the Senate—be given a full, fair, procedurally smooth, and expeditious impeachment trial. We *must* not, and we *will* not, prejudge the case, but we must be prepared to judge it.

Mr. Chairman, Article I, Section 3 of the Constitution gives the Senate "the sole Power to try all Impeachments." This is an awesome task. We are, after all, charged with the duty to determine whether a President of the United States, the head of a coordinate branch of government, should be removed from office. We are given the power to overrule an electoral mandate. After much debate, "The convention," said Hamilton in *The Federalist*, ". . . thought the Senate the most fit depositary of this important trust."

What, in the final analysis, is impeachment? It is, again in the words of Hamilton, "a method of national inquest into the conduct of public men". "If this be the design of it," Hamilton asks, "Who can so properly be the inquisitors for the nation as the representatives of the nation themselves?"

The Framers of our Constitution were realists. There is no doubt that they were confident that the people had the ability to make self-government work. But there is also no doubt that they were skeptical of human nature and feared what might happen if the President were accorded unlimited power.

Accordingly, it is clear from the constitutional debates that the Framers intended to empower the legislative branch to remove a President who had grossly abused the public trust in such a way as to undermine the integrity of government. The limited term of office was not sufficient, the Framers wanted something else.

In the words of Professor Raoul Berger: "It was because the separation of powers left no room for removal by a vote of no confidence that impeachment was adopted as a safety valve, a security against an oppressive or corrupt President and his sheltered ministers."

I believe Mr. Justice Story, in his *Commentaries on the Constitution*, put it well when he wrote: "Now, the power of impeachment is not one expected in any government to be in constant or frequent exercise. It is rather intended for occasional and extraordinary cases, where a superior power, acting for the whole people, is put into operation to protect their rights, and to rescue their liberties from violation."

As we exercise our constitutional function to conduct an impeachment trial, I firmly believe that we should seek to achieve three goals.

We should be open. We should be fair. And we should be understood.

I turn, first, to the question of *openness*. An impeachment trial is public in the most fundamental sense of the word. The welfare of the people of the United States is involved, their security is being determined, and their liberties are being protected. I doubt whether there is anything, except possibly declaring war, that the Congress does that is of greater concern to the American people than the question of whether a President should be removed from office.

Our goal should be to allow the public the fullest possible access to all our actions on this important matter. Only if the public sees all and knows all can it be insured that we act fairly, accept the result we reach, and understand our judgment.

Specifically, I would begin by making all Senate debate on the Rules of a Senate trial completely open. During the trial of President Andrew Johnson, the Senate discussed and adopted Rules in public, legislative session, readopting them after organizing as an impeachment tribunal. Debate on the Rules in legislative session would, even under present Rules, allow for open debate.

I, however, favor amending Rules XX and XXIV to permit all deliberation and debate to be in public session. I would propose that debate on the Rules, on evidentiary questions, on interlocutory questions, and on the final question be totally open.

Open debate allows the parties to fully understand our decisions and, most importantly, allows the American public to see and hear everything we do in order to better understand, to better accept, and to witness our fairness.

It is particularly important that debate on the final question of whether or not the President should be convicted be subject to complete public scrutiny. The public has a right to participate, even if only as a witness, in this most solemn public function.

Mr. Justice Story expected no less when he wrote: "These prosecutions are . . . conducted by the representatives of the nation, in their public capacity, in the face of the nation, and upon a responsibility, which is at once felt and revered by the whole community."

We are fortunate in 1974. We have a means for bringing our work to the American people. Our work may be open to an extent never before possible in the history of constitutional impeachments. Television and radio can insure that our work will not only be witnessed by the 426 people who can fit into the seats in the Senate gallery but, rather, by millions and millions of Americans all over the Nation.

That brings me to my second general recommendation. I urge this Committee to permit, consistent with the needs of fairness, decorum, and space, radio and television coverage of an impeachment trial. Media coverage will, I believe, contribute more than anything else to letting the public see that we act fairly, helping the public accept our ultimate judgment, and allowing the public to understand our actions.

The President and his accusers can truly bring their cases to the American people. The people can make their own evaluation, with no filter between them and the actual trial. Make no mistake; public confidence will be at stake. Full media coverage will satisfy the public's need to know.

Over the past several days, we have witnessed a perfect example of the values of full media coverage of Congressional activity. The House Judiciary Committee was the subject of live television and radio coverage. The proceedings of that Committee were orderly, serious, and impressive. The American public witnessed the Committee's final deliberations with no discernible negative impact on the Committee's work.

The arguments most often advanced against media coverage seem insubstantial to me. I cannot, for instance, agree with some that the presence of television and radio will somehow turn an impeachment trial into some sort of circus. If anything, this scrutiny will encourage decorum and dignity. The watchful eye of the American people will, I believe, act as a stabilizing force.

Nor can I agree that our proceedings will be too detailed or too routine or too lengthy to be fully understood or appreciated by the American people. To say that is to grossly underestimate the intelligence of Americans and to grossly undervalue their perception of the nature of these proceedings.

Nor can I agree that the presence of television and radio equipment is necessarily disruptive. Representatives of the media have pledged that, if permitted to cover the sessions, they can and will do so in a decorous and unobtrusive way. I am confident that the Senate, with the help of this Committee, can develop ways to allow coverage with minimal disruption. It has been done before in other contexts, and it can be done again.

Finally, I do not see any due process objections. Remembering that this is not a criminal proceeding, I believe that media coverage may be made fully consistent with the constitutional guarantees to the parties, to potential witnesses, and to future criminal defendants. I do not find *Estes v. Texas*, 381 U.S. 532 (1964) an impediment. And it is difficult to imagine a situation where an additional increment of publicity will have such a cumulative effect in terms of the rights of present and future criminal defendants.

I believe the words of Mr. George Reedy, former press secretary to President Lyndon Johnson, deserve repeating: "(T)he most important interest to be served is that of the people themselves. The presidency belongs to them—not to the Congress or to the media. If Congress is to direct a change in the occupancy of the office, they have the right to be present, at least as spectators, and there could be grave consequences were they to be denied a right so readily available."

Mr. Chairman, the third area of recommendation to which I wish to address myself this morning concerns *participation*.

The Senate is made up of one hundred members—two from each State. It was a purposeful decision of the Framers of our Constitution that the upper body of the legislative branch contain equal representation of the States. By placing the trial of impeachments in the Senate, the Framers, I believe, intended to make the one hundred Members of the Senate equal participants in the process of determining whether a President should be removed from office.

Rule XXIV of the present Rules preserves the right to equal participation while imposing reasonable limitations of its exercise. I favor allowing each Senator

the equal right to address interlocutory and evidentiary questions and the final question. I do not object to limitations on the time during which views might be expressed.

I also favor allowing Members of the Senate to comment on pending questions or explain votes in writing, with such to be printed in the record of the proceeding.

I particularly urge this Committee to recommend a mechanism whereby each Senator may, in writing and orally, explain his vote on the final question. During the impeachment trials of Judge Humphreys and Secretary Belknap, oral explanations were allowed. During the trials of President Johnson and Judge Louderback, written opinions were filed. During the trial of Judge Archbald, both procedures were followed.

Allowing discussion and explanation of final votes can only foster the goals of openness, fairness, and understanding.

Finally, Mr. Chairman, I believe the Senate must have the power to on its own, or upon the request of the parties, to subpoena necessary evidence—both oral and documentary—and to address interrogatories. Rule V would seem to give the Senate this authority, but the matter should be clarified. The trials of Mr. Justice Chase, Judge Peck, Judge Archbald, and Judge Swayne reveal broad use of the subpoena power. I believe, however, that the authority of the Senate, on its own motion, to issue subpoena must be made clear.

Our decision on the final question of Presidential conviction must be an informed one. We must have all the facts; we must make a fair evaluation of all facts; we must reach a reasoned conclusion.

We may take notice of the fact that there are facts to which the Senate may not have access. Specifically, the House Judiciary Committee has subpoenaed, but has not received, 64 tapes of Presidential conversations. As the supporting documents submitted to the President by the House Committee with its subpoenas make clear, these tapes are vitally important to a full and fair evaluation of the charges against the President.

Although the request of the Special Prosecutor for the tapes will be honored as a result of a Supreme Court decision, there is absolutely no guarantee that the House or the Senate will ever hear those important tapes as part of the impeachment inquiry.

I therefore, intend to ask the Senate to subpoena the 64 tapes of Presidential conversations if there is a Senate impeachment trial. I firmly believe that we need those tapes in order to be fair to the President and in order to be fair to the American people as we consider whether to remove a President from office.

I believe that it is in the best interest of complete fairness that the Senate have the authority to issue such a subpoena.

Mr. Chairman, there are many intricate questions of procedure which this Committee should answer before the commencement of an impeachment trial. We should know who may object to a question, who may explain an objection, what will be the order of proof, and many, many more basic procedural issues.

Unfortunately, Mr. Chairman, time does not permit me to address many of these questions. I know that the Committee is well aware, on the basis of materials already before it, of the nature of these questions, the precedents on their resolution, and the possible solutions. I stand at ready at any time to help this Committee in any way that I can with its difficult task of recommending to the full Senate rules for the conduct of an impeachment trial.

I have merely attempted today to address myself to four broad areas of concern and to suggest some changes which will help to achieve openness, fairness, and understanding.

I close, Mr. Chairman, with the words of former Special Prosecutor Archibald Cox: "Regardless of the outcome, the value of the proceeding will depend on whether the process is so conducted that the country perceives it as a fair and legitimate measure for restoring the integrity to government."

Thank you.

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STATEMENT OF HON. WILLIAM L. SCOTT, A U.S. SENATOR FROM  
THE COMMONWEALTH OF VIRGINIA

Thank you Mr. Chairman and members of the committee for permitting me to appear and comment briefly during your consideration of possible changes in the Senate rules regarding impeachment.

I have reviewed the constitutional provisions, present Senate rules, *Jefferson's Manual*, the resolution submitted by Senator Mansfield, and various other ma-

terials. It seems important that we study precedents developed over the years, scarce as they may be, and utilize them rather than develop new rules and procedure this year for use in the Senate in the event the House of Representatives impeaches President Nixon. Regardless of the fairness of this committee and the Senate, changes made in basic rules will be suspect during this emotional and tragic period. It might be in the public interest to make no changes at all at this time. Certainly if changes not related to the present controversy are needed, they can be made next year when hopefully emotions will not be as high.

Let me, however, share a very few thoughts for your consideration:

1. As we know, the Constitution provides for impeachment trials to be in the Senate with the Chief Justice presiding when the President is tried. During this period we are still Senators even though by virtue of office we have some quasi-judicial power. I hope that during this interim the committee will not change our titles to judges, chief judge, deputy chief judges, designate the Senate as the court of impeachment, the secretary as clerk of the court, or anything of that nature. We are still senators and such terminology, in my opinion, would be confusing to the public and could subject us to criticism.

2. That no one other than a Senator be permitted to vote when the President is on trial. The Vice President, when presiding, can break a tie because of the constitutional provision and also he is generally elected to preside over the Senate by the people of the country. Neither of these factors, however, are true in the case of the Chief Justice.

3. That the regular rules of the Senate be followed regarding news coverage. I am fearful that radio or television coverage would result in participants coloring or dramatizing their statements so that there would not be a fair or impartial trial.

4. That no rule be adopted limiting either the evidence which may be presented by the managers on the part of the House or presented in defense of the President other than limitations required by the ordinary rules of evidence as determined by the Chief Justice subject to appeal to the floor. I believe, Mr. Chairman, that the President should be afforded all courtesies due his high office during the trial with the realization that he will continue to be the country's Chief Executive for more than two years unless two-thirds of the Senate vote to the contrary and it would be against the national interest to reduce the prestige of the presidency or the effectiveness of the present occupant for the remainder of his term.

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U.S. SENATE,  
Washington, D.C., August 2, 1974.

HON. HOWARD W. CANNON,  
*Chairman, Committee on Rules and Administration,*  
*U.S. Senate, Washington, D.C.*

MY DEAR HOWARD: I received your notice that your Committee will hold a hearing Monday on possible revision of the Senate impeachment trial rules.

Briefly, my view is this:

1. If and when the impeachment trial begins, the Senate should continue on this to the exclusion of all other business (excepting emergency matters) and should meet six days a week, and probably eight hours a day.

2. The present rules should be changed to the minimum extent possible and any changes should be as simple and concise as possible.

With best wishes, I am

Sincerely,

HARRY F. BYRD, JR.,  
*U.S. Senator.*

The CHAIRMAN. In addition, without objection, the letter from Senator Mansfield transmitting the draft proposal for the—the draft itself and the section-by-section analysis thereof, will be printed as an appendix to the hearing record.

[The material referred to may be found on p. 171 of these hearings.]

That concludes our hearings for today. We will now stand in recess until 2 o'clock tomorrow afternoon, at which time further testimony will be taken from Senators who desire to appear.

[Whereupon, at 1:41 p.m., the committee adjourned.]

# SENATE RULES AND PRECEDENTS APPLICABLE TO IMPEACHMENT TRIALS

TUESDAY, AUGUST 6, 1974

U.S. SENATE,  
COMMITTEE ON RULES AND ADMINISTRATION AND ITS  
SUBCOMMITTEE ON STANDING RULES OF THE SENATE,  
*Washington, D.C.*

The committee and subcommittee met, pursuant to recess, at 2:07 p.m., in room 301, Russell Senate Office Building, Hon. Howard W. Cannon (chairman of the full committee), presiding.

Present: Senators Cannon, Robert C. Byrd (chairman of the subcommittee), Allen, Williams, Hugh Scott, Griffin, and Hatfield.

Also present: Senators Stennis, Javits, Hart, Taft, and Brooke.

Staff present: William M. Cochrane, staff director; Hugh Q. Alexander, chief counsel; Joseph E. O'Leary, professional staff member (minority); John P. Coder, professional staff member; Jack L. Sapp, professional staff member; James H. Duffy, chief counsel, Subcommittee on Privileges and Elections; James F. Schoener, minority counsel, Subcommittee on Privileges and Elections; Peggy Parrish, assistant chief clerk, and John K. Swearingen, staff director, Subcommittee on Computer Services.

The CHAIRMAN. The meeting will come to order. Our first witness today will be the Honorable John C. Stennis. We are delighted to have you here, Senator Stennis. The task before this committee is most difficult, but it is most interesting and historic.

## STATEMENT OF HON. JOHN C. STENNIS, A U.S. SENATOR FROM THE STATE OF MISSISSIPPI

Senator STENNIS. Well, Mr. Chairman, and members of the committee, I say this first, it makes me feel good to know that you gentlemen—I do not want to flatter you one bit—are the ones who are called upon to pass on these matters that are so important to the Nation and to everyone, of course.

I am going to be brief, gentlemen, and I will touch on a few major points and, perhaps what I say has already been said by several others, but I want to add my voice on this matter.

I heard on the radio, and saw in the press, that you have reached some decisions, tentatively that you are taking the old rules and starting down the line from that approach. I certainly think that is correct.

Gentlemen, if you will just permit a brief personal reference, right at the threshold of this matter, it is just not the American system to substantially change the rules during the contest.

This is not a game, but a grave contest, and I am sure that you believe that you are subscribing to that view.

Now, I am sorry, I want to be just a little personal, though.

I am a product of—and so are you—of the trial courtroom. I have had responsibilities of being a district prosecuting attorney and then for 10 years trial judge in the court of unlimited jurisdiction, civil and criminal, and I have signed decrees that took people's homes away from them, or other property, sentenced thousands, literally, of prisoners, and on up to having passed the death sentence, and so on.

And I tell you there is no culprit greater—greater enemy of justice and right and truth—than hearsay evidence.

I want to emphasize that with all the power of my being.

It is a dangerous instrumentality. It is not trustworthy. It is not reliable in the serious affairs of life and government; and the English system of jurisprudence, common law as we call it, ruled it out in the more serious affairs. And I hope, and I have not mastered the present rules, but I hope you will see fit to put in a rule, expressed as you may see fit, that outlaws the hearsay rule; at least putting the burden on those who would bring in hearsay evidence in a serious matter like this.

The burden of having the Senate overrule its own rules, and I think, gentlemen, generally my philosophy is that the Senators, if this matter does develop in the present case, as discussed, or any other case under the rules you might promulgate, that the Senators are the final judges of the law and the evidence.

A majority will rule there. There will not be any two-thirds vote required.

I mention those things because if my testimony is worth anything, I ought to give some of my background and philosophy about the general situation.

Now, I believe if this matter—any matter of impeachment comes to the Senate, there is where the first rule of search for truth should apply, as much as possible, in confrontation, as in any kind of a trial like this where you must search for the truth, the flesh-and-blood witness.

The witness has to testify under oath, under the possible penalty of perjury, and is subject to cross-examination.

That is why I refer to my trial courtroom experience during an active judgeship because I am convinced from such experience that the most powerful weapon invented for truth is that of confrontation with the witness testifying under oath with the possible penalty of perjury, and subject to cross-examination.

Incidentally, I heard a definition once of what the third degree is. Well, what is the first degree? Confrontation, you lawyers know, is the first; and the second degree is cross-examination. The third degree is left off, but that is where your determination comes in.

But I am shooting at this hearsay testimony now, when I go into these matters about this confrontation and cross-examination. -

With all due deference to everyone, anything less than that, as far as it can be made to apply, long since has been totally discredited, discarded; both under the English common law system, and the American common law system, for centuries, really.

I do not have any specific language.

I think you can do better with the language, as you see fit, to write something definite on the hearsay proposition. You can do better than I can, on any matter that is this serious to our country; and I am putting the country first, of course.

Where any party is charged with an impeachable offense and is tried by the Senate, which is highly important to them, be it a so-called minor official on up to the highest official under our Constitution then I think that the proof required ought to be proof beyond a reasonable doubt; not beyond a doubt, but proof beyond a reasonable doubt.

If I may, I have had some responsibilities in the Senate where charges were preferred. And one of the first questions asked me by a fellow Senator in debate was, "What degree of proof do you think is required here?"

I said, "Well, we did not recommend any degree of proof."

My personal recommendation is, anything less than proof beyond a reasonable doubt, you ought not to vote this resolution. Just write it off. And I assume that is in the record.

That is just my background of reasoning, and that is the way I felt about it.

Now, I notice the language here proposed, and I speak with a great deference, which is shared by all of you, that the proposal before you is for clear and convincing evidence.

I have seen lots of cases, gentlemen, and facts, where two viewpoints were supported by clear and convincing evidence—you might say, 50-50.

If you take this approach in some cases, start from here, why, clear and convincing proof is in the evidence here. That will lead you to that result over here; whereas, if you start from another point there is evidence in the record, clear and convincing, that leads you the other way. I do not think that is sufficient.

Proof beyond a reasonable doubt is the standard that has been produced by centuries based on experience. I am not saying this is a criminal trial, but it is so closely akin to it in seriousness, that anything less than that standard I do not think would be adequate. I hasten to say I believe if this matter comes to us in this case or any other case, it would be such a serious matter by the time it gets to us on the floor, that most everyone will have swung around to that standard. It will be so serious that he will have swung around into his own mind and require proof beyond a reasonable doubt before he gives a vote of guilty.

I think anything less than that is dangerous to the welfare of the country. I am not particularly recommending that you put in the rules a standard of proof: my plea is: Do not put in a rule requiring a standard less than proof beyond a reasonable doubt.

Every Senator is going to have to decide, I think, in his own mind, and I doubt that you could frame a rule that would help us much, but if you frame the wrong kind, it is the other way; it could be a stumbling block.

This is the way I see it, and I decided I could talk to you better "off the cuff" as to the way I feel than I could by trying to reduce it to writing.

Now, I just want to mention one other thing, and I am going to move on so someone else can testify.

It occurs to me, gentlemen, that under the Constitution that the talk about the Senate amending a bill of impeachment under any circumstances is impossible. It is beyond the call of the Constitution.

We have no power to amend a bill of impeachment. The Senate has not, and I do not think that the House of Representatives has any power to enable us to amend.

I read where someone suggested that they could grant that authority to us. I have not looked into the precedents on that, but I do not think the Senate has any authority to amend, in the first place, and the House has no power nor authority whatsoever to enable us to try to amend.

So I submit those matters to you, gentlemen.

It represents a matter that I have been concerned about.

May I just mention, in the next 10 or 15 minutes, it is not the time, as I see it, for Senators to discuss points of law or points of evidence, conflict of evidence, or anything like that.

If a Senator wants to, at the end, discuss this with his peers before final judgment, I urge you to seek some reasonable time, not to cause undue delay, but to give any Senator a chance to reason with his fellows, and any other Senator a chance to ask questions if he sees fit.

So, gentlemen, I appreciate this very much. It is more than a privilege to be heard, and I appreciate your attention.

The CHAIRMAN. We appreciate your being here and giving us the benefit of your advice over the years, and the positions that you have held that relate directly to this.

I may say, with respect to these items that you commented on, I am completely in accord with you that under the Constitution the Senate has absolutely no right to amend or modify any article of impeachment.

The precedents do indicate that the House has modified the articles of impeachment on occasion, but certainly I think we would be usurping the constitutional powers of the House, the powers that are given to them under the Constitution, if they were to attempt to amend or modify. That happens to be my own view.

Now, you have touched on some of the items that are going to give us problems here. The questions of the type of evidence, what evidentiary rules do you follow? I think under the rules now that are in existence, if we made no further change, I would presume that the Chief Justice would follow the normal evidentiary rules in a criminal proceeding, but I have no assurance of that if he did or did not; whether any Member of the Senate were to take an appeal, then it would be decided by a majority vote of the Senate on that very issue.

Senator STENNIS. I think you are correct.

The CHAIRMAN. I think we will have the question raised in the course of the proceedings as to what type of evidence is the best evidence, will there be an offer made, and I can conceive of an offer being made, a transcript of the testimony from perhaps the select committees here, and the question then will arise, perhaps: Is that the best evidence as far as the Senator is suggesting, the confrontation to have the witness there and have him subject to cross-examination, under oath? Those are the things that we are going to have to go into.

Now, I would like to ask you, if I may, on one or two other items that we will be considering.

How do you see the role of the Senator himself in this proceeding?

I say that because I know that some Senators have indicated already how they may feel, and they have not heard the evidence yet.

Senator STENNIS. Yes.

The CHAIRMAN. And I know that the issue would arise as to whether a Senator has the right to participate as the prosecutor, if you will, or as a defense speaker, if you will.

How do you see the role of the Senator, Senator Stennis, in this matter?

Senator STENNIS. Well, I do not think there is any way to exclude a Senator from participating even though he has expressed his conclusions—perhaps openly expressed his final conclusion. You know, he is a Senator, and he will be casting a vote.

Now, as to whether or not a Senator asks questions of the prosecution type or asks questions that might be called for the defense, I think he can ask any question that he sees fit in the manner provided by the rules by submitting the question through the Chief Justice.

The CHAIRMAN. That is correct.

Senator STENNIS. But, you mean does a member have the right to assume the role of prosecuting attorney during the trial?

The CHAIRMAN. I was just thinking more of propriety rather than does he have a right.

We know a Senator has pretty broad rights as to what he could or could not do, but I was looking for some guidance as to propriety—what the proper role for a Senator is.

Senator STENNIS. It occurs to me, Senator, primarily he should sit back and listen to that testimony intelligently and with all the dedication he has, weigh it the best he can, and then, of course add to that, I think, the benefit of argument with his fellow Senators; but I do not think he can take a role in the presentation of the case.

Now, he can ask questions. I would think they ought to be in the neighborhood, though, of things that he though had been omitted, matters that were brought in, whether favorable or unfavorable to the accused, but to take a positive stance, so to speak, for the prosecution or the defense would be highly improper. And, to throw in for good measure, I do not think he has any place before the television camera, either during the trial—and that is my idea about it—giving his opinion there, because it is too serious a matter to jump to a conclusion, or comment on the evidence, as I see it.

The CHAIRMAN. My next question was going to relate to television. As you know, there have been proposals that any impeachment trial be open to the broadcasting media in order that the American public might be kept as fully informed as possible in this proceeding. What are your views with respect to the broadcasting of this proceeding?

Senator STENNIS. Well, Senator, I may be a little, like it has been expressed, hardnosed, and I may be a little firm on things of this kind. I do not think the courtroom is the proper place for television cameras, and I do not think it is the place where they are proper.

But, I do not think, personally, it would be a proper place for television, if there is a trial; even though I can see where certain benefits could come, that is to the public.

Some of them would be interested, and it might be—a benefit might flow from it. I cannot be very particular, but I think the trial will be long and drawn-out, and it is just that just so many elements would be heard.

Some people might hear all of it, but some might hear just parts of it. I just do not like the idea of televising a trial, period.

But, further, I think we will set a precedent here of televising Senatorial proceedings. What we will do about our own regular proceedings, are we going to leave them off? If you send this film all over the world, persons can pick out certain parts of it and show it to the public, and in those countries, create a bad rather than a good impression about us, with a limited showing of some facts.

Another thing, whoever is exhibiting it, wherever they are, in this country or abroad, anywhere, can give such background or comment as they see fit, pro or con, with reference to this fragment of the testimony that he is going to show; and that impression is unconsciously affecting a lot of listeners.

I think it would be better, by far, as a whole, in the interest of the welfare of the Nation to just leave off the televising part.

The CHAIRMAN. The present rules provide that the Senate shall go into closed session for its deliberation. I am wondering if you have any thoughts on that, as to whether the deliberations ought to be held in open rather than in closed session?

Senator STENNIS. Well, frankly, I think, Senator, there would be some advantage, which would be true with our committee to have both open and closed discussions among the Senators.

I think great value comes from that close intimacy of closed discussions among Senators.

At the same time, there would be some good reasons for discussing some phases of it in public.

If the Senators wanted to have a discussion in public, that would be a part of it.

I think good can come from using the combination of those systems. That is just my impression.

If I had to choose one way or the other, all of the one way or the other, I would say let the Senators who are the jurors and judges of the law—let them have a personal, intimate, closed session and discussion of it.

The CHAIRMAN. The last item I have to get your view of is with respect to the right of the Chief Justice to vote in the event of a tie.

There are those who say that the Chief Justice steps into the shoes of the Vice President for that purpose, and should have the right to vote. However, that is not what the Constitution says.

The constitutional authority for the Vice President is the right to vote in case of a tie, which is spelled out precisely. The duties of Chief Justice are given to him to sit as Presiding Officer in the event of an impeachment trial.

Obviously, that question would not arise on an article of impeachment, but it might arise, conceivably, on some procedural matters, where only a majority is required. Do you have some thoughts on that issue?

Senator STENNIS. Well my thought on it, Senator, is that the Chief Justice of the United States is put in that position by the Constitution

itself, and that it would be quite helpful for him to move things along, and to make initial rulings, which will all be subject to appeal.

As I would see it, you know, on admissibility of evidence, and so forth, it would help to have the benefit of his judgment as well as to expedite the proceedings on this matter of casting a vote to break a tie, your observation and questions in date to that.

The CHAIRMAN. Yes, sir.

Senator STENNIS. That is a very difficult one.

He is not a Member of the Senate.

I would think, though, on matters of pure procedure, that it would be all right for him to have a vote to break a tie.

Now, on the more important question of admissibility of evidence, you just almost have to have someone to make a ruling on it, but I do not think the Chief Justice ought to have a right to cast the deciding vote on a motion to overrule his ruling.

Just leave him out as a party to it.

I had not thought about that. You gentlemen will have that before you, and I feel you will work out something.

The CHAIRMAN. Thank you, Senator Stennis.

Senator Hatfield?

Senator HATFIELD. Thank you, Mr. Chairman.

Senator Stennis, if my colleagues on the committee will indulge me just a little, I would like to ask some questions that may seem very elementary. But, as one of the nonlawyers on this committee, I find it important to try to resolve these important statements in my own mind.

Senator Stennis, you spoke about the degree of proof necessary to apply in the case of impeachment.

I believe that you used basically what is required in a criminal code; is that correct?

Senator STENNIS. Yes, that is right. Beginning from the smallest misdemeanor on up.

Senator HATFIELD. Now, I believe also you addressed yourself to the fact that an impeachment trial was distinct from a criminal proceeding, but the act of impeachment is not a civil court proceeding, either.

Is it not a third court, in effect a trial of impeachment?

Senator STENNIS. Well, as a general idea, my concept is that the Framers of the Constitution converted the House of Representatives and the Senate into a special court. That is the way I see it.

Senator HATFIELD. Was it a criminal court?

Senator STENNIS. Well, when a person is charged with a criminal act which carries a penalty or punishment, whatever you call it, why, that is getting mighty closely akin to a criminal court proceeding, but, further, more than that the Nation is a party.

The country is a party to these proceedings, and that requires substantial evidence beyond a reasonable doubt.

I do not have any trouble deciding that myself. I am a lawyer, and my conclusions are based partly on my experience as a courtroom official, but I think this is far more than just a motion before the Congress.

I say it is far more than a motion by someone to be convicted or to be taken out of office. The Nation is a party. The country is involved in this matter.

So that, that gives it a serious aspect, to me.

Senator HATFIELD. I would agree with you as to the seriousness of this action, but in my general layman's understanding we have two basic actions in a court of law: one, a civil action; one, a criminal action.

Would you classify a trial of impeachment as one of these two or as a third type of action, restricted to high officials as listed in the Constitution?

Senator STENNIS. Well, I do not know—it does not have all of the elements of a criminal court, but it has so many that predominate that I think it ought to require the degree of proof that I have already said, and that is one of the things that I am concerned about—just the preponderance of evidence is not enough.

Clear and convincing is not enough proof. As I see it, this test that I apply does not say "beyond a doubt"; it says "beyond a reasonable doubt."

That has centuries of meaning behind it.

I am getting at the Senator's question, which is very relevant, indeed, as best I can.

Senator HATFIELD. Would I draw the right conclusion, then, that under this interpretation, the President then could only be impeached on the basis of indictable offenses that would be listed in a criminal code?

Senator STENNIS. Well, I would not reserve judgment on that.

In great deference, I do not believe you gentlemen can write a rule on that as to whether or not a specific charge that comes over as impeachable is an impeachable offense.

I think every Senator has got to make up his own mind on that, and be it bribery or treason, we know they are crimes; and then this additional language wrestles with that language and is not as conclusive as it could be.

I would try not to impose just my view on anyone about that.

I have got to see the facts myself—I mean, the charges.

Senator HATFIELD. Senator, in a regular criminal court, if an indicted person is convicted of a stated crime, can he be tried a second time for that same crime?

Senator STENNIS. Well, that is fundamental.

We cannot be put in jeopardy twice for a criminal offense, but this says—

Senator HATFIELD. But the President could be, if he were impeached and convicted, is that not correct?

Senator STENNIS. Because of the express terms that are provided by the Constitution, it is a special situation. Apparently they wanted to have it so he could not be indicted and tried while he was sitting as President; but they did not want him to be excused later, that is, necessarily excused from prosecution later. But I do not believe this would constitute double jeopardy.

I do not think the double jeopardy principle of our law makes the proceedings of impeachment a civil affair.

Senator HATFIELD. But I believe the President, under article I, section 5, is removed from double jeopardy—the protection of double jeopardy, if he is convicted under an impeachment proceeding; so that

would not be, then, the application of the general criminal code or criminal law traditionally, would it?

Senator STENNIS. Well, that is true, but it does not prove, with all deference to you, that because this is made a special case, does not prove that impeachment does not have a great many elements of criminal proceedings as well as criminal offenses.

Senator HATFIELD. You see, Senator, for a layman like myself, I am not sure about a constitutional section or article.

I can go to the code. I can go to the statutes. I can go to the Supreme Court rulings, as to what is meant at a certain given time, but here in this particular case of impeachment the courts have not ruled on it, have they?

Senator STENNIS. No, no.

Senator HATFIELD. So, we have to go, basically, to the dictionary on it, and just as Justice Holmes said, we should not do. The Constitution, on the other hand, takes each word and tries to reach it as defined by a dictionary written by Webster. So, as I say, I ask these questions because I have to join with the expression of Justice Frankfurter, who said the Constitution is a living organism and not a literary composition.

So, consequently, I feel that we have to look far beyond the words of the Constitution itself, and look to the origin of the impeachment, even back to the English common law. We must look at it under the Thirteen Confederate States, and look at the Constitutional Convention. I keep running across these words that they consider misconduct in office—these were the words they used in the Constitutional Convention—misconduct in office, which did not and is not defined necessarily by a criminal code nor was it necessarily indictable under a civil code.

And then I go back to Blackstone, and I find that he says that impeachment is defined as maladministration of a public trust.

So, it is hard for me to fit that into a precise code of defined criminal acts, in my own thinking.

Senator STENNIS. Well, you will continue to find it difficult, Senator Hatfield. You are a sincere man.

You are in search of truth, but it is true that according to the record of the Constitutional Convention, the word "maladministration" was proposed by no less than George Mason, as I recall, but totally rejected by the Convention. You will see "maladministration" was, as I recall—

Senator HATFIELD. Yes. And, as I recall, it was not necessarily a rejection of a concept expressed there, but more of a precise definition of whether the State legislature should make the determination or whether it should be by the Senate of the United States. Those were the gives and takes of that Convention.

Well, I appreciate very much the wisdom you have brought to this committee, Senator.

Senator STENNIS. Well, thank you for using that term "wisdom." I feel like I am testifying, and I emphasize again the reason I came here is through a sense of duty, because of the experience I have had.

That is all. I have nothing else to say.

I have kept quiet about this case, too, as of old—I mean, I have not made any remarks about it.

Senator ROBERT C. BYRD. Mr. Chairman, I want to express my appreciation for the testimony that has been given by Senator Stennis, a Senator for whom I have a high regard, and greater respect as a former judge and as a Senator of the United States.

Senator STENNIS. Well, Senator, I certainly thank you, and so much, for your feelings over the years.

Senator ROBERT C. BYRD. There was a question of standard of proof. I personally would subscribe to the standard that has been expressed by the Senator from Mississippi and applying it to myself, and I think that I ought to follow that standard, that there be proof beyond reasonable doubt. But there is no standard that can be written to these rules by this committee or by the Senate that can force me to that standard or any other standard; and, personally, I think it would be futile for the Senate and probably ill-advised for the Senate to attempt to write into its impeachment rules a standard of proof.

It cannot enforce the standard. A Senator is going to apply his own standard, and if he wants to say that the President is guilty without any evidence at all, there is no way we can disqualify that Senator from voting.

Every Senator, under article V, of every State—under article V of the U.S. Constitution—is entitled or can only by his own consent give up its equal suffrage from the U.S. Senate. So there is no way of disqualifying, regardless of what his own standard is.

He might give lip service to that standard, but he is going to apply his own standard.

Senator STENNIS. That is right.

Senator ROBERT C. BYRD. And do you agree with me that while you and I would want to adhere to this standard, and maybe most or all of the Senators would, that we need not put it into the rules to have it applicable and that, indeed, it would be ill-advised to attempt to write any standard into the rules, any standard of proof?

Senator STENNIS. Senator, you expressed it better than I could.

My notes that I made to myself here will show that I jotted it down. You see, this is not a plea to write in any standard. It was a plea—do not write in the standard there of clear and convincing evidence.

Leave it to each man, as I see it, and as you so well stated each Senator.

It is his conscience and his judgment that will control.

Senator ROBERT C. BYRD. I have only one other question, because I think others have gone into it and have asked the questions which I would have asked, and the answers have been given.

As to the rules of evidence, in the previous impeachment trials, the Presiding Officer, whether he was the Chief Justice in the one impeachment trial or whether it was the Vice President and/or the President pro tempore of the Senate, and the other trial made the initial rulings; and under the impeachment rules, the Senate wishes to appeal it—a ruling of the Chair. And it could do so, and has overridden the ruling and has many times done so in the *Johnson* trial, the overruling of the Justice, 17 times. And I personally would hesitate to attempt to write into these impeachment rules a code of rules of evidence, whether it be in the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or some rule stating that any or all of the statutes regarding evidence could be applied.

I personally think that this is a matter which we are going to have to leave up to the Chief Justice to make the initial ruling on, or under the rules, if he wishes, in the first instance, to present the matter to the Court of Impeachment. He has that option. And if the Court wants to overrule him, it can do so.

I personally feel that that is probably the way we ought to leave it.

I would just have the one possible condition to reserve to myself, and I say to myself I might think it best for me to offer an amendment at some point—I am not saying that I will; but if anything is written into these rules concerning evidence, it ought to be a broad, simple, flexible rule which I think the Chief Justice would adhere to, anyhow; if he did not, the Senate would overrule him—such as any evidence that is relevant and material and cogent, and not unduly prejudicial.

Even such a rule I think would be very difficult for us to agree on, but we might—in any event, my question to you is, Senator Stennis, do you agree it would be unwise to attempt to write into these rules of impeachment a code of rules saying that in an impeachment trial the Federal Rules of Civil Procedures would be followed, or the Federal Rules of Criminal Procedure would be followed?

Do you agree that the Chief Justice will make that ruling and if the Senate wants to overrule it, it can or he can submit it to the Senate in the first instance.

In other words, the present rules are sufficient in that regard?

Senator STENNIS. I expressly advise against trying to read in or write rules providing that the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, and so forth control, or anything with reference to the State rules.

Now, if you could, and saw fit to, write something that would at least be a warning, you cannot control everything. It is going to be controlled by the membership of the Senate against the admission of hearsay testimony, but if you cannot do that, and see a way that you think proper, why that would be doubtlessly a very sound decision; but I want to put in that word, as I said, warning against hearsay.

Senator ROBERT C. BYRD. On that one aspect of evidence, what we have heard over the television and so on, yesterday and today, as to what the President has said, that is hearsay as far as I am concerned; but how can we safeguard a Senator from being exposed to hearsay evidence?

There is no way in the world we can do that.

We are exposed to hearsay evidence every day in the newspapers, in talking with colleagues and listening to various communication media.

Now, without anything in the rules and I dare say we would probably have real problems attempting to write anything in the rules dealing with hearsay, one way or the other—without anything in the standing rules, the Chief Justice is going to make the rulings, and there is no question in my mind but that if hearsay evidence were to be brought in, attempted to be brought in, he would rule against it.

But I still think that Senators, in their judgment, may wish in that particular instance, for that evidence to come in, even though it is hearsay; and they have the right and the power under the Rules to

overrule the Chief Justice in that instance. So, do you think that the present rules are sufficient with regard to even hearsay?

Senator STENNIS. Well, generally, I would think that maybe the best you can do is just that.

I want your consideration of this, but I fully understand the problem; but under the proposals before you, some of them—in effect, legitimatize hearsay evidence as a matter of the Rules of the Senate, which I think would be tragic error. And my remarks were addressed to that.

Senator ROBERT C. BYRD. Thank you.

The CHAIRMAN. Senator Scott.

Senator HUGH SCOTT. Mr. Chairman, I appreciate your recognizing me. I am sorry that I am late. I had been attending a funeral.

I have the benefit of the staff notes of the questions asked of Senator Stennis. I do not think I want to add anything except to affirmatively agree, generally, with what he has said; and particularly his warning against hearsay evidence. As I have often pointed out, in such matters of this type, justice to be done must be seen to be done, and it cannot be seen to be done if the general public is unaware of the distinction between hard factual evidence and live and flesh-and-blood witnesses.

For example, testifying to evidentiary matters, as against guessing or innuendo or rumor, or a forced degree of hearsay, we must be extraordinarily careful to lean over backwards to be fair in every particular. And I do appreciate what the Senator has said.

The CHAIRMAN. Thank you, Senator Scott.

Thank you, too, Senator Byrd, for what you have contributed.

Senator Allen?

Senator ALLEN. Thank you, Mr. Chairman.

Senator Stennis, along with the chairman and all of the other members of the committee, we are honored that you have come forward to give us the benefit of your reviews and of your philosophy.

One of our heroes, yours and mine, once said of another of our heroes, Gen. Stonewall Jackson said of Robert E. Lee, that General Lee was the only person that he ever had seen that he would be willing to follow anywhere blindfolded, and many Members of the Senate have that regard for you, Senator Stennis; and I might say we appreciate the comments that you have made, and the philosophy you have expressed.

Senator STENNIS. Senator, I thank you, and you make me feel very humble, really, and unworthy, coming from you. I deeply appreciate your remarks.

Senator ALLEN. Actually, then, Senator Stennis, you feel that the present rules would serve the Senate very well indeed; is that correct?

Senator STENNIS. Yes; that is correct.

The present rules, generally, and I would want more time for every Senator, if he desires to present his views—

Senator ALLEN. I understand.

That is the main suggestion you would make as to a decision, that each and every Senator, not on admissibility of evidence necessarily, or interlocutory order, or by decision, but on the final decision that he be given more time to express his views?

Senator STENNIS. Yes, sir.

Senator ALLEN. I feel sure that will be the view of all Senators, that each Senator would have that right.

Now, on the matter of the measure of proof.

I think that has been brought out very well, indeed, and your position is well stated on it, that you do not feel that any measure of proof should be established by a rule, but that if the Senate committee and the Senate wish to set the rule, it should be beyond all reasonable doubt?

Senator STENNIS. Yes; that is right, Senator.

Senator ALLEN. Well now, on the matter of setting any standard or any measure at all, it occurs to me that if we are able to set a rule that the proof shall be beyond all reasonable doubt or shall be clear and convincing, or shall be by a preponderance of the evidence, or to the reasonable satisfaction as we have in our civil cases in our Alabama courts, if they could get it at any of those levels, the Senate could also set it at a mere scintilla of evidence, which would be sufficient, would that not be correct?

If they can set it at one level, they can set it at another.

Senator STENNIS. There is logic in what you say, it being such a serious matter, as I see it.

I would think that the Senate would have power to put up a guard-post there, on the degree of proof by the same logic.

Though a majority of the Senate could change that and say a scintilla is enough, as a matter of fact, someone argued to me that this entire matter was nothing more than a motion, as in a motion in the British Parliament challenging the Prime Minister and leading to a popular vote.

I think that is a totally wrong concept, but I am not urging that you try to establish a rule as to the degree of proof.

It is such a delicate, sensitive matter, I just wish we could have a barrier there to hearsay evidence; but I agree that every Senator has got to decide it ultimately in his own mind.

Senator ALLEN. I may be getting a little far afield, but would a respondent in an impeachment proceeding be entitled to the right of due process?

Senator STENNIS. Well, strictly speaking, perhaps not in every way. Due process of law, you know, is a broad term, and takes in the whole system in a way; but certainly he is entitled to the fundamentals.

For instance, notice, and a chance to be heard.

I think, to be confronted by his witnesses, if he chooses, or at least his representatives confront them, and his peers, who are trying him, to see the witnesses.

That is a big factor, as you well know in judging testimony.

Senator ALLEN. I think it is perhaps farfetched to state this as a hypothetical inquiry, but suppose the Senate denied such fundamental rights of due process? Would there be any recourse by the respondent?

Senator STENNIS. Well, he could appeal.

Those representatives could appeal to the Senate to take a course, and all that, but if, in the end, he is denied these things, I do not think he has a right of appeal.

Senator ALLEN. That would end it?

Senator STENNIS. That is the end.

Senator ALLEN. In the Senate decision?

Senator STENNIS. That is it.

Senator ALLEN. And in an arbitrary or capricious trial, with no measure of due process, there would still be no appeal from that?

Senator STENNIS. I think that is correct.

There is some talk about having the right to appeal to the Supreme Court. I do not think so, at all, as I see it. That is the final judgment.

A unanimous verdict is not required here for conviction, and this one-third that did not vote to convict, the margin there, that absorbs the fact that you do not have to have a unanimous verdict, absorbs error under this procedure; and when two-thirds conclude that way and so vote, why, that is due process for that purpose. No appeal.

Senator ALLEN. I notice one of the rules—one of the proposed new rules provide that at the end of the trial when the Senators are being polled for their verdict, the new rules suggest or provide that the response by a Senator to the inquiry by the Chief Justice, on what the Senator says to the charge in the first article, or whatever article it was, that he should respond either "sustained" or "rejected."

That would be a departure from the custom through the years, would it not, where the response would be "guilty" or "not guilty?"

Senator STENNIS. Yes. Yes, a considerable departure.

I think the term "guilty" or "not guilty" is more proper.

Senator ALLEN. Yes, sir.

Senator STENNIS. And more in keeping with the occasion.

Senator ALLEN. Well now, the Senators should not allow their status as Senators to become judges, so-called, as provided by these proposed new rules, should they?

We should retain our status as Senators and act as Senators, should we not?

The new rules call the Senators judges, the majority and minority leaders Chief Judges, and the assistant leaders Deputy Chief Judges.

You do not see any need to have some distinction of your colleagues in the Senate, do you?

Senator STENNIS. No; I think not.

It is confusing, misleading, casting in a role that we do not occupy, cannot occupy as I see it.

We are judges to the extent that we can decide what is the law, and what is an impeachable offense.

Senator ALLEN. But we are acting as Senators?

Senator STENNIS. Yes.

Senator ALLEN. I thank you.

Senator ROBERT C. BYRD. The Senator does not see, in the attachment of those titles, any indication that that would be a life tenure; and would you envision that?

Senator ALLEN. Would suit me fine.

Senator GRIFFIN. Mr. Chairman, I want to thank Senator Stennis for taking the time to come before the committee, and give us the benefit of his views, not only because of his tremendous background, but also the respect we all have for him. I think it indicates how seriously we are all, all of us, thinking of this matter.

I was not able to listen to the presentation, but my counsel has filled me in on the major points that you have made, and I find myself generally in agreement with most everything you have said.

This matter about whether or not there would be an appeal to the Supreme Court from the Senate is one of the questions about which there is uncertainty.

The Supreme Court is now taking jurisdiction of cases that lawyers and judges in the past thought they would not take jurisdiction on.

The Constitution says that the House shall be the sole judge of the qualification of its Members, the Supreme Court took jurisdiction. The point I would seek to make and perhaps underscore is that I think it would be unfortunate to make a change in the existing rules which might give rise to the basis of an appeal to the Supreme Court, if there were not some very good reason for doing so. Not only does it throw the old rules out and write a whole new set of rules, we invite the possibility of judicial review.

Furthermore, it seems to me it is very important that the public, when this is all said and done, whatever the verdict, whether it is guilty or not guilty, that they accept the verdict. If they feel that we have changed the rules in the middle of the game, it seems to me that is something that we ought to try to avoid.

I just make those comments as a supplement, perhaps.

I am underscoring something more.

Senator STENNIS. Your comment certainly adds value, I think, on this matter of appeal now.

I think it is our constitutional duty to perform our functions on the belief and assumption that there is going to be no appeal—certainly no one can say there is going to be an appeal to our verdict. Since there will be no appeal we must act responsibly.

I think it is up to us to follow what appears to be clear law, that there is no appeal; and this is final.

The CHAIRMAN. Thank you very much, and on behalf of the entire committee I want to express again our appreciation to you for your excellent presentation. We thank you very much.

Senator STENNIS. I feel I have been derelict in not having a written statement.

I want to emphasize how pleased I am that you gentlemen are going into this thing, and doing so in an impartial way; and that I think you have come out with something sound and solid.

Senator HUGH SCOTT. Mr. Chairman, if the Senator does not mind, I do not believe one question was covered, and perhaps we should cover it.

Suppose this trial begins and the Senate has been seated with the corpus of the case and has heard what would amount to several months of testimony, 2 or 3 months, and then a new Congress is sworn in.

Would a new Congress have certain additional functions? Would the House of Representatives have to act again on the articles, or could we adopt the impeachment articles previously passed?

Would the new Senators be eligible to serve, in your opinion? Would that open up that whole situation again, and would there be a possibility of an appeal?

Senator STENNIS. Senator, frankly I am not prepared on that subject.

I have thought about it, because it has been mentioned.

We have the precedent that we are a continuing body, and if that should hold, and the new Senate should go into it, the new Senators should be entitled to vote, because they have been sworn in.

But I am not prepared to answer that question.

The CHAIRMAN. Thank you very much. Thank you again.  
Senator Javits.

STATEMENT OF HON. JACOB K. JAVITS, A U.S. SENATOR FROM THE  
STATE OF NEW YORK; ACCOMPANIED BY HON. PHILIP A. HART,  
A U.S. SENATOR FROM THE STATE OF MICHIGAN

Senator JAVITS. Mr. Chairman, if you would not mind, I would like Senator Hart to sit next to me, as he and I are testifying in tandem.

The CHAIRMAN. Certainly.

Senator JAVITS. Mr. Chairman, I would like to file with the committee my whole statement, and then deal with parts of it.

The CHAIRMAN. Without objection, it will be made a part of the record.

[The written statement of Senator Javits follows:]

STATEMENT OF HON. JACOB K. JAVITS, A U.S. SENATOR FROM THE STATE OF  
NEW YORK

Mr. Chairman, I appreciate the opportunity to appear before you today to discuss the difficult but important questions relating to the rules which would govern a Senate trial should the House send to the Senate Articles of Impeachment against the President.

In contemplating the awesome responsibility which will face every Senator should the House act, I am struck with the enormity of the grave questions which we will be called upon to resolve. I am confident the Senate will execute its responsibility justly and honorably and in a manner worthy of the public trust. As the first step in the process, we must approach these questions dealing with the rules with a wide angle of vision and a sense of history.

At the outset let me state that I agree with the Committee's decision to use the present Rules of Procedure and Practice as a starting point. This will allow us to take advantage of historical precedents to the extent practicable and at the same time make changes to bring the rules more in line with many of the newer developments in procedure in this century. I believe that our first task must be the adoption of a set of rules which are designed to insure a trial that will be conducted fairly and efficiently.

It is also critically important that this historic process be understood by the American people. The public must have the fullest possible access to the proceedings and I strongly urge this Committee to recommend that all debate on interlocutory and final questions be conducted in open session. I also urge the Senate to allow radio and television coverage of the trial in a manner which will not interfere with fairness to the respondent and with decorum.

Of more fundamental importance, however, are questions relating to the nature of the process itself, the standard of proof required on the final question of removal, the admissibility of evidence and the role of the Chief Justice. I will then discuss several other issues.

NATURE OF THE PROCESS

The legal framework governing an impeachment trial is neither criminal nor civil. It is truly *sui generis*. It is also not a judicial process. A basic aspect of this proceeding is that it involves a wide margin of discretion as opposed to a judicial process—whether it be civil or criminal—which is necessarily guided by fixed rules of law and procedure. While the judicial process deals with each case as one of a type and seeks to determine it by the application of a rule for cases of that type, the impeachment process does and should treat each case as totally unique with ad hoc determinations made for that case alone.

Does it follow that the impeachment proceeding is therefore an arbitrary process which is not subject to the rule of law? That is not the case.

The rule of law stands for the proposition that decisions should be made by the application of known principles and that rights and property not be abrogated without basic fairness and due process. An impeachment proceeding is indeed a trial with many safeguards, including the requirements that specific allegations of misconduct in a Bill of Impeachment be proved, that a full hearing be accorded, that parties be allowed to present evidence and to cross examine witnesses, that a determination be made on the record and that the entire proceedings be subject to the review, scrutiny and criticism of 220 million Americans,

the active bar and generations of people to come. It is genuinely and uniquely a democratic process. In this day and age it is a *public* process properly involving the body politic. It is a political and legal process not subject to judicial review. Although as I indicated above, this is not a judicial process, I would analogize it to a civil, non-jury trial. Let us now turn to a discussion of the rules.

I believe that the Senate can adopt new rules before the start of an impeachment trial. This was done in the Johnson trial even though the rules were adopted by the Senate again once sitting on the impeachment at the suggestion of the Chief Justice. In addition, the present rule XI was adopted in 1935 when there was no pending impeachment trial. Thus there is ample precedent for this approach. These rules once adopted can be changed during the trial by majority vote and indeed several amendments were made during the Johnson trial. However, changes during the trial should be kept to a minimum since all parties would have relied on the previous rules. As a start, the present rules should be modified by specifically providing that the regular Senate rules shall apply in the absence of a particular impeachment rule covering a specific situation. This was in fact the procedure used in the Johnson trial as recommended by the Chief Justice and it should be formally recognized in the rules.

#### STANDARD OF PROOF

The question of what standard of proof should be used at the trial is nowhere addressed in the present rules. While there have been attempts, notably in the Johnson trial, to deny that the Senate sits as a court during an impeachment trial, the Constitution, the surrounding history and the practice indicate that the Senate does function as a court when trying an impeachment. Article I, Section 3, clauses 6 and 7 of the Constitution speak of "the Sole Power to try all Impeachments", and also contain terms such as conviction and judgment. Article II, Section 4 also talks of conviction. Hamilton in the *Federalist* No. 65 spoke of the judicial character of the Senate as a court in trials of impeachments. Finally the fact that rules of evidence have been used in impeachment trials is a further indication that the Senate has operated as a court.

However, there has been no extended discussion in past trials of what standard of proof should be used by the Senate. Many have assumed that it should be "beyond a reasonable doubt" as in a criminal trial. But an impeachment trial is not a criminal trial and Article I, Section 2, clause 7 of the Constitution specifically provides for further criminal prosecution under the law after conviction in an impeachment proceeding. Additionally, the only punishment provided in the Constitution is removal from office and bar from holding further federal office. Thus the analogy to a criminal trial is not accurate. On the other hand, some have suggested that the standard of proof should be "preponderance of the evidence", the standard in a civil case. This also seems inappropriate as a standard in a serious proceeding such as an impeachment trial. Especially since the House Judiciary Committee in its deliberations used "clear and convincing evidence" as a standard it would be inappropriate to use a lesser standard in the Senate.

I lean toward the view that the most appropriate standard to use is "clear and convincing evidence" which lies between the standards of "preponderance of the evidence" and "beyond a reasonable doubt". The House Judiciary Committee in approving three articles of impeachment found by their votes that there was "clear and convincing" evidence as "warrants impeachment and trial and removal from office" as stated at the end of each of the Articles. Thus the committee did not just make a preliminary judgment like a grand jury that a trial was warranted by the evidence but from their view also made a judgment that there was "clear and convincing evidence" to warrant removal from office. While removal is exclusively in the province of the Senate, we do not necessarily have to use a different standard than the House at any impeachment trial.

In the last analysis, the standard of proof to be used will be an individual judgment that will be made by each Senator. Therefore, it might be more appropriate not to include any standard in the rules. If this is done, each Senator would be free to make up his own mind and further, there should be a prohibition against any charge from the presiding officer dealing with standard of proof.

#### RULES OF EVIDENCE

Even though I do not think it is required as a matter of law, I would nevertheless recommend to this Committee that common law rules of evidence restricting hearsay (with the recognized exceptions of course) and other secondary evidence

should all apply, since the President could neither confront nor cross examine upon the evidence if the case were otherwise. As in a civil trial, evidence should be excluded that is irrelevant, immaterial, incompetent or unduly repetitious. The ultimate test of admissibility must be whether the proffered evidence is reliable, probative and relevant.

I think it is important to remember that in a civil, non-jury trial, it is assumed on review that the judge will not rely upon untrustworthy evidence in reaching his ultimate decision. Thus, if there is *competent* or trustworthy evidence to support the decision, a reviewing court presumes that the trial judge relied on *that* evidence in reaching his decision. In an impeachment trial the Senate, sitting as a court en banc, should not be overwhelmed with technical questions of admissibility, but rather with the weight and probative worth of evidence which each individual Senator must determine as a judge.

Because of the basic differences between civil and criminal liability, there has evolved a substantially different set of rules governing the admissibility of certain kinds of evidence. In civil cases, the admissibility of the out of court statements of an opposing party is common. However, admissibility of such statements by an accused is restricted. The statement must be voluntary, must be corroborated and frequently there must be an independent hearing on its admissibility. There are also significant differences concerning the applicability of various presumptions and permissible inferences. In a criminal trial, of course, the drawing of inferences adverse to the accused is restricted. Since the impeachment process is not criminal in nature I support the civil law approach on evidentiary matters.

While all witnesses subpoenaed in a Senate trial have the same general duty incumbent upon all citizens to testify in a judicial proceeding, we should recognize certain constitutional exceptions commonly invoked as privileges, i.e. assertion of the right against self incrimination, the attorney-client privilege, marital communications and others.

I also believe that the Senate must have the power on its own motion or upon request of the parties to subpoena evidence—including documents and to address interrogatories. Rule V would appear to allow this but it should be clarified.

I think that it is imperative that the Senate be able to hear and weigh all relevant evidence, but application of the common law rules of evidence as I have suggested would permit a great deal of evidence developed by the House Judiciary Committee to be introduced in the Senate. There has been some confusion about the practical effect of several technical rules of evidence, such as the "best evidence" rule. Simply stated, the rule provides that in proving the terms of a writing, the original writing must be produced unless it can be shown to be unavailable for good cause. If, for example, a Presidential tape is offered into evidence to establish what was said at a meeting, the best evidence is irrelevant. The rule is only relevant when the issue is the contents of the *original* document (i.e. the recording) and there is an effort made to substitute transcripts or copies of the original tape. If the original is unavailable, the copy can be easily qualified. And of course, in a very real way, the tapes would be better evidence than the mere recollection of a participant to a meeting.

Even though, I do not feel that we need an established rule on evidence, the Senate should resolve this question before trial in order to allow all parties to prepare accordingly.

#### ROLE OF CHIEF JUSTICE

The role of the Chief Justice in the trial of the President has generated some discussion and I would like to see us proceed on the basis of trust and confidence in the Chief Justice with modifications in the present rules to clarify his status.

First, the present rule VII gives the presiding officer of the Senate the authority to direct preparations in the Senate chamber. This is before the trial starts and presumably the rule refers to the President Pro Tempore (or possibly the Vice President in a suitable case). Probably it should be spelled out in the rules and the President Pro Tempore should be given the power over arrangements before the trial starts. Rule VII also gives the presiding officer *at the trial* the authority to direct all forms of proceedings and all forms not otherwise specifically provided for and Rule V provides that the presiding officer, presumably at the trial, has authority to issue writs, orders, mandates, etc. authorized by the Senate and enforce such orders and regulations as the Senate authorizes. It should be made clear that all preparations, orders and the like which take place during the trial are to be carried out by the presiding officer at the trial on direction of the Senate.

The present rules are silent as to the Chief Justice casting the deciding vote on a tie of the Senate. The Constitution is also silent on this point. At the Johnson trial two separate attempts were made to deprive the Chief Justice of such authority after he had voted to break a tie. These moves were rejected each time by the Senate. I believe the Chief Justice should have the ability to break a tie vote on procedure as this power is given to the only other non Senator who presides over the Senate—the Vice President. This does not apply to the vote on any article of impeachment of course. In addition if a tie vote occurs on a ruling by the Chief Justice, he is upheld in any event by the tie vote so his deciding vote would not change that actual situation. On the other hand, in decisions submitted directly to the Senate, the Chief Justice should be able to apply his thinking to the situation if it is so close a tie vote results. Thus I would specifically provide for the Chief Justice to be able to break a tie on procedural matters and it should be so stated in the rules.

The present rule VII provides that the presiding officer at the trial may rule on all questions of evidence and incidental questions. His rulings may be appealed to the Senate at the request of a member. In addition, the presiding officer has the option of referring the question to the Senate, without first ruling, if he desires. I believe the present rule is correct and the Chief Justice should rule on questions of evidence and other incidental questions arising during the trial. However, I do not believe the presiding officer of the Senate, in this case the Chief Justice, should rule on questions which require ultimate conclusions such as the sufficiency of the articles under the Constitutional standards for impeachable offenses. This is a question that should only be decided by a final two-thirds vote of the Senate and there should be no preliminary ruling allowed by the rules. This procedure was followed in the House Judiciary Committee when a point of order was made against the sufficiency of one of the articles on the ground that it did not constitute an impeachable offense and it did not lie since the Chairman declared it was a question to be decided by the final vote of the Committee on the article. The Senate rules should take a similar approach to this problem.

The present rule XIX provides that all questions to witnesses or motions or orders proposed by a Senator must be submitted in writing and put by the presiding officer. The only exception is an adjournment motion. I believe this procedure is appropriate and the Chief Justice should have the authority to put all questions from a Senator to the House managers or the respondent's counsel and XIX should be amended to provide that these types of questions should be handled in the same way as questions to witnesses. That is the precedent followed in the Johnson trial and other trials which allowed questions from Senators to be put to the managers and the respondent's counsel. The problem of the order of questioning has also not been dealt with by the rules. I believe that Senators' questions either to witnesses, managers or President's counsel, should be put after the managers and the President's counsel have finished their questioning and that the Chief Justice should have the right to ask questions at any point in the questioning of a witness. This procedure is similar to Federal court procedure where the judge can ask questions at anytime to try and get out all pertinent information. Finally, each Senator should have the right to stand up and indicate orally that he has a question or a motion or order which he is sending to the desk. These points should be dealt with specifically in the rules.

I believe that the Chief Justice should not comment on the evidence or make any "charge" to the Senate. An impeachment trial is not analagous to a jury trial as each Senator asks questions and functions as a judge rather than a juror. Thus it would be inappropriate if the Chief Justice charged the Senate and this was not done at the Johnson trial although the Chief Justice addressed the Senate regarding the divisibility of one article of impeachment. Specific language should be added to the rules which clearly states the procedure in this regard.

#### MISCELLANEOUS QUESTIONS

First, I would like to discuss the question of disqualification or excusing of Senators from the trial or final vote. In the Johnson trial, Senator Wade of Ohio was challenged at the time the oath was to be administered because he was President Pro Tempore of the Senate and would succeed to the Presidency if Johnson were convicted at trial. It was argued in opposition to his exclusion that States could not be deprived of two votes on the crucial question of impeachment and that each Senator takes an oath to do "impartial justice according to the

Constitution". The challenge was later withdrawn. It should also be noted that in the Johnson trial there was no attempt made to challenge Senator Patterson of Tennessee, the President's son-in-law. I agree with the opponents of the attempt to challenge Senator Wade and believe that the rules should state that no Senator shall be subject to challenge regarding his qualifications to sit in an impeachment trial.

On the other hand, Senators have been excused from a trial with the approval of the Senate because of illness which prevented them from attending the trial or reading the transcripts. In one case, the trial of Judge Louderback, a Senator was excused from voting on certain articles because of his doubts as to whether an impeachable offense was stated in those articles. I believe the rules should allow a Senator to be excused for reasons stated on the record and upon approval by the Senate. The Senate should pass on the individual cases, if any, since a Senator should only be excused under the most unusual circumstances.

Rule XXIII provides for the yeas and nays to be taken on each article separately but does not set any order for a vote when there are several articles. In the Johnson trial, this was done by order of the Senate and several votes were taken on the order. This procedure, setting a vote for final consideration, should be stated in the rules. Also the rule is silent about division of any article. In the Johnson trial a division was requested and the Chief Justice attempted to devise one, but could not, and the article as a whole was submitted for a vote to the Senate. I believe articles should not be divided because this raises a further question of whether a two-thirds vote is required on each part of an article and whether the House action on the construction of a particular article can be changed without further action by the House. Thus the rule should provide for no division of an article by the Senate.

The present rules XX, XXI and XXIV need to be reviewed and revised. Rule XX provides that the doors of the Senate shall be kept open during the trial but rule XXIV provides that any discussion on preliminary questions or the final question must be behind closed doors. I believe that the doors should be open at all times even during discussions of preliminary questions or the final question by the Senate except when the Senate by vote decides otherwise to avoid undue prejudice to the respondent or to avoid disclosure of essential security information. At the Johnson trial, most questions were decided without debate because the Senate did not want to go into closed session on many of the issues. Thus, there will undoubtedly be more debate on preliminary questions if the rule is changed. If there will be more debate because of the change in rules then debate on interlocutory questions should be cut back to a total of one hour with five minutes for each Senator recognized rather than 2 hours with ten minutes for each Senator.

Rule XXIV provides that each Senator has fifteen minutes in the final question including all articles and I believe this is the best way to handle that problem; if time permits the Senate could at the time of summation raise this to  $\frac{1}{2}$  hour for each Senator. There should be adequate debate on the final question, but with 100 Senators a reasonable time must be set to conclude debate. Since the number of articles in any impeachment trial is always a variable it is preferable to deal with the time for the final question encompassing all articles. I believe rule XXIV should also be changed to eliminate the automatic requirement for the yeas and nays except when one-fifth of the Senate demands them and except on the votes on the articles of impeachment.

One other question which has been raised relates to amendment of the House articles during the trial. This was done in the Louderback case. There, the House managers went back to the House for an amendment and the amended article was then answered by the respondent. I believe that an amendment of an article can only be made constitutionally by the House and cannot be made by the managers during trial pursuant to advance authorization by the House as has been suggested by some.

In another area, I agree with the procedure of present rule XIII providing that the Senate shall sit at 12:00 (noon) each day unless otherwise ordered, except I would change the time to 10 a.m. generally to allow more time during each day without the need for special order.

Finally, I believe that no interlocutory or final appeal can be taken from Senate decisions at any stage of an impeachment trial. If an attempt is made during the trial to file any appeal, our proceedings should not be stayed but the Senate should continue to carry out its Constitutional duty.

Not one of us is looking forward to the next few months. For me, this will be the most difficult decision I will ever have to make in public life. The problems I have touched on today are not intended to be exhaustive. Literally scores of procedural matters may have to be decided before we even begin to weigh the evidence. All of us in the Senate are mindful, as we approach this task, that as we judge the President, history will judge us and the American Constitutional system. We are therefore determined that due process will be accorded and justice done and that the country will be proud of the U.S. Senate.

Senator JAVITS. I shall try to confine my statement to 10 minutes.

Let me say, first, that I agree with the committee's decision to use the present Rules of Procedure and Practice as a starting point.

It allows us to take advantage of the historic precedent and at the same time to make changes to bring the rules more in line with many of the newer developments of procedure in this country.

Second, I think the public should have full access to the proceedings.

And as Senator Stennis has stated, I am worried about the impact of television on witnesses. I am not a bit worried about the impact of television on us, because ultimately we have to decide and vote in public, and we ought to say why. We can close the doors any time that two members so move, and a majority votes with them. We generally are committed to the public character of the proceedings, as Senator Byrd has pointed out, we are not going to be sequestered. But if we feel some particular discussion must be kept confidential, we can close the doors.

If we need executive testimony, we can always appoint a committee, which has been done before, and indeed these rules have got a provision for a small committee, or we can do it ourselves.

So, I think that that solves that.

I am, however, worried about the examination of witnesses before the cameras, because I am a lawyer.

I would suggest the possibility of a rule which perhaps the Rules Committee could bring in about panning, or otherwise using the camera to the disadvantage of a witness; requiring it should be shown from a fixed point.

And, second, I think, if I were you gentlemen, I would allow witnesses to be televised and then rule—have the Senate rule or committee rule on whether that objection is well-taken or not, because there is something about the fact a particular witness might just feel he simply cannot testify freely and without pressure, as a witness should, under the television lights, and cameras.

And we should make this agreement—

Senator HUGH SCOTT. Mr. Chairman, may I ask this very pertinent question?

Would you grant to the President the right to object to television?

Senator JAVITS. No. I would not, because I think he is in the same position we are.

Senator HUGH SCOTT. Thank you.

Senator JAVITS. Now, as to the nature of the process itself, the standard of proof, the admissibility of evidence and the role of the Chief Justice.

These are a few items I would like to take up. I would say an impeachment trial is neither civil nor criminal.

It is sui generis.

It is a unique process set forth in the Constitution, and while it is not a process which is arbitrary, not subject to any rule, I think it is a unique process, and the Constitution lays that down as clearly as it does the right of the Supreme Court to rule on constitutional cases, and therefore it has an equal impact.

I believe we will want to obey the requirements of due process, to give notice to accord a full hearing, to allow the parties, including the President, to present evidence, to cross-examine, to make a determination on the record, and the proceedings would be as open and public as possible, to allow all Americans to make a judgment themselves, as well as for posterity.

All of this would be our desire, whether it is required by law or not.

I do not believe an appeal lies from any judgment of the Senate, and I do not believe that the fact that a "new Senate" would come in would change the situation to respond to Senator Scott's question, because my objection was on all of that, and I can testify to that expertly.

Since 1957, I have been consistently defeated on the proposition that the Senate is a new body, and therefore that the adoption of its rules are de novo.

The Senate has consistently voted the other way, and, as to impeachment by the House, I believe when the grand jury goes out, this is an analogy, I think, which exists, the indictment persists.

But, another grand jury may bring in another indictment.

Similarly, a new House may bring in another impeachment, but the proceeding in the Senate, in my judgment, takes off from the terminal point of the House's vote on impeachment, and a new House does not necessarily mean a new Senate; and, I believe, the Constitution supports that view.

As to the adoption of rules, there is no question about the fact, not only the tradition, that even a sui generis body like the Senate, sitting as a trial court in impeachment can adopt rules for its own regulations.

It can change them in the course of a trial, but it can adopt them to begin with and stand by them as long as it wishes.

Now, as to the standard of proof, I thoroughly agree with my colleagues that the standard of proof should not be written in the rules.

I believe that every Senator must determine that for himself.

You can never contest out the question, anyhow; so why set a standard?

You cannot administer, you cannot compel. For myself, I believe, for whatever good it is to my colleagues, that the standard is clear and convincing evidence. This would warrant impeachment and trial and a removal from office.

And, of course, the House impeachment article says exactly that. And therefore I believe that they state a proper impeachment article in law.

Again, nobody can supervise that.

They are not disabled, in my judgment as a lawyer, but they do state a proper impeachment article in the law.

As to the rules of evidence, again I would not believe that we should adopt "rules of evidence" in the rules; but I believe the Senate should pass on the matter as each case comes up.

I do not like the idea that Chief Justice Chase was consistently overruled by the Senate in the *Johnson* case.

I think that is not healthy for us, and not healthy for the process or the country. So I believe we ought to, as far as we can, give the Chief Justice some idea as to how we feel about the rules of evidence.

I hear the discussion, for example, about hearsay. Well, I am a trial lawyer, and we all know the hearsay rule is not without exceptions.

If the President is shown to be a member of a conspiracy, he is bound by everything any one of the conspirators says.

If he has made an admission against admission, which he may well have done, as late as last night, it may be testified to.

Now, the best-evidence rule is yet another matter, and that I would hope very much will apply.

In other words, we would seek the best probative piece of evidence that we can in every given case; but I do not believe that we can rule out or rule in hearsay, and I believe it would be a mistake to try to do that.

I believe, generally speaking, the Senate will apply pretty much the rule which is applied in the courts, where you are trying a case without a jury; and, to me, that is probably the most exact analogy.

I do not believe we are jurors, because jurors do not ask questions, and we can. Jurors do not make objections, and we can.

Jurors do not appeal from a ruling of the judge, and we can.

As to whether we are judges, I do not think it is necessary to argue that question.

It is a theological question.

The fact is that we are 100 men—no women, unfortunately, right now—who are trying to decide a case according to the determinations of the Constitution. In my judgment we will generally apply the rules that courts apply, equity courts, in hearing cases without a jury.

Finally, the role of Chief Justice.

I must say, gentlemen, that I was rather appalled by the denigration of that role in the new rules that were proposed.

I think the Chief Justice of the United States is a very distinguished man, and he should be so treated.

And my feeling is that there is a lot of fuzziness in these rules you have before you, which ought to be straightened out by the presiding officer at the trial, and the Presiding Officer of the Senate. I think you should make it very clear as to what duties the presiding justice of the trial has, to wit, the Chief Justice.

My judgment would be that everything up to the bar of court arrangement, admission of people, et cetera, ought to be the job of the Presiding Officer of the Senate, which means the leadership itself.

Once again, you get beyond the bar of court, I think the Chief Justice ought to be the man that issues the writs and issues the orders, and that the Senate has to direct him to do it; but he ought to be in full dignity the one to do it.

As to the right to break tie votes, I believe they must be on procedure, as Senator Cannon has pointed out. They cannot be substantive.

I would let the Chief Justice break a tie, and there is a very simple reason for that. All he has to do is rule.

If he rules, and there is a tie, then he is sustained.

So, it really is not much of a step to give him the dignity of being able to submit a matter to the Senate before advancing his own view, reserving his own judgment, if there is a tie; and I had my office check,

there were two ties in the 17 cases in which Chief Justice Chase had to rule—

Senator HATFIELD. There were three sustained, three times.

Senator JAVITS. I am sorry.

Anyhow, it was a small number.

Senator HUGH SCOTT. Two ties and three sustained.

Senator JAVITS. The last point in this respect I would like to make again, the rules need some clarification about their requirement, that motions, appeals, questions be put in writing and I hope you gentlemen will wrestle with that question because it seems impossible, the trolley car can pass you by, at least five city blocks before you can write out your question on a particular point in a proceeding.

So I would recommend that you allow a Senator to rise and say, "Mr. Chief Justice, I have a question at this point, which I sent to the desk in writing."

Just like we do in offering an amendment, simply that a Senator may rise and be recognized, and declare: "Mr. Chief Justice, I appeal from your ruling in writing, and I send my motion to the desk."

Senator HATFIELD. Mr. Chairman, could I interrupt at this point and ask a question?

The CHAIRMAN. Surely.

Senator HATFIELD. How would you then feel about Senators having staff members on the floor to serve as legal advisers?

I have asked the immediate retired dean of the University of Oregon Law School to come back here and join my staff as counsel to me, if we get into an impeachment trial.

If he is forced to sit up in the balcony to observe the impeachment proceedings, then I am deprived of immediate counsel. He would have to hand notes down to me and then, I would lose the valuable timing you have been discussing.

If I am not permitted to have a staff person with me on the floor, or at the back of the Chamber, what is your thinking about that?

Is there going to be a discussion of the lawyers?

Senator JAVITS. I would apply the two rules, one is the Byrd rule, meaning Robert C. Byrd of West Virginia, and the other rule which is within the jurisdiction of this committee. According to the Byrd rule, you arrange those things in advance.

In other words, somebody will get up and ask a unanimous consent that so many of the staff should be admitted, and, obviously, you cannot have 100 staff people, I mean, you know, the Chamber just would not accommodate it, so, we will have to come to some agreement as, for example, the lawyers do not need any staff people, which is a big presumption.

Senator HATFIELD. Maybe some of us could sit next to you.

Senator JAVITS. That is what I would call a Byrd rule, some way of compromising that question, and perhaps rotating people when it comes time, in a particular moment, and you have been listening closely, and you wish to have somebody there.

And the space rule, of course, is the physical arrangement which will make it possible, considering we have to accommodate.

Senator ROBERT C. BYRD. We might be able to get Kennedy Stadium.

Senator JAVITS. Accommodate some people from the House, but I do think that, as you gentlemen control the space question, it would be

very advantageous if you brought in some ground rules on both these propositions.

Now, I would like to, if I may, move speedily through the rest of what I have to say.

I do not think anybody can challenge the Senate, and that goes for new Senators who are elected, in January.

I think the qualification of a Senator to sit is absolutely constitutional.

Now, any Senator who is newly elected could disqualify himself by saying: I cannot really rule on this case, I have not heard the evidence.

Another thing which I think you ought to deal with is that there is a provision in rule XXIII providing for the yeas and nays on almost everything.

Perhaps you would simply want to apply the rules of the Senate, except to apply the cloture rule, that is, a live quorum plus another rollcall vote automatically on every article of impeachment.

Senator HUGH SCOTT. Why not a simple division?

Senator JAVITS. But, I think you ought to deal with that.

The other thing that I would hopefully very much feel that you would deal with would be that you would forbid, by the rules, any delay in the trial due to interlocutory appeals, not to us but to courts.

I just think that is a very important point.

I think the Senate ought to put its foot down right off on the proposition that there is—that we do not recognize a court appeal in the impeachment trial.

Finally, I would agree with Senator Stennis about the time for debate.

I would hope you could make a little bit more ample time—I know it takes time, but, Lord knows, this is worthy and also I think you ought to fix the time of assembly every day, so you would not have a question of, say, 10 o'clock in the morning, and how long a session would last, 6 hours, or whatever.

That is particularly important, as I suspect the leadership will have to go into the two-track business for a while.

Finally, gentlemen, I would be less than frank if I did not say that I believe we have a great opportunity to vindicate American history and make the country very proud of the Senate, and I hope we will not muff it, to use the curbstome word.

The CHAIRMAN. Thank you, Senator Javits, for a very fine statement.

Senator Scott?

Senator HUGH SCOTT. I have no questions.

The CHAIRMAN. Senator Byrd?

Senator ROBERT C. BYRD. Senator Javits, I think you have provided the committee some very fine suggestions.

I had some questions written down.

Is there any rule that you would so move, and I think you have covered the ground very well. If there is any question which bothers me or yourself, that is whether or not a motion to reconsider would be in order.

Senator JAVITS. I can envision a vote on conviction or acquittal on article 1, let us say.

The vote is taken.

The Chair announces the vote.

Under the Senate rule, any Senator who does not vote cannot vote, nor can a motion then be entertained to allow that Senator to vote.

If he has a vote, he can change his vote, but if he does not vote, and the Chair announces the result, he can be coming in the door, he cannot vote.

Now, if we were to run into a situation where we had a two-thirds—a vote, and a Senator was seen rushing down the corridor just as the Chair announced the vote, he opened the door, and that vote was 35 to 19, as it was in the *Johnson* trial, which would look bad on our attendance, he wanted to vote, and in my humble judgment the precedent would be out on that vote, which has been announced, because two-thirds had voted to convict, and the Constitution says the President and Vice President or other sole officer is or shall be removed upon impeachment and conviction, et cetera, et cetera, upon impeachment and conviction; and once the vote is announced, he is out, and the Vice President ought to be standing there ready to take his oath.

But suppose Senator Cannon rushed in about that time, and he had not voted?

Senator JAVITS. Which is not his wont.

Senator HUGH SCOTT. Or Senator Javits or Byrd of West Virginia?

Under the standing rules we cannot vote.

Now, under the precedent dealing with cloture motion, Senator Humphrey, when he was Vice President, I believe you will bear me out on this, ruled that if cloture is invoked, no motion to reconsider is in order because it is invoked and you cannot uninvoke it.

If I may invoke a term of my own. Or the Byrd rule, that is called the Byrd word.

I do not think he can be uninvoked, according to cloture, and he cannot be uninvoked according to Senator Humphrey's ruling.

If cloture is not invoked, a motion to reconsider is in order, and once it is invoked, no motion to reconsider is in order.

Now, we could run into the same situation in an impeachment trial with respect to the motion to reconsider.

Senator ROBERT C. BYRD. Well, that wouldn't help us in this situation. Senator Allen has very correctly pointed out if he has not voted he could move to reconsider.

Senator JAVITS. Right.

Senator ROBERT C. BYRD. But the point is the Chair has announced that vote and the President is convicted and in that one instant he is out of the Presidency and it wouldn't do any good, or it would be of no avail to then move to reconsider.

So I think this is a grave question, Mr. Chairman, we are going to have to come to grips with and I would be interested in hearing what the Senator from New York has to say in reaction to it.

Senator JAVITS. I must say inasmuch as I don't like it I would have to agree with you. I think where the Constitution consummates an act it is consummated. On this case I don't see what we can do about it anymore than when the then Vice President Humphrey ruled in the cloture case. That's what our rules said, cloture is invoked when two-thirds invoke it. The same with this. When we vote saying "remove" he's finished. As you say, the Vice President the minute he raises his hand he's President.

So I would like to do something about it but I don't think you can do anything about it.

Senator ROBERT C. BYRD. The question of appeal doesn't bother me. I'm just one Senator but I agree with you. The question as to whether or not a senator can be disqualified doesn't bother me. Article V of the Constitution will argue that. But whether the Senate goes over to another year that to me is not really very debatable. This business of reconsideration could be very bad for us.

Senator JAVITS. It certainly could. We generally move instantly but who knows what life can bring in such a momentous decision that we are all going to be making here. Really, I can't see any way out of it. I have a task force working out of my alma mater at New York Law School. They will be producing a report and I wish to be permitted to file that with my testimony. I'll ask them to look into it.

Senator ROBERT C. BYRD. I'd be pleased if the Senator would.

The CHAIRMAN. I called on Senator Griffin in the past and Senator Byrd. And it was suggested that we might want to hear from Senator Hart and then ask questions of both of you.

Senator HART. Thank you. I am not sure of what Senator Javits' schedule is but why don't you finish the questions with him. If he can stay, fine.

The CHAIRMAN. Would you have time, Senator Javits, to wait while we hear Senator Hart's questions?

Senator JAVITS. Yes. Perhaps there's some other question I can answer. I find I have something else at 4:30 I must attend.

The CHAIRMAN. Senator Hatfield?

Senator HATFIELD. I have no questions, Mr. Chairman.

Senator Javits' testimony has been very helpful to me and I appreciate that.

Senator ALLEN. Thank you, Senator Javits. I think you have made real fine suggestions and certainly we're glad that you agree with the committee to use the present rules as the starting point and the vehicle for possible qualifications rather than to have the whole new set of rules to start from.

I was interested in the matter of the best-evidence rule that you spoke of. What effect would that have on tapes as distinguished from the actual persons who participated in the conversations recorded by tape?

Senator JAVITS. Well, I think one, Senator, we wouldn't take transcripts if the tapes were available. And second, we would have the privilege of calling those who uttered the statements on the tape if that person were available. If we still challenge it. On the other hand we would not be inhibited from admitting into our record other evidence, for example the Watergate Committee report or anything before the Judiciary Committee or court proceedings. We would not be bound to do it but we would have the discretion as to whether we would if we felt that was the best evidence on a given situation. For example, that is often done. Senator Allen has got a lot of experience just like I have. We often stipulate to that in trials, even criminal trials. So obviously the Senate cannot stipulate. But were the offer made, the Chief Justice would rule. And you might appeal or I might or somebody else might. And it would be for the prosecutors of the House who

would have to find a step up, somewhat better evidence. That's what I had in mind.

Senator ALLEN. Thank you for that information. I think that's fine and I think your point is certainly well taken.

I'm wondering about your suggestion about any Senator having the right to rise and say he had a question to ask. I notice the proposed new rules provide Senators may give questions to the leadership, you might say, and at the end of direct examination and cross-examination they would have the opportunity to put those questions in.

I'm wondering about the right of a Senator to jump up while the questioning is going on because the prosecutor, the managers or the defense might be in a line of questioning there that would not be aided by an interruption.

Senator JAVITS. I thoroughly agree with you, Senator. And that's what I have provided in my written statement, and that is, that only after the presentation of the evidence and the cross-examination that a Senator could rise. You see the thing I had in mind is, you ask a question, let's say, or he asks. I might have a very important followup question. Well, if I have to sit there and wait, you know, for 20 minutes or until he gets around to reading it you forget about it. But certainly not as to interrupting the presentation and the cross-examination.

Senator ALLEN. Would that be open to 100 Senators?

Senator JAVITS. I don't know what else we could do, Senator. I didn't come here to say you should do it that way. You're seized with the problem and I gave you what I thought was my solution to allow a Senator to say at that point "I have a followup question, Mr. Chief Justice, which I sent to the desk." You have to have some feeling about good faith, one, and frankly, you know, if this is on television as it probably will be, you know, this business of television is as broad as it is long. You can often make a fool of yourself popping up with silly things as well as you know, score heavily in what you do and say which is important and very useful.

So I think we would use discretion and I doubt that it would be overdone.

Senator ALLEN. The question that Senator Scott asked, would the President have the right to ask there be no television and you say, no, he would not have that right. Would this question apply to the whole proceeding or to television only with respect to him?

Senator JAVITS. I think if he appeared, if he wanted to, I would not let him make that judgment. But he is the President and we certainly ought to show as much respect for him as any witness.

Senator ALLEN. What you all are talking about then is whether the President would have the right to rule out television on him and not the whole proceeding?

Senator JAVITS. That is correct. I think in the proceeding we are in charge but as to the witness I think you ought to listen to the reason why the witness even the President may not want television. We may overrule but nonetheless I think we ought to hear any suggestions.

Senator ALLEN. Senator Metcalf who appeared here yesterday and has gone into this television thing in great depth has suggested that no cameras be allowed there on the floor itself and it is entirely likely that

the cameras would not really be in great evidence there. But you would think that a witness knowing he was being televised might object to it?

Senator JAVITS. I think so. But we don't have to accept the objection. I think in fairness we ought to hear it if somebody does object. We ought to say "Sorry, it is going to happen anyway."

Senator ALLEN. And I didn't quite understand your suggestion about the ayes and nays. What was that?

Senator JAVITS. My point was the way the rules are now written there is a lot of animosity about yeas and nays and I didn't think you needed that with questions and appeals for ruling from the Chair, and I think Senator Scott's suggestion is a good one. In this particular area we ought to proceed either by division or rollcall. Rollcall being permitted as usual by 20 percent of the members. But the rollcall should be automatic plus a live quorum on every article of impeachment.

Senator ALLEN. What about the ruling on evidence then?

Senator JAVITS. Just division or rollcall. We've always followed the practice of giving anybody who asked for a rollcall and I'm sure we will. But I don't think it ought to be automatic. And the way it is now, as I read it now, it is automatic.

Senator ROBERT C. BYRD. They can do it by voice vote.

Senator JAVITS. Yes.

But I think Hugh's right in this case, I don't think you ought to have a voice vote.

Senator ALLEN. I'm wondering about the hearsay matter on the argument that has been advanced that the Senators being a sophisticated group, highly knowledgeable, very practical, that they would be able to hear hearsay evidence and reject it or give it such weight, if any, that it was entitled to. But I'm wondering about the television audience though not having that degree of sophistication you might expect to find in the membership of the Senate. And I'm wondering about whether hearsay is hard to rule out. I don't see how you very well could without running the risk or danger of having a whole lot of information before the Nation that really is not admissible.

Senator JAVITS. Well, I think you're right, Senator Allen. But that's why each of us is going to be more than a juror.

Listen, however I might pass on the President—and I have certain views right now about where we sit—but I don't feel in the remotest conscience inhibited from objecting to, you know, something like where it would make a wrong impression or, you know, rising and making a motion that before we proceed with this testimony we ought to close the door. I mean, suppose somebody gets up there with A, B, C, and D, or you see the indications of it. So I simply say, all I say is I don't think you can write it in the rules and I don't think you can bar it.

Senator ALLEN. Do you think each Senator should have the right to object?

Senator JAVITS. It's got to be sustained by the Senate, Senator Allen. That's a big one. He has a right to object. But if the Chair admits it over the objection of a party he can take an appeal from the ruling of the Chair.

Senator ALLEN. I wonder how that's going to affect the counsel for the parties, the respondent and the manager if you've got 100 Senators

jumping up every now and then offering questions and objecting to the admissibility of evidence.

Senator JAVITS. Well, I didn't say "object." A Senator can't object to the admissibility of evidence.

Senator ALLEN. I thought that was the point you were making.

Senator JAVITS. No. The point I'm making is if there is an objection from one of the parties a Senator may take an appeal from the ruling of the Chief Justice when he rules on that objection.

Senator ALLEN. Yes. Merely on the appeal.

Senator JAVITS. Yes, sir. No right on the objection.

Senator ALLEN. Thank you.

Senator JAVITS. Thank you, Mr. Chairman.

Senator GRIFFIN. Mr. Chairman, I have lots of questions but I'm going to forego them to give time to hear from Senators Hart and Taft.

Senator ROBERT C. BYRD. Senator Cannon, could I ask Senator Javits two quick questions?

The CHAIRMAN. Yes.

Senator ROBERT C. BYRD. The question. Did I understand you, Senator Javits, to say you would suggest that the rules not provide for a voice vote on any questions?

Senator JAVITS. On anything. I think Hugh Scott is right about that.

Senator ROBERT C. BYRD. Well, I understood Mr. Scott—I didn't understand that being Mr. Scott's suggestion. Under the present rules we have to choose between a voice vote and a rollcall vote.

Senator JAVITS. And a division.

Senator ROBERT C. BYRD. We cannot have a division rule.

We ought to at least include that.

The CHAIRMAN. That's right.

Senator JAVITS. I don't quite follow you. You say we cannot have a division?

Senator ROBERT C. BYRD. That's right.

Senator ALLEN. Under the impeachment.

Senator JAVITS. Oh, yes, yes.

Senator ROBERT C. BYRD. Voice or rollcall.

Senator JAVITS. We should have a provision for division because it could be very confusing.

Senator ROBERT C. BYRD. Do you go further and say we should not allow a voice vote?

Senator JAVITS. Agree with Hugh Scott and I understood him to say and mean we should not allow a voice vote.

Senator ROBERT C. BYRD. I didn't understand that. But at least that's your position.

Senator JAVITS. It's just a precaution, Senator Byrd. I have no cogent objection. But with so many people in the Chamber, it may remind you of these conventions, you know, where the chairman says all in favor say aye and all opposed say no and the ayes have it.

Senator ROBERT C. BYRD. I have respect for your knowledge in this field Senator Javits. You were attorney general for the State of New York, a Member of the House and Member of the Senate. You've been a member of the bar a long time. In your judgment would televised hearings, could it be said they would prejudice the respondent in a

subsequent criminal proceeding? Televised hearings, could they be said to prejudice him in a subsequent criminal proceeding?

Senator JAVITS. I do not believe that it would prejudice him any more than the enormous press coverage this will get. Anyhow, the drawings of the witnesses instead of the photographs, the simulation of the give and take in the testimony. In short, frankly, I think he is better off if the original thing is before the people rather than some facsimile thereof. I realize the difficulty of an unprejudiced trial and the whole Nation will be listening to this. But he is the President.

Senator ROBERT C. BYRD. Thank you.

The CHAIRMAN. Senator Hart?

**STATEMENT OF HON. PHILIP A. HART, A U.S. SENATOR  
FROM THE STATE OF MICHIGAN**

Senator HART. Mr. Chairman, and members of the committee, maybe I should just file this statement.

The CHAIRMAN. I think you should read the statement. I read it and I liked parts of it.

Senator HART. The statement indicates that Senator Javits, Senator Mathias, Senator Kennedy, and I began a few weeks ago largely agreeing to see where the existing rules on impeachment stood. Staff members in our offices identified those areas where there was precedent, acknowledged when it was a blank, and suggested that, without reaching any conclusion that with respect to some of those areas where there was precedent that perhaps in that 1974 we might be able to do better.

We filed those and now I'm here to express the very great appreciation all of us have that this committee is going to give attention right across the board.

We have had only one Presidential trial under these rules and it was not a verdict treated kindly by history. Now, we can say it was because of the rules. And the memorandum we filed with you emphasizes the fact the rule was adequate a century ago where there was obscure precedent existing but doesn't mean that precedent or rule is the best procedure.

Some of the procedural questions clearly should be resolved before trial. Others may seem less likely to come up in light of the past practice. Yet the absence of objection to a procedure in the past does not preclude a challenge in a Presidential impeachment trial.

To the extent possible, therefore, the Senate should resolve these questions in advance, rather than risk bogging down in unanticipated disputes at the trial.

Second, I suggest that the single most important criteria for proposed rules is openness. The impeachment trial of a President in 1974 should be completely open to public scrutiny. The American people should feel fully privy to such a decision about the leadership of their Government.

From this basic proposition, two points follow:

1. The trial should be televised;
2. With the exception of special circumstances, such as classified information, all of the proceedings, including Senate debate and deliberation should be in open session.

If the Senate televises the trial, many logistical decisions will arise, but I am confident satisfactory arrangements can be made which will minimize intrusion upon the proceedings. The fundamental question is whether they should be televised at all. Many have urged it. But despite widespread support for broadcasting the trial, others counsel caution. They suggest it might raise due process problems and, in any event, is unwise.

As you know, the leading case involved a televised State criminal trial, *Estes v. Texas*. The Supreme Court held by 5 to 4 that the telecast had denied the "fair trial" guaranteed to the defendant by the due process clause on the 14th amendment.

When we deal with impeachment, the *Estes* case is not a controlling precedent; the interests to be balanced are far different. But even if our decision is a policy matter rather than a legal judgment, the Supreme Court's analysis of the ways in which television could affect a trial provides an excellent focus for that decision. My initial concern about this case led to a legal memorandum prepared in my office which compares the *Estes* case to our situation, and I would like to submit it with my statement for the record. I think it is a very useful one.

The CHAIRMAN. Without objection, it will be made a part of the record.

[The memorandum referred to may be found on p. 137 of these hearings.]

Senator HART. I am now satisfied that *Estes* presents no legal barrier to televising the trial and that as a policy matter we should do so.

In *Estes* the Court dismissed the educational value of a televised trial as minor. Here its benefit is compelling. America is concerned and divided about Watergate and seeks the best resolution of its impact on the Presidency. Whatever the outcome, it should be perceived as a result of fair procedures.

The verdict must also gain the widest acceptance possible as one reasonably based on the evidence. Or as William Buckley put it recently, it must seem "defensible." Above all it is urgent that most Americans, including those who dislike the verdict, at least acknowledge it was not merely a crass political exercise.

It seems indisputable to me that opening up all of the trial to public view is the best path to these ends. We may easily overestimate the public understanding of the nature of an impeachment trial. Particularly if conscious efforts are made to assail the Senate's integrity, many Americans may view it as a partisan legislative struggle. While the trial will be reported in any event, surely here is one case where a picture is worth a thousand words. I am confident that the public viewing the trial will be impressed with the effort of each Senator to perform his duty. And on this point we could have no better illustration than the tonic effect on public confidence which the broadcast of the House Judiciary Committee proceedings had on those who saw responsible efforts of all Members.

The Supreme Court's concerns in *Estes* simply seem insubstantial here when we remember it is not a question of televising the trial versus no news coverage. All the sophisticated techniques for coverage will flood the media, including courtroom sketches flashed on television screens while newscasters read dramatic excerpts from the day's testimony. Legal scholars will provide commentary. The daily record

of testimony will provide further grists for minute coverage. This will all occur even if live coverage is barred.

The Court's main concern in *Estes* was that television would increase the jury's view of the case as notorious. Well, I wonder if any of us can imagine a more notorious case than Watergate, particularly any aspect touching the White House.

The Court felt that all the participants—judge, jury, witnesses, counsel—would be self-conscious and distracted. These problems are no less troublesome for an impeachment trial. But they are far more inevitable. A presidential impeachment trial is inherently a historic event, one of the highest news interest. All participants will know they are in a goldfish bowl throughout the trial. Is it realistic to expect that they will not be self-conscious if there is no television?

The Court's other main point actually cuts in favor of television in the present unique situation. The *Estes* opinion argued that television would foster strong views in the community about the proper verdict and that jurors might be intimidated by that prospect. But in the present situation, we must start from the opposite premise. Almost every American will have strong feelings about the trial and second guess the verdict, whether or not the trial is televised. That is precisely the best reason for exposing the public to the actual trial. Senators might well be more concerned about being second guessed by constituents who had access only to selective piecemeal accounts of the trial than they would be about judgments by those who had seen and heard all that they had.

The present rules require closed sessions for any Senate debate. This should be changed to permit open sessions not only for Senate debate of interlocutory questions and proposed orders, but also for deliberation on the final judgment. I have covered most of the reasons in discussing television.

Senator GRIFFIN. Could I interrupt to ask a question on that point?

The CHAIRMAN. Go ahead.

Senator GRIFFIN. In connection with those closed sessions or executive sessions, I ask this in light of the proposal which was included in the revision submitted by Senator Mansfield.

Have you given any thought to whether or not the Chief Justice should preside at executive sessions? Is that a part of his constitutional function to preside?

Senator HART. You mean assuming we have some sessions which are not open is the Chief Justice to preside in that?

Senator GRIFFIN. Whether open or not, these sessions where we debate the procedural matters. I guess the basic question is that part of the trial?

Senator HART. It had not occurred to me that the Chief Justice would be displaced from the Chair at any phase of this proceeding. Do I understand the question?

Senator GRIFFIN. That's the question. Because I think there are some who are contending it is an important thing and one of the things we ought to have resolved—

Senator HART. Before we get there.

Senator GRIFFIN. Because it bears on what is the meaning of the word "preside" in the Constitution which the Chief Justice is supposed to do. How much of a function is it?

Senator HART. Well, I think he is—I was not aware of this suggestion and whoever made it clearly gave it much more thought than I in answering. But my impression is that the Chief Justice is furnished to us as our agent to do our will. I'm not sure that our will could extend to throwing him out at a particular moment.

Senator GRIFFIN. But if we voted to go into executive session.

Senator HART. I would assume he would be there.

Senator GRIFFIN. For the purpose of debating a procedural matter or a deliberation on final articles of impeachment, the question is who would preside in that session?

Senator HART. I had assumed that the Chief Justice would still preside.

The CHAIRMAN. I tried to go through these with particular reference to that and I come to the conclusion in my own mind that the Chief Justice would absolutely have to be present and preside.

Senator GRIFFIN. I think so, too.

The CHAIRMAN. Whether closed session or open session and whether considering procedural matters or not. And that's why I was raising the question earlier about whether or not he should have the right to vote because he might be given a power that was never intended. Now, if he has made his ruling I think as Senator Javits or someone suggested, if he has made his ruling and we appeal from the ruling, obviously he shouldn't have the right to vote on the appeal. But the appeal would be lost if it were a tie vote. But on the other hand suppose he didn't make the ruling and said "I'll submit it to the Senate." And the Senate then votes and has a tie vote and then he could vote to break the tie.

Senator GRIFFIN. It's six of one and half a dozen of the other, whichever way it goes.

Senator HART. There are, Mr. Chairman, and members of the committee some suggestions in this statement on the role of the Chief Justice and appropriateness of the rule. But I was not aware that the suggestion had been made that we could have a Senator preside at some stage.

Senator GRIFFIN. I suppose it could be the President pro tem in view of that.

Senator ROBERT C. BYRD. Mr. Chairman, I don't see how we can get around the plain language of the Constitution which says "When the President of the United States is tried the Chief Justice shall preside." If the Senate wishes to adjourn as a court and transact legislative business, that's a different thing. But as long as it is in session as a court it seems to me that there would be no question about it that the Chief Justice would preside whether in closed or open session.

Would the witnesses agree with that?

Senator HART. I would.

Senator JAVITS. I certainly agree with it.

Senator HART. I think 100 votes could have him step aside.

On that business, I made a note here, on that business of shifting gears and becoming a legislative body for a little while. And the two-track system that Senator Javits anticipates applying here, I hope that it would be seldom—I hope very much that all of the compelling legislative business of the Senate would have been concluded before we sit as a court on this issue. Maybe that's a wish that will never be

realized but we can explain to each other that this is a logical procedure. We are no longer a court and we are going to argue over a weapons system for a day and then we'll come back to the business of judging the President. And I'm not sure that those in Grand Rapids, Bob, will understand why we are busy sometimes in partisan language arguing legislative proposals.

I just hope we will all do our best to get that calendar cleaned so we don't have to shift gears.

To return to my statement, I comment on the fact that the present rule on debate by Senators in open session raises several problems. These problems have been described in my presentation here and I'm sure through earlier witnesses. I am reluctant to read through it and yet I feel strongly the need to make certain that the issue is fully explored.

Senators may ask questions of witnesses and by precedent of counsel. Senators also may object to questions put by others. A Senator would state his objection in making it, but unless he could obtain executive session he would be unable to explain his objection or rebut arguments against it. The rules are unclear whether he could demand closed sessions or would need the vote of the majority.

When a Senator put a question to which objection was made the situation would be even worse. Normally, a Senator would assume its propriety and would not defend the question in the course of putting it to the witness through the Chair. Unless he persuades the Senate to close the doors, his colleagues will hear only the opposition to his question—a one-sided presentation. The difficulty is compounded if there is television. The logistical complications of stopping the broadcast and clearing the galleries would deter frequent use of executive session.

And suppose the Senate does go into closed session to discuss a motion or proposed order. If a Senator offers a substitute or amended version, then the parties, who are excluded from the closed session would not know of the new proposal or be able to express their views on it. That would require coming back into open session and then closing the doors again. The prospects are endless.

The inhibition against closed session if the trial is televised also would undercut the ability of Senators to discuss questions put before the Senate for a vote upon a ruling by the Presiding Officer.

And in all of these situations the public would be told that they could not know the views of Senators debating issues which might prove crucial later on in the trial.

The only plausible justification for shielding Senate discussion of interlocutory issues from public view is that it discourages lengthy debate. But that is a pretty strong case of overkill. If the concern is lengthy delay, then the answer is the present limit on how long any Senator can speak on any interlocutory question, which is 10 minutes. Or make it 5.

Even if Senate debate of disputed rulings are permitted in open session, the question remains of whether to keep the final deliberations secret. In court trials which are public jury deliberations are closed. Yet the Senate sits here as far more than an ordinary jury. It is the final judge of the law in a proceeding at once judicial and political in nature. The importance of sharing this process with the Nation is

clear. Would the public have a satisfactory understanding of how the result was reached and the essential confidence in its fairness if it were unable to hear the Senate evaluate the evidence and discuss the applicable standards? I seriously doubt it.

Here again the action of the House of Representatives is worth noting, for the Judiciary Committee and full House in their two-stage approval of impeachment articles would have aspects analogous to grand jury proceedings which are normally secret. Yet the committee's final debate was public and it appears the House consideration will be televised, too.

One more point on secrecy. The rules should provide that if the Senate does go into secret session to receive evidence offering under a claim of national security classification, the Senate should also be free, upon motion of any Senator after the evidence has been reviewed, to decide that the evidence need not remain secret and may be disclosed on the public record. This is comparable to the powers of a court which first received such material in camera.

Perhaps the two most controversial issues before you are the appropriate standard of proof and what rules of evidence should apply.

Many have suggested that the Senate should not try to promulgate a correct standard of proof—whether beyond a reasonable doubt, clear and convincing evidence or some other—because each Senator will apply his own standard when he votes.

This is an appealing resolution of a difficult question. But the issue might arise before then. If counsel in opening or closing remarks asserts that a particular standard applies, there may be an objection and an effort to strike the suggestion as an improper standard. If the Senate is prepared to let each side's remarks stand as their nonbinding view, that is one possible approach. But if there is going to be a vote and a ruling by the Senate which purports to establish a standard, then we should do some serious study of the issue before the trial. Moreover, the public and the parties may well want to know before the trial starts what standard Senators intend to apply.

For myself, I must confess uncertainty about the proper procedure. Several considerations suggest that the evidence should establish the articles "beyond a reasonable doubt." First, members of the House Judiciary Committee as well as members of the legal staff, suggested they felt obliged to satisfy a standard of "clear and convincing evidence" or some near equivalent.

The House merely finds there should be a trial. It seems appropriate for this body to satisfy a higher standard if we are rendering a final verdict.

Second, although the purpose of impeachment is to safeguard the office, not to punish, the severity of the sanction on incumbent is obvious. Finally, it is a momentous step for the Nation as well as the respondent. Conviction would overturn a very large electoral mandate. All of these considerations lead me to consider seriously the highest standard.

But the issue is complex. The Founding Fathers did not regard American impeachment as a criminal proceeding. Prosecution was permitted to follow conviction upon articles of impeachment. And in other contexts, courts have held that even when a charge of criminal behavior is involved in a civil proceeding which could be "uncom-

monly harmful to purse or prestige," a standard less than beyond reasonable doubt suffices.

The most important consideration against the strictest standard, however, lies in the purpose of impeachment itself. It was designed as the only surgery to remove officials whose continuation in office threatened the public. The potential for good or ill is greater in the Presidency than in any other position.

Suppose evidence suggests an overwhelmingly strong probability that impeachable offenses have been committed but the Senate cannot conclude they have occurred with the moral certainty required when we imprison a criminal defendant. If the respondent must then be left in office, does the impeachment clause of the Constitution provide adequate protection to the people against the potential of further abuse?

Even if the committee decides not to offer a standard, it would be helpful if scholarly analysis on this crucial question was sought for the benefit of all of us. For example, I understand that Charles L. Black of Yale suggests a high standard would serve to check the natural tendency we have to believe the worst about those whose actions we dislike. But he concludes that the standard ought to be something a little less than "beyond a reasonable doubt."

I am also not sure in my own mind whether the Senate ought to set evidentiary guidelines based on the standard rules of evidence, or take a more flexible approach. Some urge adoption of rules of evidence, presumably those applied in civil or criminal trials in Federal court. Others argue an impeachment trial ought not be artificially deprived of relevant evidence by traditional exclusionary rules which evolved to offset a petit jury's inability to discount evidence of doubtful reliability.

This, too, seems an area where expert testimony would be helpful to us. But let me make a few observations. To some extent I think the choice before us has been painted too starkly. It is not a matter of having no rules and letting in the kitchen sink, on the one hand or applying rules of evidence and being denied all hearsay or the use of the tapes under some best-evidence rule on the other.

In fact, application of the present rules of evidence in Federal court would permit a great deal of the material relied upon in the House to be introduced. There are a whole host of well-established exceptions to the hearsay rule, including admissions by a party defendant and declarations against interest. Moreover if testimony is offered only to establish that the President made a particular remark to an aide agreeing with an announced plan there may be no hearsay issue at all. It is not meaningful to ask whether such an out of court statement was truthful—the only context in which the hearsay bar applies. The statement is simply offered to reflect his state of mind.

As for the so-called best evidence problem in regard to the tapes, this, too reflects some confusion about the rule. If a tape is offered to establish what was said at a meeting, the best evidence rule is simply irrelevant. It applies only when the question at issue is the contents of the original document or recording, and might come up in regard to the use of transcripts or copies of an original tape.

The tapes would have to qualify under exceptions to the hearsay rule but that is a different issue. And once qualified, the tapes would be, in any layman's sense, better evidence of what had been said than a

participant's recollections. Tapes, like pictures, don't lie. Indeed the U.S. Supreme Court has emphasized the protection afforded defendants because electronic recordings made by undercover agents prevent an innocent person being harmed by inaccurate witness testimony.

On the other hand there may be problems as to substantial portions of the necessary evidence. Prior testimony at congressional hearings, grand jury proceedings or trials would be essential unless the trial were to repeat all the testimony laboriously compiled over the past 2 years. It is not clear that this could be utilized, particularly if some of the key witnesses invoked the fifth amendment privilege against self-incrimination at the impeachment trial. This also raises the need to specify whether the Senate may grant testimonial immunity and compel testimony, and whether it would choose to do so if the witness were undergoing prosecution as a criminal defendant at the same time.

I do not like the idea of the Senate being free to accept any evidence offered that strikes its fancy. But on the other hand, if we were to use the great engine of impeachment without consideration of the basic testimony and tape recordings already well known to the American people it would be a mockery.

Unlike the standard of proof or the nature of an impeachable offense, the question of what evidence is admissible should not be deferred until trial. Even if the decision is to have no fixed standard beyond the Senate's judgment of what is sufficiently relevant and reliable, that judgment should be made before the trial starts and communicated to the parties who must begin to prepare their case if a House impeachment vote seems likely. The Senate could adopt a middle course. That would be a presumption that would be subject to exception where the Senate decided on a case by case basis that there were sufficient indicia of reliability in relation to its pertinence even though it might not be competent under traditional exclusionary rules of evidence.

On the comments under the role of the Chief Justice, Senator Byrd reminded us under rule VII the Chief may make a preliminary ruling under any interlocutory question. Or, at his option, he may submit it directly to the Senate. I favor retaining this rule with some explicit elaboration. The preliminary ruling option is not required by his constitutional mandate to preside. But it is a well-established procedure whose abolition might be misinterpreted. Also, it usefully avoids the necessity of the Senate voting on every evidentiary or procedural question no matter how minor, or how clearly settled by earlier decisions in the trial.

On the other hand, the Chief Justice should not make preliminary rulings on questions which intrinsically involve deciding some aspect of the final judgment entrusted to the Senate. Thus, if an effort is made to strike articles on the ground they specify no impeachable conduct, it would not seem appropriate for anybody but Senators themselves to pass judgment.

Second, the rule should expressly permit parties, as well as Senators to obtain Senate review of the Chair's preliminary ruling. In most cases the Senate will have heard argument to decide whether to vote on the question itself. But the parties might not have anticipated the basis given by the Chief Justice for his ruling. They are the participants best placed to evaluate the importance and the vulnerability of his ruling. A Senator might have less incentive to appeal because the

significance of the ruling is not so readily apparent. I would permit any Senator, or a party with the concurrence of one-fifth of the Senate, to demand an appeal.

It would also be useful to nail down two other aspects of this situation. The rule should indicate that a Senator can request a short explanation by the Chief Justice of his ruling if he has not offered one. And it should be in order for Senators to request either party to comment briefly on any aspect of the Chief Justice's explanation which the party had not previously addressed. This response, in the nature of appellate argument should be limited to 5 minutes per side.

At the conclusion of these remarks I have appended draft language to accomplish these clarifications of rule VII. As for the Chief Justice's power to cast tie breaking votes, I suspect the issue will prove more symbolic than substantial. If an appeal results in a tie, the Chair's ruling should stand. If a question is put directly to the Senate, a tie breaking vote is not necessary. The tie could be deemed a Senate decision against the proposal or proposition embodied in the question voted upon, as when a motion to table or amend a bill is defeated in legislative session by a tie vote. But I have no objection to his casting a tie breaking vote, except on substantive questions integrally related to the ultimate judgment of whether impeachable conduct has been proven. As in the case of preliminary rulings, that, too, should be a power reserved solely to the Senate.

Further, the rules should clarify to what extent the Chief Justice may comment on evidence or otherwise participate in substantive deliberations on the final question. At the least, the rules should expressly preclude any charge on the applicable law. It would be anomalous for the Senate, as ultimate judges of the law as well as the facts, to be instructed by the Presiding Officer whom they may overrule on points of law during the trial. The parties themselves will present adequate briefs or closing arguments on the legal issues and concepts which have become important aspects of the case.

There are many other areas in which the present rules should be sharpened and ambiguities should be nailed down one way or the other. As I mentioned at the outset, the staff study already presented to the committee may be a useful checklist in this regard. Let me note just two more. It would be helpful if the rules spelled out in advance the degree to which the House might amend the articles even after the trial had started to take new evidence into account or otherwise in the interest of justice. The appendix to this statement also contains some draft language for such a provision.

Finally, the rules should make specific provision, as Senator Mansfield has suggested, for recessing the trial, or deferring a particular decision, until Senators have had an opportunity to review the issue and the law. Similar provision should be made for Senators to require additional briefing on a point by the parties.

Mr. Chairman, you have been patient and I will ask my staff to communicate with the committee staff any further suggestions I have not covered today. Once again let me emphasize my appreciation of the effort you are putting into this review and make clear that I make no claim to final answers on these exceedingly complex questions. I apologize for taking so much time, but as you know better than any of us the importance of this thing just compels you to try to make sure you've raised everything you should have.

The CHAIRMAN. Thank you for a very fine statement.

Senator Griffin?

Senator GRIFFIN. I certainly want to thank both of the Senators for the work that was done in this presentation. The detail and the thought that obviously is going to be very helpful to the committee.

One point that Senator Hart made about the importance of considering appeal by the parties and allowing counsel to argue a point before the Senate votes on appeal. I think it is very appealing to me. As it stands now and as I understand it a Senator may appeal and then without any debate there is a vote. He wouldn't even have the benefit, I assume, and maybe I'm wrong, of the argument of counsel or parties on the point.

Senator HART. A while after a week of listening to the testimony we'll think, each of us, that we understood the flow of that case.

None of us would ever be in quite the position as counsel is to understand the ultimate significance of something that may appear to us—

Senator GRIFFIN. I would probably favor allowing Senators to debate at that particular stage but I do think if it isn't clear that counsel for the parties should have some debate on the questions and that's a very constructive suggestion.

I conceive of the Chief Justice, for example, in ruling on a point, whether it's spelled out in the rules or not, giving a very brief explanation as he leads up to his ruling. It seems like the Chair, of course, ruling on a point by point, and he would do that. Then the only presentation that the Senate would have to consider would be that explanation by the Chief Justice which wouldn't be fair.

Senator HART. The parties could react, should be able to react to that.

Senator GRIFFIN. Thank you very much.

The CHAIRMAN. Senator Byrd?

Senator ROBERT C. BYRD. Could I pass for the moment.

The CHAIRMAN. Senator Allen?

Senator ALLEN. I have no questions.

The CHAIRMAN. We appreciate both of you being here.

Senator HART. Let me raise this while Jack is here. Senator Javits says we should at least bar interlocutory appeals. Is that a good idea? If the Supreme Court hopefully is going to rule whether an article is an impeachable offense we can't do anything about that. If they want to take that they can take it. But wouldn't it be calamitous if there were a trial, a Senate trial and then the Court ruled? We would be really undoing the country. Better to require any attack on the constitutionality of the articles to be made by a motion to strike at the outset and if there's going to be an expedited appeal let it at least be decided by the Court, if we're going to—if they're going to claim the right to take it before the Senate votes on that article.

Senator GRIFFIN. I'd like to raise the question whether or not we can bar an interlocutory appeal by merely adopting a Senate rule?

Senator HART. I don't think you can. We can write a dozen rules to say that but if some fellow across the street wants to take a paper to the Court—

Senator GRIFFIN. I think there is another way to approach it perhaps and that is following the logic that Senator Ervin pursued with respect to various issues which I also have used. There is a very good argument for that in the Congress by statute which can impose limitation of appeal on the Supreme Court, maybe by statute conceivably

that we might at least alter the appeal at jurisdiction to the extent of not allowing interlocutory appeals.

Senator JAVITS. May I answer that question?

Senator GRIFFIN. If you have an answer.

Senator JAVITS. The answer I have as far as interlocutory appeal was that we should not allow the trial to be delayed by interlocutory appeals. I agree with Phil, anybody can try to take one. But I like to know also that in Federal courts you can't take interlocutory appeals unless the judge certifies the questions. So we did make a rule doing the same thing the Federal judges did. Nonetheless, I didn't try to throw the net out that far. All I said was the Rules Committee ought to determine the fact that the interlocutory appeal is taken.

The CHAIRMAN. In other words, if one were to be taken on the matter of a question of impeachable offense that that question should be addressed perhaps after the impeachment is reported to the Senate and before the trial commences.

Senator JAVITS. Right. It could be, or either in the trial. The important thing would be the Rules Committee would lay it down that we're not going to stand by while the courts are thinking about it.

Senator ROBERT C. BYRD. Mr. Chairman, may I say something here and see if it appeals to the two Senators and to Senator Griffin?

Professor Black in dealing with this question tells about the country banker who when asked whether or not he would cash a check for a stranger answered it this way. That there were 10 rules governing the cashing of checks for strangers. The first rule was never cash a check for a stranger and all of the other nine rules didn't matter.

If the committee and/or the Senate were to write into its rules anything of this nature would it not immediately be raising the implication that the decision of the Senate itself in the final analysis is appealable? I'm afraid to get into this area of the rules at all.

Senator JAVITS. I think you're right. I think I would forget them.

Senator ROBERT C. BYRD. Does the Senator from Michigan agree?

Senator HART. But not writing it in isn't going to avoid the appeal.

Senator ROBERT C. BYRD. No.

Senator JAVITS. Except we deal with it when we cross that bridge.

Senator ROBERT C. BYRD. In this regard I think not only the wording, the plain wording of the Constitution but also logic and precedent are on our side. Judge Ritter was impeached. He sued for back pay on the basis that he had been improperly removed from office. The Court of Claims refused to hear his case saying that the courts had no jurisdiction over impeachment. The Supreme Court granted certiorari and apparently agreed with the Solicitor General's brief that the courts had no jurisdiction over the impeachment.

Senator JAVITS. I think you're right.

The CHAIRMAN. Thank you very much, gentlemen. We appreciate it. [The legal memorandum referred to by Senator Hart follows:]

AUGUST 2, 1974.

## LEGAL MEMORANDUM TO SENATOR HART FROM BURT WIDES

### TELEVISIONING A SENATE IMPEACHMENT TRIAL OF THE PRESIDENT

#### I. INTRODUCTION

Should a Senate impeachment trial of the President be televised? Many Senators (and other observers) endorse televised proceedings. Their main argument

is that direct public viewing of both the procedure and the evidence would maximize public acceptance of the trial as fair—whatever the outcome.

Others such as James Reston, counsel caution. Recognizing the public acceptance argument, they suggest, nevertheless, that television, on balance, would be unwise. Participants would be distracted, physically and psychologically, from careful deliberation. The dramatic context of a world-wide audience would diminish the solemn atmosphere desired; it would seem too much a "political circus."

The past few months' debate has given little attention to legal issues which television might raise. Fundamental questions of due process should at least be considered before any final decision. The leading case, *Estes v. Texas*, 381 U.S. 532 (1964), involved televising a state criminal trial. On certiorari, the question before the United States Supreme Court was whether the telecast of pretrial and trial proceedings in the criminal fraud case had denied the defendant, Billie Sol Estes, the "fair trial" guaranteed by the Fourteenth Amendment Due Process Clause. In a 5-to-4 decision, the Court held that it had.

The *Estes* case is not a strong precedent. The opinion went way beyond the factual situation before the Court, as the dissent vigorously noted. The Court was sharply divided, and only one Justice from the majority still sits. We have had an additional decade of exposure to intense televised coverage of public events, including matters of criminal justice.

Equally important, while impeachment is analagous to a criminal prosecution, an impeachment trial—especially Presidential impeachment—is *sui generis*. And finally, some of the Court's reasoning in *Estes* simply seems inapposite to the unusual course of events during the past two years.

Nonetheless, the case is the authoritative Supreme Court evaluation of television's impact on the trial process. Even if the Senate's decision is to be made on "policy" rather than "technical legal" grounds, concern for a proceeding which is fair ranks very high. The considerations examined by the Court in *Estes* help answer the question of whether a televised Senate trial would be fair.

This memorandum first reviews the *Estes* opinion. Then the Court's analysis is weighed in the specific context of the Watergate experience and an impeachment trial.

## II. THE ESTES DECISION

Because of the sizeable fraud involved and Estes' political associations, the case had been widely publicized even before the first telecast proceedings. There already had been a change of venue. Shortly before the trial was to begin, there was a two-day hearing on a defense request for a continuance and a defense objection to television and radio. This hearing, itself, was televised live. The broadcasting logistics substantially disrupted the courtroom atmosphere.<sup>1</sup> The objection to television was denied. However, the judge granted a continuance, during which a small booth was erected in the rear of the courtroom, from which several television cameras could film through a small slit window. The projecting lenses were still noticeable, but were less obtrusive.

At the trial there was little live coverage—only the State's opening and closing remarks of the jury and the return of the verdict. The rest of the trial was filmed intermittently and rerun on the afternoon and evening news shows. Even then, there was *no sound recorded* for either the jury selection or *any witness testimony*; the footage merely was run as background for a newscasters' voice-over comments. At defense counsel's request, his argument to the jury was not televised; the cameras stayed on the judge during that period while the narrator quoted from or summarized some of the defense argument.

In this context, four justices found that television's impact on the trial process was potentially so distorting that it *inherently* denied a fair trial.<sup>2</sup>

Justice Harlan joined the result but said he would apply the *per se* rule only to trials likely to involve some notoriety.<sup>3</sup>

<sup>1</sup> Two cameras stood inside the bar rail, four just beyond the gate. There were three microphones on the judge's bench, and others beamed from nearby the jury box and counsel tables. Electric cables snaked everywhere. The initial panel of veniremen was present and was subject to being telecast. The panel was later dismissed because of the continuance.

<sup>2</sup> "The record in this case presents a vivid illustration of the inherent prejudice of televising criminal trials and supports our conclusion that this is an appropriate time to make a definitive appraisal of television in the courtroom." (Warren, C. J., concurring.)

<sup>3</sup> Justice Harlan's distinction is a bit hazy. As the rest of the majority noted, only cases with some notoriety are likely to be televised. Also, the broadcast itself will provide notoriety. Apparently Justice Harlan's point was that sensational cases, such as *Estes* have more potential "notoriety" to be exploited and enhanced by television than do more routine matters.

Justice Clark's opinion for the Court first acknowledged the rights of Free Press and public trial under the First and Sixth Amendments, respectively. Both, he wrote, were served adequately by more limited media access. And, he noted, public trial was designed to ensure the accused was fairly dealt with, not to risk his being unjustly prejudiced.

Moreover, he rejected any requirement to find *actual prejudice* resulting from the telecast; substantial *risk of harm* sufficed, since proving the harm would be too difficult.

The televised pre-trial hearing was included because such coverage could have an impact on the trial itself; it could directly affect potential jurors' attitudes. (Indeed, four members of the jury which sat in *Estes* had seen the televised pre-trial hearing.)

The Court noted a variety of specific ways in which television might affect the conduct of jurors, judge, witnesses counsel and the defendant:

#### A. Jurors

1. *Distraction*.—Jurors might be distracted from concentration on the evidence by both the physical intrusion of broadcasting equipment and the psychological awareness that they were on camera. "Not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony."

2. *Notoriety*.—Awareness that the proceedings are being televised will heighten the jurors perception of "the notorious character of the petitioner, as well as the proceedings." Great emphasis was placed on the contribution of the pre-trial hearing and the trial broadcasting to this sense of "notoriety." The Court found it "highly probable" this awareness of notoriety will "have a direct bearing on [a juror's] vote as to guilt or innocence." The assumption clearly implied is that the impact would be a *bias* against the defendant because the notoriety would suggest unusually serious misdeeds.

3. *Community Opinion*.—Another result of both the notoriety and the direct public viewing would be community pressures which might affect the jury's impartial judgment. The Court spelled out the problem: Television would subject jurors to a mass viewing audience whose evaluation of the jury's performance would be affected by the coverage of the trial. The jurors could not "help but feel the pressures of knowing that friends and neighbors have their eyes upon them."

If the general community had direct knowledge of the trial, they will be less likely to defer to the jury's judgment than they would if only the jury and a few spectators had heard the evidence first hand and seen the witnesses testify.

4. *Selective Reinforcement of Evidence*.—If the jurors are not sequestered, they may well see nightly news rebroadcasts of selected portions of the day's testimony.

The majority agreed that this selective reinforcement might subconsciously influence the weight given the rebroadcast testimony.

5. *Difficulty of New Trials*.—If a new trial should be required, the possibility of selecting an unbiased jury would be jeopardized because the community had been exposed to the coverage of the first trial.

#### B. Judges

Judges, too, would be distracted by the physical and psychological impact of being on television. This would be true particularly where the judge is not insulated from politics: "Telecasting is particularly bad where the judge is elected . . . [then] the telecasting of a trial becomes a political weapon, which along with the distraction inherent in broadcasting, diverts his attention from the task at hand, the fair trial of the accused."

The judge also might be harassed by the necessity of continual ruling on issues raised by the telecast. In *Estes*, the judge was forced to make continual modifications of the initial decision to broadcast as new complaints were raised.

#### C. Witnesses

In addition to being mentally distracted by the awareness they were on television, witnesses' testimony might be distorted. Reluctant witnesses might be embarrassed or intimidated by the broadcast and not testify as freely as they otherwise would have.

Other witnesses might become cocky or be tempted to overstate their testimony for reasons extraneous to the trial.

Secondly, television increases the difficulty of enforcing the "rule on wit-

nesses." (This is the rule that prospective witnesses not be permitted in the courtroom to hear earlier testimony. In that way, they remain unable to dovetail their testimony or adjust it to the answers of previous witnesses.)

#### D. Defendant and Defense Counsel

Like the other trial participants, defense counsel might be distracted from his responsibilities. In *Estes*, defense counsel did complain that he could not concentrate because of the telecast.

In addition, the intrusive nature of camera closeups could impair effective attorney-client consultation during the trial.

Finally, the Court noted that the inevitable closeups of the defendant's gestures, expressions and reactions to testimony would "transgress his personal sensibilities, his dignity and his ability to concentrate on the proceedings before him."

The Court emphasized that these factors are not merely hypothetical; although difficult to prove, they are suggested by common human experience. Thus, broadcasting criminal trials is barred by all but two states and by the Federal Rules of Criminal Procedure.

The Court acknowledged that many of the dangers it had listed also were present from newspaper coverage or regular reporting by radio and television newscasters. But the majority concluded, without elaboration, that the impact of these considerations from direct television was "far more serious. . . ." and qualitatively different.

Chief Justice Warren, writing for himself, Justice Douglas and Justice Goldberg, traced the historical development of modern trials as an ever expanding exclusion of extraneous factors from the search for truth.

The dissenting opinion was written by Justice Stewart for himself, Justice White, Justice Black and Justice Brennan. He argued the pre-trial hearing was not relevant since the grant of certiorari excluded the possible impact of pre-trial publicity and was confined to the fairness of the trial proceeding itself. Nor was he willing to consider the indirect impact of television upon the public impression of the judicial system and, in turn, the seriousness with which trial would be taken by all participants. "The Constitution does not make us arbiters of the image that a televised state criminal trial projects to the public."

The dissent emphasized the facts in this case which undercut the general analysis in the majority opinion of potential harm from telecasting:

- (1) the case was already quite notorious before the broadcast coverage;
- (2) the fully televised pre-trial hearing involved no substantive issues;
- (3) the evidence was fairly dull—circumstances under which documents were negotiated rather than emotionally charged or dramatic questions;
- (4) once selected, the jury had been sequestered;
- (5) no witness saw fit to avail himself of the court rule that he could object to being televised;
- (6) *Estes* did not testify and called no witnesses on his behalf;
- (7) the booth arrangement had minimized the intrusive effect of the cameras;
- (8) there was little live coverage and no sound broadcast of the testimony.

On that record, Justice Stewart concluded: "I cannot now hold that the Constitution absolutely bars television cameras from every criminal courtroom, even if they have no impact upon the jury, no effect upon any witness, and no influence upon the conduct of the judge."

### III. THE ESTES DECISION APPLIED TO A WATERGATE IMPEACHMENT TRIAL

Could a televised impeachment trial which ended in conviction of the President be "reversed" by the courts for lack of fundamental fairness? This question presupposes judicial review of the proceedings—itself a hotly disputed issue.

The Court would have to treat *Estes* as precedent to a greater extent than would the Senate acting as an independent decision-maker on impeachment procedures. But the obvious differences between impeachment and a state criminal trial offer enough elbow room for the Court to find *Estes* inapposite, even if its basic premises are not called into question on reconsideration.

Therefore, apart from justiciability, the same considerations probably would be applied by the Court in reviewing such an appeal as the Senate should weigh *prospectively* to decide the television issue as a matter of policy and fairness.

Several preliminary observations can be made. First, Justice Harlan spoke in *Estes* of a day which might come when "television will become so commonplace an affair as to dissipate all likelihood that its use may disparage the judicial process. If and when that day arrives, the constitutional judgment called for

now would of course, be subject to re-examination in accordance with the traditional workings of the Due Process Clause."

The decade since *Estes* was decided not only has seen an exponential growth of live coverage for important public proceedings but specifically has ended with two years of intense coverage for Watergate-related proceedings.

Therefore, we can, to some extent, discount the projected impact of televising a trial in terms of its effect on the attitude of participants toward the proceeding. On the other hand, the general rules of states and the Federal courts still ban broadcasting criminal trials.

A second basic point is that the position taken by the President on the issue of televising a trial would have great, if not decisive, weight on the public's perception of fairness. It might also constitute a legal waiver of objection if the President indicates that he welcomes coverage. There might still be some legitimate concern about the impact of television on the truth-determining process. But it would be largely academic. Given the pressures for television, Presidential acceptance would surely moot the issue as a policy decision. On the other hand, it is not clear whether the President would acquiesce, or urge, telecasting.

Third, there will be a prior decision on television by the House of Representatives. We have already seen the Judiciary Committee deliberations televised. And the House leadership reportedly is negotiating with the networks over possible methods of televising the full House debate. The issues in *Estes* are not presented as clearly in that setting; the House involves no trial presentation of testimony, only debate. Still, the House decision would create some momentum, if not actual precedent. If television is permitted there, the public will not readily understand why it might be precluded in the Senate—the different nature of the proceedings notwithstanding. The President's position in the House also would be of great significance. Nevertheless, it still is necessary, to assume that the President's counsel might object to televising the trial, or might at least not urge it.

Finally, any analysis of the "difference" which television might make in the nature of the trial the President receives must assume some frame of reference—some assumption of the conditions which will prevail if direct broadcast coverage is not permitted.

Present-day techniques for indirect broadcast coverage are sophisticated. Courtroom sketches flashed on the screen while newscasters read excerpts from the testimony or summaries probably will flood the nation's television screens. Newscasters attuned to the legal implications of testimony and prominent legal experts signed on as "commentators," will provide instant analysis which goes well beyond mere reporting of dramatic courtroom confrontations. Moreover, the absence of live coverage would certainly escalate pressures to obtain interviews with the participants—House managers, defense counsel and Senators—in the halls and on the Senate steps. Whether those sought out are willing or reluctant participants, the possibility of such indirect description of the trial by those present may prove inevitable.<sup>4</sup> Such comment would still be possible, but would be much less significant for the public if the proceedings were directly televised.

Also beyond summaries of the evidence during the day or rebroadcast at night, there may well be a publicly available copy of the transcript reprinted the following day in the Congressional Record or a comparable format. Thus, at least a large segment of the public could second-guess the Senators on the basis of the cold record, even if they were not able to see the testimony first-hand.

Finally, one's subjective projection of the atmosphere likely to surround the proceedings may incline toward the expectation of a very dignified atmosphere in the galleries and the halls of the Capitol. Or, one may project that, whatever the decorum in the Senate chamber, the pressures for minute media coverage will produce the overall atmosphere of publicity and cinema verité associated with national political conventions. In the later case, of course, the additional impact of direct telecasting may seem particularly marginal.

With this background in mind, one can review the specific dynamics of a televised trial which the *Estes* Court saw as a danger to fair trial.

#### A. Jurors and Judges

Senators will be the fact finders, comparable to judges sitting without a jury. They also share with the Chief Justice—and have the ultimate responsibility

<sup>4</sup>Common Cause has suggested Senators refrain from public comment on the evidence once the trial begins until after the verdict.

for—the judicial function of ruling on legal questions. Thus, the points made in *Estes* regarding both jurors and judges apply to the Senators' role at the trial.

1. *Distraction.*—If the trial is televised at all, it will almost certainly be full live coverage. The amount of physical disruption and distraction would depend upon whether cameras and lights are placed on the floor—perhaps in doorway recesses at the sides or corners of the chamber—or are placed only in the galleries. The degree of additional sound equipment needed is also unclear. (Perhaps that can be handled by plugging into the existing microphone system at each desk.) Some physical distraction of Senators and other participants is inevitable if substantial equipment is set up on the Senate floor. In addition, Senators would be well aware they were on television.

By profession, Senators are far more used to public scrutiny, including television, than are ordinary jurors. But, by the same token they are not necessarily any less self-conscious about it, especially if its potential impact on their political future is as great as it would be here. Senators will be called upon to rule on complicated legal questions—in some instance such ruling might require overruling the Chief Justice of the United States after he has given a solemn explanation of his initial decision to a nationwide television audience as well as to the Senate. In addition, the rules and precedents provide for Senators to put questions, in writing, to the witnesses. To what extent would Senators be able to exclude their awareness they were on television from their actions, or inactions, in these two areas?

The Court in *Estes* emphasized the danger of such an impact in the case of judges who were elected. Surely few single cases might have the impact on a judge's political fortunes as might a Senator's vote (and to a lesser extent his other activities) at this impeachment trial.

2. *Notoriety.*—One need not belabor the "pre-trial publicity" involved. But only part will have come from the preliminary stages of the impeachment proceedings in the House. A good deal has come from related, but independent, Watergate proceedings and events, including the Senate's performance of a legitimate legislative function through the Select Committee hearings. Substantial publicity—even if an understandable response to charges—has come from the actions of the President himself: the news conferences, addresses to the Nation and release of the tapes transcripts.

However the overlapping aspects of pre-trial publicity is analyzed, the issue of "notoriety" would seem the biggest problem with applying the *Estes* decision here. While the *Estes* case was also well publicized before trial, the Court clearly suggested that televising the hearing and then the trial significantly increased the matter's notoriety—or at least the perception of notoriety by the jury.

In the present instance, it is hard to imagine a matter more "notorious" than Watergate—especially any aspect relating to the White House. The national media has been consumed by it for over a year. Televising the proceedings is not needed to remind any Senator of this notoriety, as it might have been for any of the *Estes* jurors who had not followed the pre-trial publicity. Most important, Senators will be aware that the notoriety inevitably surrounds the charges against a President of the United States: the fact of the telecast is not likely to create an unconscious bias toward his being guilty.

3. *Community Pressure.*—With or without live television coverage, every Senator will be intensely aware of the public scrutiny his actions will receive. In *Estes* the Court thought it would make a difference if jurors knew they might be second-guessed by friends and neighbors who had actually witnessed the testimony. In a sense this would be even more true for Senators, since second-guessing what the evidence will prove has become a national pastime on Watergate matters. At the same time, this awareness may have less impact because Senators also know that many of their constituents will have formed firm views on the ultimate verdict, whether or not the trial is televised. Far more detailed presentation of the evidence and analysis of its significance has already come out on Watergate than emerges in most criminal cases. And, as noted, detailed accounts and analysis of the trial testimony will also be widely available—especially if daily record transcripts are published.

More than in the average criminal trial—even a controversial one—Senators know here that constituents have a very substantial body of information on which to form firm convictions about the ultimate verdict, even if the proceedings are not televised. Any additional degree of conviction that comes from seeing the testimony directly is arguably more marginal and cumulative than in criminal trials.

Indeed, this aspect of the *Estes* decision seems to cut the other way. It is likely that a Senator might be more concerned about being second guessed by constituents who had only received a selective, piecemeal account of the proceedings to supplement their other information about Watergate than he would be about the judgment of those who had seen and heard all that he had.

4. *Selective Reinforcement.*—Presumably Senators would not be sequestered. There would be a question of selective reinforcement through viewing videotape replays of particular excerpts from the trial. The Senate might adopt a rule requiring Senators not to view such telecasts. But it might not be easy to anticipate that listening to a particular station on radio or television, one was about to see or hear such a rebroadcast.

Again, however, the question can be asked whether the intense news coverage likely to be given the impeachment trial would make the reinforcing effects of watching such telecasts only marginally greater than the impact of testimony read by commentators against photo or sketched backgrounds.<sup>5</sup>

5. *New Trial Difficulties.*—It is hard to imagine a second impeachment trial before 1976. Even if conceivable, that prospect presents a different issue since a majority of the Senators who sit and hear the testimony in the first trial would sit for the second. There is no issue of selecting a new panel unaffected by the initial testimony.

#### B. Witnesses

1. Many of those likely to be key witnesses have already testified under oath before the Senate Select Committee. On the one hand, this means they have had some exposure to being televised. On the other hand, their direct testimony is substantially locked in—however it may have been affected initially by television. Moreover, some witnesses have also been interviewed on television and participated in highly publicized pre-trial proceedings or trials by the time the impeachment trial takes place.

Thus awareness they are on camera won't have the same impact as it might on a person with no prior exposure to such intense publicity. This is not to say they may not be affected. As the Court said in *Estes*, some may be cowed, others cocky, and others may play to the viewing audience. But we must also ask whether, in a President's impeachment trial, inherently historic, momentous and so publicized, it is realistic to expect such dynamics only if the trial is directly televised.

The rule against witnesses hearing prior testimony also presents problems here. But if daily transcript is reprinted in the Record or a similar publication, the problem will be just as great without television.

Further, several witnesses may be facing prosecution on related charges. If a witness were to take the stand but then invoke the Fifth Amendment, persons watching the telecast who might be potential jurors at the future prosecution of that witness would see him invoke the Fifth Amendment and hear any comment thereon. That would diminish the witness' right to invoke the same privilege—without comment—at his own trial. And, of course, if he does testify, that would raise the possibility of biasing jurors at his own trial.<sup>6</sup>

#### C. Defense Counsel and Defendants

The problems of distraction for defense counsel would be enhanced in an impeachment trial by the fact that the media has come to focus on him as a personality in his own right. Moreover, the interaction of defense counsel and the House managers may be affected by the fact that the latter are, like the Senate judges, elected officials with a heightened awareness of their presence before a vast public audience.

On the other hand, attorney-client consultation for the defendant is likely to be done by phone. Given the strong analogy to a criminal trial, the Senate is un-

<sup>5</sup> Of course the same arguments can be made regarding highly publicized criminal trials which receive the same kind of intense daily reporting. The recent trial of Messrs. Stans and Mitchell in New York is an example. Yet no one suggested televising that proceeding. Put differently, the argument that television's impact in any of these aspects would only be cumulative, can be made for a controversial criminal trial as well as impeachment. To that extent, efforts to "distinguish" the impeachment trial actually are implicit challenges to the Court's reasoning in *Estes*.

<sup>6</sup> These problems might present separate constitutional issues if a witness objected to the televising of his testimony and was overridden. The dissent in *Estes* raised that possibility, even though there was no suggestion the witnesses were under indictment. That prospect is even more likely by the time a Senate trial starts and the bulk of this problem—the Ellsberg psychiatrist break-in trial and the Watergate cover-up trial—might be obviated. But the recent "Ellsberg break-in trial" showed an unbiased jury can be picked, and jurors in the Watergate cover-up case may be sequestered by the start of the Senate trial.

likely to call the President to testify. Barring a surprise appearance at his own initiative he will not be present at the trial. In any event, he would certainly not be present for the bulk of the proceeding. Therefore the consideration raised about a defendant being forced to sit under the camera's scrutiny is also inapposite.

#### IV. THE PUBLIC INTEREST IN TELEVISIONING THE IMPEACHMENT TRIAL

Thus far, we have not considered the reasons *advanced for televising the trial*. In *Estes*, the State of Texas argued that the telecast was "enlightening to the public and would promote greater public respect for the courts."

In his concurring opinion the Chief Justice sharply rebuffed this suggestion: "It is argued that television not only entertains but also educates the public. But the function of a trial is not to provide an educational experience; and there is a substantial danger that any attempt to use a trial as an educational tool will both divert it from its proper purpose and lead to suspicions concerning the integrity of the trial process."

But there Warren weighed only the benefit of educating the public generally about the criminal justice system. While that is desirable, the public rarely has such a strong conviction about any one case that support of the legal system will turn upon the outcome. As for a general understanding of our trial system, that can be achieved in other ways, such as dramatized recreations or documentary programs.

For an impeachment trial of the President, the desirability of public viewing is different and far greater. The country is concerned and divided by Watergate. The public is anxious to find the best resolution of its impact on the presidency. Whatever its outcome, the final judgment on impeachment must be perceived as the product of fair procedures. It is also important that the verdict gain the widest possible acceptance as a judgment reasonably based on the evidence. Above all, it is important that most Americans, including those who disagree with the verdict, at least do not dismiss it as a purely partisan political exercise.

Permitting the public to view the trial directly through television would serve these ends:

(1) It would provide a full appreciation of the impeachment trial process. We may overestimate the degree to which the nature of the trial is widely understood. For too many Americans, the image may still be one of regular legislative confrontation and partisan debate. Of course the trial would be reported by the media in copious detail. But surely this would be the proverbial picture worth a thousand words.

(2) Beyond seeing the trial process, the public might also see vivid instances of procedural fairness and nonpartisanship. For example, votes by the Democratically controlled Senate sustaining defense counsel's objections would bolster the desired perception of openmindedness. A subsequent news story simply would not have the same impact.

(3) Finally, there is the importance of the public viewing the evidence before the court of impeachment. How do witnesses whose credibility is important testify under pressure?

As for the reams of documentary evidence and transcripts, it is easy to assume the material has been read and digested by the public—or that they have at least read substantial excerpts and heard endless analyses. In fact, many may never be familiar with the evidence on which their President is either acquitted or convicted unless they see and hear it presented at the trial.

Those are the affirmative arguments for permitting a televised trial. Opponents might suggest the arguments overstate the degree to which telecasting would increase public acceptance of the Senate's verdict. Earlier, in discussing Senate concern the voters would second guess the outcome, I noted that thousands of Americans *have seen* the Ervin hearings. Many *have read* excerpts of the tape transcripts, the President's position papers and so forth. Most Americans have strong feelings about the issue and are not likely to observe the legal obligation on Senators to consider only evidence admitted at trial. The public's reaction to the verdict, as "reasonable", or "vindictive" or "a cop-out," may depend upon its evaluation of *all* the information available by the trial date which, in the public's mind, bears on presidential culpability. In that context, is it really likely that the public's acceptance will turn on its seeing the trial first hand?

One might also argue that if substantial information is received by the impeachment court in secret session, public satisfaction with the proceedings will prove a will-o'-the-wisp. Executive sessions may be ordered to receive mate-

rial related to national security; grand jury testimony; or additional presidential papers and tapes released upon conditions of limited access. The deliberations are also in closed session under the rules. If the public is offered a televised trial but then sees the coverage interrupted frequently at critical junctures for secret sessions, might not the overall effect heighten, rather than mitigate a sense the full basis of the Senate's action was not publicly known? The frustration with this procedure would be greater than if the interruptions merely were reported in the press.<sup>7</sup>

#### V. SUMMARY AND CONCLUSIONS

As the Court admitted in *Estes*, evaluation of the problems posed by televised trials necessarily involves our conjecture based on human experience. Each of us brings our own assumptions to bear. But there are some fundamental differences between the *Estes* case and the present situation which are inherent in the nature of the proceedings.

In some ways an impeachment trial presents a "stronger case" for prohibiting television on fair trial grounds than did the actual record in *Estes*: (1) the fact finders will not be sequestered; (2) the person who will find the facts and rule on the law are elected officials; (3) there would be full live coverage; (4) the issues are not dull commercial transactions but dramas of political corruption.

Yet these factors seem outweighed by the uniqueness of the impeachment trial which is likely to make the effect of television more cumulative than it might be in a criminal trial. In *Estes* the Court felt that television would make the participants very self-conscious, producing distraction and distortion of their respective trial roles. Though no less troublesome here, these concerns are somewhat inevitable in an impeachment trial.

The Court's other principal concern was that television would encourage strong opinions in the community at large about the verdict and that this prospect would affect the jurors' own decisions. But the arguments advanced for telecasting an impeachment trial *start from the premise that in this case most citizens will have strong feelings about it and will second guess the verdict, whether or not it is televised*. That is precisely why the concern for maximizing acceptance of the verdict—if not agreement with it—counsels directly exposing the public to the trial.

While this benefit cannot be calibrated, the balance of considerations supports the conclusion that the momentous and potentially divisive "resolution" of Watergate should be open and shared with the public to the greatest possible extent. There may be a time for restraint in news coverage of public proceedings. But Watergate's corrosive effect on public confidence in government, and the concern now to vindicate "the system", suggests that this is not such a time.

Senator ROBERT C. BYRD. While Senator Taft is preparing to speak I would not want the record to go without my saying that in my judgment both Senators Hart and Javits have demonstrated a great deal of effort and thought and their suggestions in my judgment have been very useful to this committee.

Senator ALLEN. Mr. Chairman, may I state before Senator Taft gets started that I have another commitment that I have to fulfill. I have read your statement in its entirety and I commend you very much on the two major points that you have raised.

Senator TAFT. Thank you very much.

The CHAIRMAN. Senator Taft?

#### STATEMENT OF HON. ROBERT TAFT, JR., A U.S. SENATOR FROM THE STATE OF OHIO

Senator TAFT. Thank you, Mr. Chairman, for the privilege of appearing here before you today and the privilege of listening to my

<sup>7</sup> On the other hand, the problem of secrecy will arise either way. It could be argued that the negative impact would be lessened if the audience saw first hand that the executive sessions were an integral and logical aspect of the trial necessitated by special requirements of confidentiality.

distinguished colleagues who I thought were extremely elucidating in their comments. Senators Stennis, Javits, Hart, all of them I thought made very excellent points for consideration by the committee. I have gone at this in somewhat a different manner. I am limiting the general gist of my comments to television coverage and what I think the effects might be. And again, as a second point to the matter of burden of proof.

Both of these points I shall go into in some detail which ultimately may go to the question of not only fairness of trial, because I think it is paramount, but above all history is going to judge us and is going to require that the elements of fair trial as they are generally understood and accepted in our society have been followed.

I will skip through some of my testimony and just generally point out that I think that certainly all of us are trying to maintain a degree of impartiality and I think our thinking on this entire matter is commendable.

I also should mention that while I have in the past, and my family and I still have, some commercial interest in the television media, what I say here today is totally without relation to what might be a favorable or unfavorable effect upon that media of the decision by this committee except that I believe it would be de minimus as to any monetary effect to me personally.

My position is also taken without regard to what decision I might suggest as to permitting general television coverage of sessions of the Senate or of its committees. The objections that will be discussed with regard to coverage of a possible trial, do not, in my opinion, exist as to these questions; and generally as in the case of the vote of the Senate Banking Committee last year, I favor opening of all committee sessions to fullest media coverage.

All of us who have been elected to public office are aware of the revolutionary effect television has had on American politics and government. In the 1950's I ran for State legislature without any use of television in my campaign and even with little use of it in my campaign for Congress at large from Ohio as late as 1962. I felt that it was expensive and that it was not needed. In 1964, I ran for the United States Senate in the same year that our colleague Barry Goldwater ran for the Presidency. Who can forget the little girl disappearing in the infamous mushroom cloud, or the east coast saw-off ads which the Johnson campaign played on television? The impact on the Goldwater campaign was devastating. I didn't change my mode of campaigning nor did I make any special preparation prior to debating Senator Steve Young on television that year. Without professional makeup or preparational format, I argued the issues and, largely on the basis of youth, expected to look better than my opponent, Senator Steve Young. On the contrary, Steve Young was prepared by professionals and with their help he came off extremely well. It became quite clear that something has happened since that period when my father was cornered by Lawrence Spivack on "Meet the Press" about certain polls that indicated that Dwight D. Eisenhower was more popular with the voters, after which statement my father affronted the camera head on and replied "The Gallup Poll is rigged."

In my congressional campaigns in 1966 and 1968 I got smarter and looked for professional assistance. I practiced before the television

cameras in a class at the CBS studios along with Gerald Ford, Bill Steiger, and House colleagues.

In my 1970 senatorial campaign my campaign staff wisely demanded that I get the treatment, with coaching by Bob Goodman, Roger Ailes, and others. We went the full route; how to sit down, how to look down to move to another camera. How you get up, how you check your floor lighting. Watch out for close stripes and other diversions, empty your pockets, no confusing check suits or close stripe shirts, bold ties not blotchy ones. How you look for a chance to put in your three or four zingers into a debate. How you introduce your family. I'm still not good at it, but to be even tolerable takes practice and conditioning. We all know it. And, eventually, it becomes a second nature—with little direct thought.

Now, I suggest that even more happens inside the head than outside. You become an actor. You speak, act, and think in relation to your audience if you are any good, and few candidates are elected who aren't.

I ask you now to reflect what this means in a trial in the Senate. What chance is there that most Members of the Senate will truly forget for one second the presence of TV cameras—no matter how sequestered, boxed, or limited. How unavoidable will it be that some of us will inevitably slip in whole or part into the role of presenting our own case to a jury of the TV audience—to support our eventual or predetermined individual judgment as to how each of us votes.

Let's provide for procedures which will allow us to evaluate the facts in the calm, dignity and true light of reason, not the blinding seering klieg lights of television cameras. Let any trial be full and open. But let it be fair. Fairness and television coverage are mutually exclusive.

In the early days of television, the famous Kefauver hearings were covered on live television. This prompted the late Judge Thurman Arnold to write a penetrating and provocative essay in the June 1971 issue of the *Atlantic Monthly* entitled "Mob, Justice, and Television." Some of Judge Arnold's points seem appropriate today and I would like to quote them:

The vice of this television proceeding is not in the way this particular committee conducted itself but in the proceeding itself. Any tribunal which takes on the trappings and aspects of the judicial hearing, particularly where there is compulsory examination of witnesses, must conform to our judicial traditions, or sooner or later on it will develop into a monstrosity that demands reform. These traditions are: (1) It must be public and at the same time not a device for publicity; (2) It must protect the innocent even at the cost of letting the guilty escape. Television has no place in such a picture. For witnesses it is an ordeal not unlike the third degree. On those who sit as judges, it imposes the demoralizing necessity of also being actors. For the accused it offers no protection whatever.

Mr. Chairman, with these considerations in mind, it is no wonder that the Senate by its own rules and good sense generally prohibits TV coverage of its proceedings regardless of how crucial or important a particular debate may be. The intrusion of television in our proceedings involves the substantial risk of undermining the reliability of the system designed to protect fair trial, and I submit this rationale is equally applicable to an impeachment trial involving the President. When we have allowed it, as in the Watergate hearings, it is for a non-judicial, investigatory function. The Senate ban is in harmony with the rules and practices prevailing in the Federal courts which prohibit

the televising and photographing of judicial proceedings. Furthermore, all but 2 of 50 States, presently operate under the same restrictions. In addition, canon 35 of the Judicial Canons of the American Bar Association although having no binding effect on courts nevertheless reflects the view that judges should ban television cameras except for purely ceremonial events and proceedings which are to be shown only in educational institutions and after the case is over and all direct appeals exhausted.

I submit that this is persuasive evidence that our concept of a fair trial does not accommodate such an indulgence. Furthermore, it is submitted that if there is to be a change in the Senate rule banning TV or a suspension thereof it should not come vis-a-vis an impeachment trial. Unquestionably issues and allegations of partisanship would arise which would be most difficult to rebut under the circumstances.

In support of my position that TV coverage of Senate impeachment proceedings is not appropriate, I submit it is not necessary to reach a determination whether this trial is essentially a legal proceeding versus a political process or some hybrid combination. It is a fact that by constitutional mandate the President having been accused by the House of committing impeachable offenses warranting his removal, is entitled to a trial by the Senate. At the very least this trial is a quasi-judicial proceeding which commands safeguards necessary to insure that the President obtains a fair hearing.

As Mr. Charles L. Black, Jr. has written in his book "Impeachment" on page 10 thereof, and I quote:

In function, then the "trial" (referring to an impeachment trial), in the Senate is, as its name implies, at least quasi-judicial. The important thing is not the name given but the thing desired—total impartiality, at least resembling that of a faithful judge or juror.

In fashioning rules for the conduct of the proceedings, the Senate cannot compromise the principle of affording a fair trial because to do so is to undermine constitutional guarantees and to risk the public's distrust in our system of government. Moreover, even in assuming for argument's sake that the proceedings may not be criminal in nature because the ultimate penalty imposed may be only the removal from office, the nature of the penalty should not diminish our task of affording a fair hearing in all respects together with a resulting just judgment.

In reaching my conclusion, I am not unmindful that maximum freedoms must be permitted in allowing the press to exercise its function of fully covering every aspect of this impeachment proceeding and communicating with our constituents regarding each development. However, this freedom to inform and the public's right to be informed must be balanced against the maintenance of absolute fairness required in this judicial or quasi-judicial process. In my view, televising this proceeding is inherently violative of the President's right to a fair hearing. We could argue, and I shall, at length, on the legalities, precedents, and legal, moral, and governmental principles involved for and against television coverage; but for myself, I know, and for most other Senators, I have a strong conviction that the conduct we follow, the thinking we do and therefore the conclusions we reach will be affected deeply by the presence of television coverage. There is nothing we can do to prevent this from being true, but let us recognize it as the

truth, and recognize that it interferes disastrously with the prospects of a fair trial in a trial where fairness may be the most crucial test of all to be applied by history. The charges to be tried are extremely serious, but they will be minimized as compared to a judgment of time that partisanship, self-aggrandizement, or personal political advantage dominated the procedures of the Senate.

As Senators, we should have no part of it. The public will be informed and fully, without TV coverage of the Chamber, as we know well, but let us carry out our duties as we will swear to do—to judge the case impartially to the best of our ability, to allow the accused due process of law in these deliberations, without the omnipresent mind-corrupting aura of greasepaint affecting our duties and deliberations.

The most definitive decision dealing with the effects of televising courtroom proceedings in a defendant's criminal trial appears in *Estes v. Texas*, 381 U.S. 256. There the Supreme Court recognized the inherent invalidity of televising the accused's criminal trial as infringing upon his fundamental right to a fair trial guaranteed by the due process clause of the 14th amendment.

Some will challenge the applicability of the Court's decision in *Estes* to impeachment proceedings, saying that impeachment is not a judicial forum; hence the *Estes* rationale is not controlling. I disagree. As the Court in *Estes* emphasized, the function of our judicial machinery is to ascertain the truth. Without question, this is the function of our impeachment inquiry. Our Senate rules must be geared toward this objective. As was stated by the majority in *Estes*, the use of television, however, cannot be said to contribute materially to this objective. I agree that this pronouncement is applicable to the instant matter.

I know that inherent in TV coverage, by its very nature, is a potential adverse impact upon we Senators who sit in judgment. This is a unique historical occasion where we directly participate in a major history making event. As such, and in our individual searches for the truth, we must confine our mind to the fact finding process. We must never be dissuaded from this function by our conscious or unconscious yielding to the effects of a nationwide television coverage of our solemn proceedings. We are elected officials and as such we can never dispel the feeling that our constituents have their eyes upon us. Experience dictates that it is not only possible, but most probable that it will have direct bearing on how we vote as to the ultimate issues. I submit that it can have no other effect.

Television coverage opens the door to a myriad of irrelevant influences. Ambitious participants, publicity minded counsel and witnesses may do what comes to mind in order to carry off a satisfactory TV performance.

Moreover, the minute any of us step on that TV-covered floor, we will then instantly be out of our proper role, charged by the Constitution, of judging impartially the allegations that the President has committed high crimes and misdemeanors sufficiently serious to justify his removal from office.

Gentlemen, it is human nature that our eyes will be fixed on the camera and our minds distracted with the telecasting rather than with the testimony and the ascertainment of the truth of the ultimate issues for our decision. We cannot afford to divide our attention in this pro-

ceeding for it would not only deny the accused due process but also undercut confidence in the guilt-determining aspect of this procedure.

In the wake of the pervasive pretrial publicity including televising the Watergate Committee and Judiciary Committee, I feel the intensity of public emotion created by TV coverage of the trial.

Television coverage will play havoc with our decisionmaking process. It will provide us with more public exposure than any one of us could otherwise expect. It creates unparalleled opportunity to create a favorable impression on our constituents. It places us in the role of presenting our own case to a jury consisting of the TV audience in support of our eventual or predetermined individual judgment as to how each of us votes. As such, TV coverage can only impede or unduly delay the proceedings to the prejudice of the President and the American people.

It affects the nature of the questions we propose or fail to propose because of our preoccupation with knowing that our questions are being monitored by our constituents and friends. If our constituents are hostile to the President, a televised Senator-juror, realizing he must return to the people who elect and support him may well be led to what the Court in *Estes* realized, "not to hold the balance nice and clear and true between the State and the accused." It is also true that we, as elected jurors, will be subjected to reviewing selected parts of the proceedings which the requirements of broadcasters determined must be emphasized and telecast. This would subconsciously influence us more by seeing this reenacted selected testimony and is yet another inherent problem of which I am extremely concerned.

The adverse impact of TV on us as jurors is sufficient in and of itself to eliminate the use of it in this quasi-judicial courtroom setting. The potential for abuse and the temptations presented to us which detract from our constitutional oath are the kinds of dangers referred to by Mr. Justice Douglas when he warned that "\* \* \* it (TV) is dangerous because of the insidious influences which it puts to work in the administration of Justice." And as Chief Justice Taft wrote in *Turney v. Ohio*:

\* \* \* and the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the respondent, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Actually, because of the pervasive amount of pretrial publicity the respondent has experienced through the televising of the Judiciary Committee, Senate Watergate Committee hearings and the extensive coverage prior to those hearings, it will be extremely difficult to guarantee due process of law in the Senate even now. See *Shepherd v. Maxwell*, 384 U.S. 333 (1966).

An editorial in the August 5 edition of the Cincinnati Enquirer has focused upon the problem of pervasive pretrial publicity in this impeachment proceeding. The article in relevant part states, and I quote:

In the high drama of the televised sessions, the eloquent language in which charges were made and the measured tones in which votes were cast, it is easy to get the impression that there is a preponderance of evidence against Mr.

Nixon and that the actions of the Judiciary Committee in recommending impeachment are based on conviction alone.

For many members, that may well have been the case. But there is more to it than that.

Mr. Chairman, I would ask the entire editorial be printed as part of my statement in the record.

The CHAIRMAN. Without objection, it will be made a part of the hearing record.

[The article referred to follows:]

[From the Cincinnati Enquirer, Monday, Aug. 5, 1974.]

#### THE POLITICS OF IMPEACHMENT

The solemn rhetoric with which the House Judiciary Committee developed the articles of impeachment against the President gave a distorted view of the nature of an impeachment proceeding.

One after another, men and women of varying backgrounds and of both parties traced the abuses they charge the President with having committed against the Constitution and the American people. Except for those who recognized that the case against the President is based on questionable evidence and questionable inferences, committee members paraded before the American people a series of charges and accusations that will have a devastating impact on public opinion.

In the high drama of the televised sessions, the eloquent language in which charges were made and the measured tones in which votes were cast, it is easy to get the impression that there is a preponderance of evidence against Mr. Nixon and that the actions of the Judiciary Committee in recommending impeachment are based on conviction alone.

For many members, that may well have been the case. But there is more to it than that.

Impeachment is a wholly political process in which legislators use the power of their office to influence policy. Even before the Judiciary Committee acted, conservatives in the House announced that the President's decision to sign into law a bill providing legal service for the poor could "dislodge up to 50 votes" that would otherwise have been cast against impeaching Mr. Nixon. When congressmen threaten to vote for impeachment because the President is to sign legislation they deplore, they provide the most compelling argument that Mr. Nixon's impeachability will be determined not alone on the evidence before the Congress but on the basis of the politics involved.

There is nothing new in this.

While standards of conduct are being applied to Mr. Nixon that were not applied to his predecessors, he is not the first American to suffer the special torture of a nearly partisan impeachment.

"Plain Bill" Sulzer was impeached and removed from office as governor of New York in 1913 on the basis of charges similar to those aimed at Mr. Nixon. Mr. Sulzer, according to Editorial Research Reports, refused to go along with the political bosses of Tammany Hall, the powerful New York City Democratic machine, in the political compromises they demanded of him. Instead, Mr. Sulzer wanted to continue investigating graft in state government.

Tammany forces were determined to bring Mr. Sulzer down. They launched an investigation that brought charges of abusing his office and spending campaign donations for personal expenses.

Tammany won the battle with Mr. Sulzer's impeachment and removal from office. But the voters of New York City had a different opinion of Mr. Sulzer. They elected him to the state assembly though he lost a subsequent bid for governor.

Thirteen civil officers of the United States have been impeached and four of them have been convicted and removed from office. Politics played a role in all of those proceedings and at least three of those impeachments were clearly partisan.

Federal Judge John Pickering was the first to be impeached and convicted. Mr. Pickering was a Federalist judge for the New Hampshire district when President Thomas Jefferson complained to the House in a partisan attempt to remove Mr. Pickering from office. Mr. Jefferson had found a good candidate for impeachment.

Mr. Pickering was insane but his impeachment was nonetheless "a political football," according to impeachment scholar Raoul Berger. The charges against Mr. Pickering were practicing irregular judicial procedures, having loose morals and being drunk. Despite the charges and the defendant's insanity, impeachment

and conviction failed to draw a unanimous vote. For "purely political reasons" Mr. Pickering's fellow Federalists "strongly opposed his resignation," according to historian Albert E. Beveridge.

Shortly after Mr. Pickering's removal Samuel Chase, an associate justice of the Supreme Court, was impeached for partisan conduct in office. The Senate acquitted him.

The Federalists, however, had been baiting Mr. Jefferson. Mr. Chase, in particular, was "making intemperate attacks on the Jefferson administration in harangues to the grand jury," according to Professor Berger. But the Federalists in the Senate, along with some "disaffected" Republicans blocked Justice Chase's conviction.

The impeachment of President Andrew Johnson in 1868, after an earlier attempt failed to win a majority vote in the House in 1867, was marked throughout by politics and partisanship.

Mr. Johnson had lost the support of his fellow Republicans in Congress and opposed their efforts to bring some measure of military rule to the South in order to protect the rights of Negroes. When Congress passed a reconstruction act dividing the South into military districts so military courts could protect civil rights, Mr. Johnson tried to interfere with the work of the federal commanders.

Secretary of War Edwin M. Stanton, a holdover from the Lincoln administration was the key enforcer of military reconstruction. To insure that Mr. Johnson would continue to work through Mr. Stanton, Congress passed legislation prohibiting the President from removing the secretary of war without the Senate's consent.

When President Johnson removed Secretary Stanton without Senate approval his impeachment was launched. The House assigned the investigation to the Committee on Reconstruction which recommended Johnson's removal.

But the principle was too much for the Senate to accept, and Mr. Johnson escaped conviction when the Senate came within one vote of the two-thirds margin needed to convict a President and remove him from office.

The lessons of these impeachments clearly warn that a Congress driven by passion and fear for its own survival will commit offenses against the Constitution that will not stand the test of history.

The evidence in all of the impeachments in America's political history has been just as compelling when it was presented in the 19th century as the evidence against Mr. Nixon appears to some to be today. But that evidence and those impeachments are seen as an impassioned and partisan use of a low political weapon. They offer a warning for the present and a prediction of the future.

Senator TAFT. The point I want to make to the committee is I think we should carefully examine the coverage of the Judiciary Committee. I heard it described as admirable. But let's not forget there wasn't one single bit of evidence that was brought out that hadn't already been pretty well covered in the press as far as I could see. However, I do think that the overall impact of it on the public insofar as the defendant was concerned was most serious. Now, maybe that's the nature of the case. Maybe you've judged that but it shouldn't be the case. The fact that the hearings of that committee were televised did have a major affect on public opinion and that is transmitted back to Members of the House who are going to be required to vote on the question of the articles of impeachment.

Mr. Chairman, I believe television of impeachment proceedings in the Senate offers such temptations and in accordance with the *Turney*, *Estes*, and *Shepherd* rationale ought not to be allowed. As Justice Black so succinctly stated in *In re Murchison, et al.*, 349 U.S. 405 at 136, "But our system of law has always endeavored to prevent even the probability of unfairness \* \* \* justice must satisfy the appearance of justice." Not even the dissenters in *Estes* suggested that televising trials was affirmatively desirable. On the contrary, Justice Stewart, with whom Justices Black, Brennan and White joined wrote:

I think that the introduction of television into a courtroom is at least in the present state of the art, an extremely unwise policy.

Not only is there adverse impact on us as jurors in this proceeding, but also television coverage must affect and impair the nature of testimony given. Witnesses will act and respond to the coverage differently. Some may be overconfident, cocky and be given to overstatement; others shaken by the fear of national coverage may become demoralized and falter under the atmosphere knowing his voice and difficulties are being viewed by the whole world. Witnesses may be reluctant to testify thereby impairing the search for truth.

Also of serious concern is that a potential witness may, by watching the testimony of others on television, build his own testimony on a foundation of which he has no direct knowledge. Or, in the alternative, he may refuse to tell his version of what he knows to be true for fear that it contradicts the weight of testimony given by others before him. He could so shape his testimony as to make its impact crucial.

The Supreme Court recognizing this problem in *Estes* stated, "The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable." The presence and participation of a vast audience creates a tense atmosphere and places great pressures upon the witnesses. It is not conducive to a quiet search for the truth, which this impeachment proceeding must be.

Moreover, an analysis of the *United States v. Kleinman, et al.*, 107 F. Supp. 407, leads me to conclude that witnesses may not be compelled to testify by contempt proceedings before Congress where TV coverage has created an atmosphere nullifying a thoughtful, calm, considered, truthful, factual disclosure. The Court explained its reasoning as follows:

(4) The only reason for having a witness on the stand, either before a Committee of Congress or before a court, is to get a thoughtful, calm, considered and, it is to be hoped, truthful disclosure of facts. That is not always accomplished, even under the best of circumstances. But at least the atmosphere of the forum should lend itself to that end.

In the cases now to be decided, the stipulation of facts discloses that there were, in close proximity to the witness television cameras, newsreel cameras, news photographers with their concomitant flashbulbs, radio microphones, a large and crowded hearing room with spectators standing along the walls, etc. The obdurate stand taken by these two defendants must be viewed in the context of all of these conditions. The concentration of all of these elements seems to me necessarily so to disturb and distract any witness to the point that he might say today something that next week he will realize was erroneous. And the mistake could get him in trouble all over again.

Under the circumstances clearly delineated here, the Court holds that the refusal of the defendants to testify was justified and it is hereby adjudged that they are not guilty.

As an additional factor against television coverage, the presence of television will yet place another burden and responsibility upon the jurors thus rendering our task even more complex and difficult. Physical intrusion including the presence and operation of the television equipment will be an impediment in the conduct of the proceedings. This point is supported by the fact that the Senate is required to make this television decision first because other rules which must be subsequently agreed upon will be in accommodation to the fact that there is television coverage.

Certainly we should not ignore the impact of television on the accused. Although he need not be present at the impeachment trial, if he desires to be present, he should be free from the mental and emo-

tional harassment which is inherent in television coverage, an atmosphere not that of a police lineup or third degree. One cannot doubt that television will magnify the impact of public opinion on the trial. The inevitability of close ups of his gestures, expressions, and conferences with counsel will transgress his personal sensibilities, cause the President embarrassment, affront his dignity and sensibilities, and interrupt concentration on the proceedings which should be free from distraction. As long as Mr. Nixon remains our Chief of State he is entitled to be free from the detrimental effects of television coverage in the defense of his cause.

Eliminating the TV cameras will not deprive the public of its right to know. It is our tradition and the precedent of the *Andrew Johnson* trial to permit the fullest coverage by the press of any impeachment and this coverage will be continuing as free and extensive as necessary to inform viewers. Recognizing that there will be indeed adequate coverage of the event, which all citizens have a right to have, I believe that the prejudicial aspects of television coverage to Mr. Nixon outweighs the desirability for national TV coverage. The intrusion of television into this trial of the President involves the risk of undermining the integrity of the trial process thus jeopardizing our national need to emerge from this domestic crisis unimpaired. I recommend against it.

In other words, I think the fairness of this trial will be seriously jeopardized if we permit the television proceedings at all. I think if decision of the committee, decision of the Senate is, it ought to be allowed, it ought to be allowed I think, only with the very strictest limitations.

I have a very hard time seeing where you can open the door and where you must close it fairly, and in the last essence, fairness is the issue that is going to be involved.

The second issue that I want to raise, and I do not need to go into any great detail because I think it has been discussed at length by other witnesses, but I do want to raise a serious point with regard to it, that is the question of burden of proof. It seems to me that "beyond a reasonable doubt" must be the standard.

As our written statement points out, this has been the test.

And Gen. Benjamin F. Butler, counsel for the House of Representatives in the *Johnson* trial case, made this perfectly clear. He conceded that if the Senate was acting as a court and not the Senate, then, and I quote,

\* \* \* the managers of the House of Representatives must conform to those rules as they would be applicable to public or private prosecutors of crime in courts, and that the accused may claim the benefit of the rule in criminal cases, that he may only be convicted when the evidence makes the fact clear beyond reasonable doubt, instead of by a preponderance of the evidence.

I do not see how this "clear and convincing" standard got in here at all.

"Preponderance of evidence" is the general civil rule. I certainly do not think it belongs here. I would like to point out in regard to this question some of the others, there is some question whether—I do not know what may be an impeachable offense, but it certainly is a crime whether or not it is a crime under the code or not that is required I am

not fully determined yet, as Senator Stennis was, but I would point out that article III of the Constitution has the following words:

The trial of all crimes except impeachment shall be by jury.

It seems to me those words in themselves pretty clearly indicate the thinking of the Constitution was that this is a crime that may be different from other crimes, but nevertheless a crime, definitely, it seems to me, is covered here. And the point that seems to me the committee has got to consider very carefully, particularly in view of what I mentioned earlier about the Supreme Court not just allowing us to adopt any rules that we want is the fact that if we adopt a different standard of proof and if we adopt different rules of evidence from the *Johnson* case and other impeachment cases, we may well be flatly in contravention with the Constitution insofar as an ex post facto provision of the Constitution is concerned.

We go into that and clearly I think set out authorities that establish that principle.

I just quote from one of them, Sixth Circuit case, in 1939, or 1940, when certiorari was denied in the *Landay* case, which says as follows:

If the statute authorizes conviction upon proof less in amount or degree than when the offense was committed, it is ex post facto, and unconstitutional.

So not only would such a rule going beyond the sustaining the stricter burden of proof be unconstitutional, it might lead to a conflict of grave dimensions; the President might seek a writ from a lower, appellate, or intermediate court, under the "all writs statute" or original jurisdiction under article III. That has been commented on, of course, in an article by Raoul Berger. I am sure the committee is familiar with this article.

Mr. Chairman, those are the points I think it is important that this committee consider. I think we must seriously consider these matters, seriously consider not the desirability of writing perfect rules necessarily, but of taking every precaution possible to see to it that fair rules and established rules of procedure, the most strict ones to be applied. Because this case is not going to turn, in my opinion, on the rules that are adopted here unless we make a mistake, impose rules that violate the principles of fairness and principles of the Constitution.

I thank you.

The CHAIRMAN. Thank you very much, Senator Taft. We appreciate your very helpful testimony and the paper you have presented.

Senator Byrd.

Senator ROBERT C. BYRD. I have no questions.

I want to commend Senator Taft on the amount of research that has gone into the paper. I think it would be helpful to the committee in its consideration of the assignment that has been given.

Senator TAFT. Thank you, Senator.

Senator ROBERT C. BYRD. Just one question I do have.

In the statement of the distinguished Senator, I read from page 13 this extract:

As the counsel for the President, Mr. Groesbeck of Ohio stated on Saturday, April 25, 1868, during his closing arguments, the accused "... can only be convicted when the evidence makes the case clear beyond a reasonable doubt." (Dover, page 207) (emphasis added). Nothing that occurred thereafter changed that position, and the Senate acquiesced and agreed to this very day that such was the required measure of persuasion.

Now, my research of the precedents thus far has necessarily been quite limited. But I have not found thus far that the Senate "agreed" to that standard of proof.

May I ask the Senator, was a Senate vote taken on this?

Senator TAFT. No; I did not mean to imply a Senate vote was taken.

I meant to imply all subsequent impeachment cases, such a standard as far as I know is borne out.

Senator ROBERT C. BYRD. But does the Senate—here, again, I would have to state that my research does not in any instance indicate that the Senate as a body adopted this or any other particular standard of proof.

Senator TAFT. The Senate has never varied from the rules that were adopted in the *Johnson* case, that is correct.

In applying those rules in the various impeachment procedures and those rules have been followed as I understand it since that time, this is the rule that has been followed.

Senator ROBERT C. BYRD. May I say as far as my own impression is concerned, each Senator has adopted his own standard of proof and the majority of Senators who have spoken on the matter have from time to time indicated that this standard was the standard which they were going to—

Senator TAFT. I am glad the Senator has brought that out, because I want to make that abundantly clear to the committee as to my own opinion; I had a note added to mention it. That is, I think it is very important that the rules affirmatively include a guide as to the burden of proof and that they include the preponderance, I mean "beyond a reasonable doubt" standard.

I think to fail to do so and to have stand in the record the implication that each Senator may apply his own standard, even though we know each juror on a jury does apply, he is instructed as to the standards but he applies his own standard perhaps as to what he considers means an overwhelming—

Senator ROBERT C. BYRD [continuing]. This final—

Senator TAFT. Burden of proof.

Senator ROBERT C. BYRD [continuing]. Excuse me, did the Senator complete his statement, or I mean sentence?

Senator TAFT. Go right ahead.

Senator ROBERT C. BYRD. This final sentence, does the Senator agree with me, although various Senators from time to time during the impeachment trials that have been conducted by the Senate have expressed personal views as to what standard of proof ought to be applied, and that some have taken the high standard—to wit, the words "clear beyond a reasonable doubt"—that other—

Senator TAFT. That is not the highest, but—

Senator ROBERT C. BYRD [continuing]. That others, although perhaps in the minority, have expressed different views that the Senate itself has never in any impeachment trial adopted any given standard of proof for its Members to follow?

Senator TAFT [continuing]. I do not think I agree with that. I think there have been individual Members who may have expressed their own opinions on this, but I think the rule that has been followed and has been agreed to have been followed—there may have been those who are in the minority, but the rule that has been followed since the *Johnson* case has been the heavier burden of proof.

Senator ROBERT C. BYRD. Would the Senator do this for the committee? I would welcome the Senator's research if he can show in any instance the Senate as a body adopted formally a standard of proof.

Senator TAFT. I do not think you are going to find that.

Senator, I do not believe that—if that were true, it would be an amendment or an addendum to the rules that we already have. I do not think that is the case. But it has been conceded I think by most authorities this is the case.

Senator ROBERT C. BYRD. This is the question I wanted to clarify. I think the Senator and I are in agreement.

Senator TAFT. Thank you.

The CHAIRMAN. Senator Brooke.

#### STATEMENT OF HON. EDWARD W. BROOKE, A U.S. SENATOR FROM THE COMMONWEALTH OF MASSACHUSETTS

Senator BROOKE. Thank you, Mr. Chairman, Senator Byrd.

I am pleased to have this opportunity to discuss the procedures to be adopted by the Senate in the event of the necessity of an impeachment trial. I want to commend the distinguished members of this committee for holding hearings to obtain the views of individual Senators. On a matter of such paramount importance, the opinions of as many Senators as possible should be taken into consideration.

If the House of Representatives does vote to impeach President Nixon, the Constitution vests in the Senate the awesome responsibility of trying the impeachment. The rules of procedure that will be adopted by the Senate to guide us through such a trial are of great importance.

It is mandatory that the Senate carefully review at this time the present Senate rules on impeachment trials and determine in advance what changes may be necessary.

Such a review could preclude the possibility of disastrous procedural entanglements that might otherwise ensue after the commencement of a Senate trial.

The present Senate rules have been applied a number of times in our history. And they have worked well. In general, they serve as a good and basic framework from which to operate.

In my opinion a drastic overhaul of the existing rules is not necessary. In fact, with the possibility that there might only be a short period of time before the start of a Senate trial, implementation of a completely new set of rules might engender repercussions which we cannot now envision.

I am inclined to follow the advice of Senator Lynn Trumbull, who stated during the 1868 impeachment trial of Andrew Johnson that, and I quote:

On entering upon this trial about which the country is sensitive and which is a delicate matter at least, our wisest course would be to take the rules which had been adopted nearly 70 years ago, and under which five trials have been had, and out of the administration of which no difficulties had arisen. I was not for anticipating trouble. I was disposed to take the old rules, change them as far as was necessary to meet the changed case, and proceed under them; and if we shall find, as some anticipate, which I do not, a disposition to trifle with the Senate, to take up its time by dilatory motions and prolonged arguments, it will be in our power at any time to stop that, and the whole world will then say that the Senate is justified in stopping such a course of proceeding; but I would not put ourselves into a straight-jacket to begin with.

But as Senator Trumbull observed, it may be necessary to make revisions in the present rules. It has been more than 100 years since the last impeachment trial and time has changed many things. Therefore, we must carefully study the present rules and be ready to modify them where necessary.

I would like to focus my attention on four basic issues which the committee has been considering: one, standard of proof in an impeachment trial; two, the admissibility of evidence; three, the role of the Chief Justice as presiding officer; and, four, whether the impeachment trial should be televised.

The question of what standard of proof should be adopted for an impeachment trial is not an easy one to answer. To date the issue has revolved around the concept of proof "beyond a reasonable doubt," which is the standard used in courtroom criminal proceedings, and proof based on a "preponderance of the evidence," which is the standard used in courtroom proceedings.

Those advocating the adoption of a strict criminal standard point out that removal by conviction on impeachment is a devastating penalty, the ruin of a life. And even more important, they contend, it unseats the person the people have deliberately elected for the office. Thus the adoption of a lenient standard of proof could mean that this sanction, and this frustration of popular will, could occur even though substantial doubt of guilt remained.

On the other hand, opponents of the strict standard assert that the criminal standard of proof could mean in practice, that a person could remain President whom every Member of the Senate believed to be guilty of corruption, just because his guilt was not shown "beyond a reasonable doubt."

Both sides make valid points. Perhaps strict adherence to either the criminal or civil standard of proof would be unwise in an impeachment trial. After all, an impeachment trial is neither a criminal nor a civil trial. Senator Mansfield, recognizing this, has proposed an alternative standard that falls between the two extreme standards. His proposal provides that the burden of proof needed to find a President guilty of impeachable offenses should be "clear and convincing evidence." Another option might be the adoption of an "overwhelming preponderance of evidence" standard as suggested by Yale Professor of Law Charles L. Black, Jr.

I prefer the last two standards to either the strict criminal standard or the less stringent civil standard.

Precedents of past impeachment trials are not helpful in trying to establish the proper standard or proof. Authorities and cases may be marshalled to present one point of view or another. It appears that in the final analysis, each Senator must apply his own standard. As Senator Elbert D. Thomas noted in the impeachment of Ritter:

The Senate \*\*\* makes its own rules and the individual Senator votes in accordance with his own opinion, without instruction from the court in the sense that an ordinary jury receives instruction.

The admissibility of evidence has become a controversial issue in the consideration of impeachment trial rules. This should not be so. I believe that any problems that have developed result from a misunderstanding of the nature of an impeachment trial and the present Senate impeachment trial rules and precedents

It must be understood, as noted above, that the impeachment process, though being somewhat analogous to criminal proceedings, is in many respects substantially different. And the role of a Senator in an impeachment trial is quite different than the role of a juror in a criminal trial. The technical rules of evidence used in criminal trials have been developed to hold juries in narrow limits. But Senators cannot and should not be held in such limits. They are judges/jurors in a quasi-judicial trial. They are continually exposed to hearsay evidence; they cannot be sequestered and kept away from newspapers like a jury. And, in addition, it must be assumed that Senators are knowledgeable and worldly enough to perceive what is relevant or credible evidence in an impeachment trial.

This is not to say that there should be no evidentiary guidelines at all in an impeachment trial. But I believe the current rules and precedents provide many of the necessary safeguards.

In past impeachment trials the Senate relied on common law rules of evidence. Basically these rules provide that if the evidence is relevant to the charges of the impeachment article and does not fall into a category such as hearsay, the evidence is admissible. The common law rules of evidence would allow the flexibility that we would need in an impeachment trial.

I suggest that our objective in determining admissibility standards should be that the Senate should hear and consider all evidence which seems relevant, without regard to overly technical rules. Rules should be flexible enough to permit the introduction of whatever evidence is needed to give Senators the clearest understanding possible of what has transpired.

We must remember that it is our task to strike a balance between the rights of the respondent in an impeachment trial and the right of the Senate and the country to at long last resolve in the fairest way possible the grave political crisis that now afflicts our Nation.

The role of the Chief Justice of the Supreme Court as Presiding Officer in a Presidential impeachment trial is, in my opinion, an important one. However, that does not mean that the Chief Justice should exercise the same responsibilities and powers as a Senator. The Constitution vests the sole power to try impeachment in the Senate. Therefore, I believe that it is entirely within the province of the Senate to prohibit the Chief Justice from voting on any procedural or evidentiary questions.

A good argument can be made that Senators, because of their constitutional mandate to judge the guilt or innocence of the President, should be the only ones entitled to vote on anything that might bear on their ability to make that judgment.

Previously, I mentioned the need to adapt the present rules to the changed circumstances of our times. Perhaps the most important amendment to the rules that would help accomplish this purpose would be a section providing for televised proceedings.

The reasons for televising an impeachment trial are many. Foremost is that it is crucial that whatever action is taken must be understood and broadly accepted by the public. Therefore, maximum exposure of the American people to the evidence on which any decision is based provides the best opportunity that public opinion will reach the same general conclusion, influenced by the same considerations, as that reflected by Senate action, whatever that action, if any, may be.

A second reason is that two-thirds of the American people depend on television for news accounts. If the public is not allowed to view the proceedings live, they will depend overwhelmingly on interpretations and analyses by network television through regularly scheduled news programs or special presentations devoted to impeachment.

Giving the responsibility or the power to network television to control that analysis and interpretation is unwise, especially when the political needs of the Nation are for a broad understanding of both the procedures and the evidence utilized by the Senate in deciding the impeachment question.

Without live coverage of the impeachment proceedings, media coverage itself will become an issue—one that can and should be avoided in order to minimize the damage to the Nation that the impeachment issue, however it is resolved, has done to the national social fabric.

And third, television coverage would encourage and enhance the prospects for an atmosphere of solemnity and careful deliberation during consideration of impeachment, and Members of the Senate would be made even more aware of the seriousness and far-reaching consequences of their actions. The fact that constituents would be watching should not alter judgments rendered but no doubt would help to insure that any such proceedings would be conducted in a manner which reflected favorably on all those participating in them.

If the Senate decides that an impeachment trial should be televised, appropriate safeguards must be adopted if we are to prevent serious abuses. We must insist that certain conditions must be met so that cameras and microphones will remain unobtrusive—silent spectators rather than disruptive participants—as we listen to the evidence and make our decisions. I am confident that it will be relatively easy to devise these safeguards.

Mr. Chairman, I would also like to suggest that we amend rule III of the present impeachment trial rules regarding the number of sessions per week the Senate must have if there is a Senate trial. The rule now states that the Senate shall meet 6 days every week—Sundays excepted—until final judgment shall be rendered.

I submit this is an unreasonable rule. Anyone who has participated in a trial of any length understands how difficult it is to conduct adequately a trial 6 days a week. Such a schedule leaves no time for thoughtful reflection and no time at all for proper trial preparations.

I believe such a time schedule, though appealing because of its seemingly expeditious intent, is actually counterproductive and will prove to be of diminishing value as a trial wears on. I suggest that a 5-day schedule would be more appropriate and productive.

In formulating rules for a possible impeachment trial, our overriding concern should be our accountability to the American people. Of utmost importance is our obligation to help restore their confidence in our governmental institutions.

To insure accountability we must strive to make all proceedings as open as possible. Televised proceedings are consistent with this principle. But we must also insist that all debate and deliberations be open, with the exception of those debates involving national security. The public must be allowed to witness in its entirety such a solemn and important undertaking.

We must also be careful to adhere strictly to the fundamental principles of fairness. In this regard the appearance of fairness is just as im-

portant. The American people must be convinced that the Senate is observing the principles of due process.

If we maintain our allegiance to such considerations, I am sure that the Senate will discharge its constitutional obligations responsibly, judiciously and honorably.

I thank you.

The CHAIRMAN. Thank you very much, Senator Brooke. You have certainly addressed some of the issues that we are very much concerned with, and we have been wrestling with for some little time. I know that your statement will be very helpful to the committee.

Senator Byrd.

Senator ROBERT C. BYRD. I share in the chairman's statement with respect to your appearance, Senator Brooke, and with regard to the statement that you have submitted to the committee.

The committee is indebted to you for this helpful statement.

I have two questions. One, in your statement, I am not sure that I detect definitely your position with regard to the question as to whether or not the Chief Justice should be allowed to vote, to break a tie.

Senator BROOKE. On evidentiary matters I presume you are talking about?

Senator ROBERT C. BYRD. Well, the Senator may wish to make some distinction.

Senator BROOKE. Well, I would certainly restrict it to procedural questions and evidentiary matters. There is no question that the Chief Justice does not have a vote on impeachment itself.

I think the Constitution is clear and explicit in this regard.

However, the Chief Justice should have the power to vote to break a tie in procedural and evidentiary matters. I hope that I have made that clear. If I did not, thank you for asking the question.

I do not think, Senator Byrd, that the presence of the Chief Justice is simply perfunctory. I think he has a more important position than that. If his role were merely casual, someone else probably could sit in that capacity. But in bringing the Chief Justice of the Supreme Court, the foremost law interpreter of the Nation, into the Senate, he should have the power to rule on evidentiary matters. And in the event the Senate does not agree, if there is objection taken and there is a vote, I should think he would also have a vote.

Senator ROBERT C. BYRD. The Senator from Massachusetts, as a former attorney general for the State of Massachusetts, I would be interested, and I am sure the committee would be interested, in hearing his opinion with respect to this question, whether or not a televised impeachment trial might possibly prejudice a subsequent criminal trial in which the respondent was the defendant.

In the Senator's judgment, would it make it more difficult or would it make it impossible in his judgment for an impartial jury to be selected in a subsequent criminal trial of the respondent?

Senator BROOKE. The Senator raises a very valid question as to whether an impartial jury could be selected with the immediate coverage that would be given by televising the impeachment proceeding.

This, of course, is a unique case. In a normal situation, when a criminal has been charged and there has been excess media exposure, there is certainly basis for a defendant's counsel to claim that an impartial jury cannot be selected under those circumstances.

I find, though, because of our great advances in technology, that more and more of these motions are being denied by courts today than heretofore.

I think the court recognizes that with a very literate society and with the technology we have in the country, it is very difficult, if not impossible, to get jurors who have not read, seen, or heard anything about the trial.

Of course, television coverage would provide massive coverage of the impeachment trial. Practically every American who was not working when the trial was aired would be viewing it, I would presume.

I am sure it would be the largest television audience in the history of this Nation, or in the history of the world for that matter, if it is televised.

But, frankly, Senator Byrd, I still think we have got to balance it. I think our first job, our highest priority here, is to try the President of the United States on impeachment articles. And in trying the President of the United States, I think in addition to the Senate's role as a quasi-judiciary body, I think that we have a political issue as well.

We have both a justiciable issue and a political issue. I think the political issue must be given some weight, because, as I said in my prepared statement, this will not be a criminal trial as such. Because of the political issues, great importance should be given to the public's right to know and to hear, to understand, and hopefully to accept the verdict of the trial tribunal, which in this instance is the Senate.

If this were a criminal trial, I would have some more serious reservations about it.

Senator ROBERT C. BYRD. But does the Senator, in consideration of the fact that there may be certain criminal charges involved in the final formalized articles submitted to the Senate by the House, if the House does impeach, does the Senator have cause for concern that a televised trial in the Senate would make it impossible to select an impartial jury if a subsequent criminal proceeding were to be conducted with the respondent in the impeachment trial being the defendant in that criminal proceeding?

Senator BROOKE. It would certainly make it more difficult to select an impartial jury, but I think, again, it is a question of priorities.

In this instance the question should be resolved in favor of the public's right to know and to understand, and therefore I believe we should televise impeachment, even though I certainly agree that it would make it more difficult to choose a trial jury.

Senator ROBERT C. BYRD. The Senator, then, does not see this as a fatal flaw in the suggestion that the proceedings be televised?

Senator BROOKE. No, I do not, Senator Byrd.

[Discussion off the record.]

Senator ROBERT C. BYRD. Sorry, I thank the Senator for waiting.

Senator BROOKE. Senator Byrd, I think the defense counsel, respondent then being the defendant, could argue that massive coverage of an impeachment trial, the first in over a hundred years, would make it impossible for an impartial jury to be selected. That case could just as well be made with massive newspaper accounts.

I would envision big headlines of daily coverage, page after page of the testimony that was introduced in the trial. Documents, tapes,

the like. The printed word, of course, lasts even longer than the—reviewed, listened word. And I think that the case would be strong under any circumstances.

So what I am saying, in effect, I guess, is I do not see how you can avoid it. Though it obviously would give you much more exposure, I do not think it would be much more damaging in the long run.

I think you are just going to have to make a choice between that and the right of the public to know.

I think the dangers to the country are greater if you do not televise. To me that is paramount, much more paramount than the possibility that a criminal trial would proceed.

First of all, we do not know there will be a criminal trial. I personally hope that there will not be. But we do not know it. And I think that the dangers to this Nation if these proceedings are not televised is so great that it could be very divisive, very harmful to us for years to come.

I think when we consider that, we would have to resolve it in favor of televising and opening up these hearings.

Senator ROBERT C. BYRD. I thank the Senator.

The CHAIRMAN. Thank you very much.

We appreciate your helpful appearance here today.

Senator BROOKE. And I again thank you for the opportunity, for staying so late to listen.

The CHAIRMAN. The record will remain open until August 9 for statements of other Senators.

The committee will stand in recess until 10 o'clock tomorrow morning, when we will proceed on the resolution involving broadcasting of impeachment hearings.

[Whereupon, at 5:35 p.m., the committee recessed, to reconvene at 10 a.m., Wednesday, August 7, 1974.]

[Letters subsequently received by Chairman Cannon from Senator Hughes and Senator Kennedy (enclosing memoranda) are as follows:]

U.S. SENATE,  
Washington, D.C., August 5, 1974.

HON. HOWARD W. CANNON,  
*Chairman, Committee on Rules and Administration,*  
*U.S. Senate, Washington, D.C.*

DEAR HOWARD: In the Rules Committee's examination of the rules which should govern an impeachment trial of the President of the United States, I hope you will give some attention to the problem of insulating Senators from any improper outside influences.

If and when we sit in judgment on the President, we must obviously maintain the appearance as well as the fact of impartiality. In order to avoid any possibility of interference with the free judgment of Senators on the evidence and issues which may arise in a trial, I believe that it would be helpful for guidelines to be established on the kinds of permissible and impermissible contacts between Senators and the President, the White House staff, the President's counsel, and the managers on the part of the House of Representatives.

I am not a lawyer and am not familiar with the alternatives or analogies in jury trial procedures. But I do believe that such carefully considered guidelines would help to assure the nation that there will be no opportunity for outside interference with this grave Constitutional process.

Sincerely,

HAROLD E. HUGHES.

U.S. SENATE,  
Washington, D.C., August 7, 1974.

HON. HOWARD W. CANNON,  
Chairman, Committee on Rules and Administration,  
U.S. Senate.

DEAR MR. CHAIRMAN: I am enclosing memoranda I have prepared, dealing with two of the issues now before the Rules Committee, in connection with the study of the Senate rules on impeachment—the standard of proof and the admissibility of evidence.

My hope is that the memoranda will be of benefit to you and the other members of the Committee in your consideration of the Rules, and I look forward to the result of the Committee's deliberations.

With my best regards,  
Sincerely,

EDWARD M. KENNEDY.

#### STANDARD OF PROOF

Practical legal analysis easily leads to the belief that the two standards of proof now being widely debated for application in a Senate impeachment trial—"proof beyond a reasonable doubt" and "proof by clear and convincing evidence"—are more easily distinguished in theory than in fact, and that in an actual trial, the two standards will probably lead to the same conclusion when applied to the evidence in an important and momentous proceeding like impeachment.

Both standards reflect the law's search for a high degree of proof, but neither standard is entirely clear, and over the years, each has been a source of continuing uncertainty for judges and juries in ordinary proceedings of the civil and criminal law.

In theory, the distinction between the two standards is substantial; the difference is frequently stated in terms of probability. Thus, "proof by a preponderance of the evidence" (the traditional standard of proof required in civil cases) may be stated as proof by a 51-49 balance; "proof by clear and convincing evidence" is stated as a balance of 75-25; and "proof beyond a reasonable doubt" is stated as a balance of 90-10.

But the weight of the evidence in real cases cannot be measured in such precise mathematical terms. In some jurisdictions, courts have held that the test cannot be accorded a quantitative value, and they have prohibited instructions to juries phrased in terms of probabilities, rather than actual findings or beliefs. In fact, although the standards look different verbally, they merge in the real world of judges, juries, facts, witnesses, documents, and other evidence.

*Beyond A Reasonable Doubt.*—The requirement for a strict standard of proof in criminal cases has been traced as far back as Roman Law and Coke's Institutes. In English jurisprudence, its development was a response to the need felt for the highest standard of proof, as a result of the extremely heavy penalties, including death without benefit of clergy, that were often meted out for relatively trivial offenses. The modern formulation in terms of "proof beyond a reasonable doubt" appears to date from the high treason cases tried in Dublin at the end of the eighteenth century.

Primarily, the high standard for criminal convictions reflects the judgment of society that in cases of serious consequence, where the very life and liberty of the citizen are at stake, the margin for error should be extremely narrow, in order to reduce the opportunity for mistakes in which the innocent are convicted. In the famous phrase of Starkie, the author of a famous nineteenth century treatise on evidence: "The maxim of the law is that it is better that ninety-nine . . . offenders shall escape than that one innocent man should be condemned."

Today, in all State and Federal courts, "proof beyond a reasonable doubt" is the standard of proof required for conviction in criminal cases. The definition of a "reasonable doubt" has been interpreted in a number of ways in conventional instructions given by judges to juries.

The preferred and most widely accepted interpretation speaks in terms of "such doubt as would cause ordinary prudent men to pause or hesitate, beyond the time required for consideration of the evidence, before acting on the more weighty and important matters in their own affairs."

An alternative formulation of reasonable doubt, also widely used, was stated a century ago by Chief Justice Shaw of Massachusetts in *Commonwealth v. Webster*, 5 Cush. 295, 320 (1850): "It is that state of the case, which, after the entire

comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."

Other formulations, accepted by the courts in various jurisdictions, have interpreted "reasonable doubt" through formulations like the following:

A real or substantial doubt, not a speculative or capricious doubt, not a vague or shadowy or imaginary doubt.

A doubt which a sensible person can explain by a good reason.

A doubt that is not a mere hesitation to pronounce guilt because of the punishment that might follow.

Beyond a reasonable doubt, not beyond all possible doubt.

A doubt directed to the whole case, not to separate bits of evidence.

A reasonable doubt need only be a "substantial" doubt, not a "very substantial doubt."

Or, stated positively, the burden is satisfied where there is proof to a "reasonable or moral certainty;" where guilt is the "only reasonable hypothesis from the evidence presented or lack of it;" or where the evidence "excludes any other reasonable hypothesis except guilt."

*"Proof By A Preponderance of the Evidence."*—This is the standard of proof traditionally and currently applied in almost all civil cases. In general, it establishes a "more likely than not" requirement for a finding or conclusion that a judge or jury is required to make in a civil case; in other words, before a party is entitled to prevail on a claim or a defense, he must establish it by the "greater weight of the evidence" or by the "more persuasive and convincing force of the evidence." As distinguished from the "beyond a reasonable doubt" standard, the "preponderance" standard leaves room for substantial doubts as to conclusion, so long as the doubts do not rise to a level where the weight of the evidence for one party is no greater than the weight accorded the evidence on the other side.

*"Proof By Clear Convincing Evidence."*—In contrast to "proof beyond a reasonable doubt" and "proof by a preponderance of the evidence," the standard of "proof by clear and convincing evidence" is much less broadly established in our law. In general, the standard of clear and convincing evidence is a concept that originated with the English chancellors for the determination of facts in certain cases in equity. Today, it is applied to certain unusual issues whose consequences are relatively more serious for the parties involved and where, accordingly, a special higher burden of persuasion than "preponderance of the evidence" has been thought warranted.

Usually, this higher standard is applied in situations such as charges of fraud and undue influence; suits on oral contracts to make a will or to establish the terms of a lost will; suits for the specific performance of an oral contract; proceedings to modify written contracts on grounds of fraud, mistake, or incompleteness; and various other claims and defenses where there is special danger of deception, where a certain degree of opprobrium attaches to the finding, or where a claim or defense is not favored for other policy grounds.

*Conclusion.*—Both the origin and application of the "clear and convincing evidence" test suggest that in practice, it may be difficult to distinguish it from the "beyond a reasonable doubt" test, and that in actual practice, "clear and convincing evidence" may be simply a civil lawyer's way of saying "beyond a reasonable doubt."

As a matter of logic and philosophy, the standards can be differentiated, as noted earlier in the discussion of probabilities. But in the practical world of judges and jurors weighing actual evidence in civil and criminal cases, it is difficult to believe that concepts of proof can be sliced so thin.

Certainly, in a case as serious as the trial of an impeachment, involving the potential removal of a President from office and the nullification of an election mandate won at the polls, a high standard of proof should be required, and a formulation should be adopted that tends to direct the mind to the desired standard.

But surely, in weighing the evidence introduced against President Nixon in a forthcoming Senate trial, a Senator who felt that there was a "reasonable doubt" on the evidence as a whole would have great difficulty in concluding that the evidence was nevertheless sufficient to merit conviction by the standard of "clear and convincing evidence." Practically speaking, if there is a reasonable doubt, how can the evidence be regarded as clear and convincing?

As a result, the Senate may reasonably conclude: (1) that both standards—proof beyond a reasonable doubt and proof by clear and convincing evidence—

are consistent with the precedents in our jurisprudence, both civil and criminal, in which the highest standard of guilt has been applied; (2) that whichever standard is applied, neither standard should realistically be perceived as either "for" or "against" the President; and (3) that it is unnecessary for the Senate to decide on a specific formulation of the high standard required in trials of impeachments, since the choice is between essentially similar formulations and is therefore best left to the determination of individual Senators.

*References:* McCormick's Handbook on the Law of Evidence §§ 339-341 (1972); Wigmore On Evidence § 2497-2498 (1940; 1970 Supp.); Rule 30, Fed. Rules Crim. Proc., and USCA, notes 195-201; Black, *Impeachment* 15-18 (1974) (suggesting "overwhelming preponderance of the evidence" as the standard of proof in an impeachment trial).

## ADMISSIBILITY OF EVIDENCE

### INTRODUCTION

If the Senate receives Articles of Impeachment from the House of Representatives, two major questions will arise concerning (1) what body of evidence rules should be used (if the Senate considers it desirable to adopt a uniform set of rules) and (2) how those rules will apply—i.e., what the results will be on admissibility of specific testimony, tapes, or documents. Before discussing the alternative sets of rules of evidence which may be adopted for an impeachment proceeding, and to acquaint the reader with the immediate implications of these various approaches, this memorandum will first discuss the admissibility of expected evidence under the federal rules of evidence for criminal trials. It will then consider alternative systems of evidence and the steps which the Senate might take to expedite the determination of evidence questions before the trial.

### ADMISSIBILITY OF TAPES, TRANSCRIPTS, AND DOCUMENTS

#### 1. *Are the tapes of White House conversations admissible in evidence?*

Yes. All or nearly all of the tapes would be admissible as long as they were relevant to the offenses charged in the articles of impeachment. This is because most of the tapes contain conversations of the President himself. Statements made by one of the parties in a trial are always admissible as evidence in that trial, and statements recorded on tape are no exception.

Tapes of statements of Presidential assistants made during conversations with the President are also admissible because they are needed to indicate or clarify what the President meant and what he knew or had notice of. For instance, if John Dean says that Hunt "ought to be given some signal," and the President then says, "For ——— sake, get it," it is necessary to know what Dean said in order to understand what the President said.

The only potential problem arises with tapes of conversations among Presidential aides when the President himself was not present. These tapes can be admitted into evidence if the discussions concern matters within the official responsibilities of the aides, express a plan or intent to do something, or are part of a conspiracy involving the President. Otherwise, they would probably not be admissible.

While it is true that "You can't cross-examine a piece of tape," it is equally clear that under the strict rules of evidence applied in criminal trials, nearly all portions of tapes would be admissible. This is particularly true because the President has stated that the tapes are accurate, verbatim recordings of conversations and has acknowledged their official character by claiming executive privilege with respect to them. However, frequent objections may be made to particular portions of the tapes, resulting in time-consuming delays in the trial.

Under the strict criminal rules of evidence, each person involved in making each tape would have to testify to establish its accuracy. This would include the Secret Service personnel who monitored the recording machines and each person who had custody of each tape at any time. However, the parties could agree to the authenticity of the tapes in advance and avoid the necessity for much of this testimony.

#### 2. *Are transcripts of White House tapes admissible into evidence, or must the tapes themselves be played before the Senate?*

Transcripts of tapes are admissible if the original tapes are, except that the President could not introduce a transcript unless he made the original tape available as well.

However, questions may arise as to the accuracy of the transcripts. When such questions arise, the original tape would have to be played before the Senate, unless procedures were established to resolve the questions in some other manner. One such mechanism would be the appointment of a committee which would be empowered to analyze the tapes and to certify accurate transcripts to the Senate. Tapes could be made available for listening by individual Senators.

Under the strict rules of evidence, each person involved in transcribing, typing, and copying any transcripts would have to testify as to their accuracy.

3. *Are transcripts of testimony before the Watergate Committee, the House Judiciary Committee, and in court proceedings admissible in evidence?*

Probably not, because the President did not participate in those proceedings or did not have the opportunity and a similar motivation to question and cross-examine witnesses there. However, in some situations (such as the House Judiciary Committee proceedings), the arguments for admissibility are stronger than in others. But in each case, substantial arguments against the admissibility of the evidence are available.

The President was not represented at the Watergate Committee hearings. While Mr. St. Clair did participate in the House Judiciary Committee hearings, he was not given an unrestricted opportunity to call his own witnesses and to cross-examine others. In court proceedings such as the Ehrlichman trial, the President was not directly represented at the trial. Even in cases where Mr. St. Clair took part, such as the hearings on the tapes before Judge Sirica, he did not have the same motivation to question witnesses because the issue was whether the President had to turn over tapes, not whether he would be removed from office.

Because this evidence might not be admissible under rules of criminal procedure, nearly all background facts might have to be reestablished by recalling witnesses. For instance, the Watergate burglary would have to be proved firsthand. Moreover, it is possible that certain key facts could not be proved at all under the strict rules of evidence. If, for example, various witnesses refuse to testify, it might be difficult to establish the background of events on March 21—that Mr. Haldeman left the President's office, telephoned Mr. Mitchell, who spoke to Mr. LaRue, after which Mr. Hunt was paid. Yet these facts are well-known, for witnesses testified to them under oath in the Senate Watergate Committee hearings.

The rule excluding prior testimony could work to the disadvantage of both parties. For example, Mr. St. Clair might want to introduce the testimony of Mr. Haldeman before the Senate Watergate Committee in support of the President (especially if Mr. Haldeman refused to testify in the Senate trial), but might be unable to do so under the criminal rules.

4. *Are documents such as White House memoranda, FBI reports, and correspondence admissible in evidence in a Senate trial?*

Some are admissible and some are not. Any document written or signed by the President would be admissible because he is a party in the impeachment trial. Documents that were routinely made in the course of carrying out official duties would be admissible.

With respect to other documents, in many cases some portions would be admissible and some would not. For example, portions of FBI reports that stated facts would be admissible, but portions containing conclusions might not be. Under the criminal rules of evidence, each paragraph and sentence of many documents might have to be scrutinized to determine its admissibility. This would obviously be a time-consuming process.

In addition, under the strict rules witnesses would have to testify as to the accuracy of each document, including stenographers, typists, and copiers if a Xerox copy were submitted.

5. *Are the compilations of evidence considered by the House Judiciary Committee admissible in a Senate trial?*

Generally no. The "Statements of Information" could not be admitted because they consist of conclusions as to ultimate facts. The documents contained in the supporting evidentiary material would have to be evaluated as described in #4 above.

While the compilations of evidence would generally not be admissible as evidence in the Senate trial, they could possibly be made available for Senators to read as supplements to the articles of impeachment, much as a bill of particulars supplements an indictment.

6. *Should the Senate adopt the federal criminal rules of evidence for an impeachment trial?*

There are several arguments for and against applying the strict federal criminal rules. On the positive side, there is a well-developed body of federal decisions and precedents that would help in deciding questions of evidence. Second, the criminal rules contain strict safeguards. Using them would avoid the charge of unfairness which might be made if the Senate adopted rules containing lesser safeguards than those accorded a criminal defendant. Third, the case will be argued by experienced trial attorneys and presided over by the Chief Justice, all of whom are familiar with the criminal rules.

The are several arguments against applying the criminal rules. To begin with, an impeachment trial is not a criminal trial. It can be argued that the President is already accorded stringent safeguards, such as the requirement of a House impeachment prior to trial and the provision for conviction by a two-thirds vote. The two-thirds requirement indicates that the Founding Fathers felt that an impeachment trial was fundamentally different from a criminal trial, where a unanimous verdict is required.

In addition, there are several reasons why the rationale behind the restrictive criminal rules does not apply to an impeachment trial. First, most evidentiary restrictions were adopted because of the non-expertise of jurors. But Senators are more knowledgeable and sophisticated than typical jurors and can be considered to be more analogous to judges in their experience. Senators could consider possibly unreliable evidence and simply accord it less weight in reaching their decision, which judges often do.

Second, the restrictions on evidence were meant to exclude evidence which might be unreliable in everyday situations. However, the evidence in an impeachment trial relates to activities in the highest councils of government and can be expected to be more reliable. Third, a great deal of evidence would be excluded under the strict rules which is already in the minds of Senators and on the public record. Further more, much time would have to be spent in establishing facts that are already well-known, and some important and well-known facts may be unprovable if witnesses refuse to testify. The Senate would be in the odd position of failing to consider key evidence and the public might not understand why.

Fourth, under the strict rules, frequent objections may be made by opposing counsel and possibly by Senators, resulting in protracted debates on evidence. The public may conclude that the whole truth was not coming out because of legal technicalities. And fifth, the necessity to conform to strict procedures of authentication could be time-consuming.

If the rules of criminal procedure were adopted, the rules of a particular federal judicial Circuit (such as D.C.) would have to be chosen, since the precise rules of evidence vary among the Circuits. (The rules in the D.C. Circuit are generally applied quite restrictively.)

7. *What are the alternatives to applying the strict federal criminal rules of evidence?*

The first alternative is to apply the rules of evidence used in federal civil trials before judges. These rules are virtually the same as those used in criminal trials, but are applied more loosely. For instance, when there is a question of admissibility of evidence, a judge will often allow it to be presented, reserving judgment on whether it is admissible, and will then decide the case on the basis of evidence found to be admissible. In addition, judges often admit evidence that is possibly unreliable and simply give that evidence less weight.

Since Senators have greater knowledge and experience than typical jurors, this alternative might be more appropriate than the criminal rules of evidence, and it would provide more flexibility. However, it might open the trial up to charges of unfairness, because the safeguards of a criminal trial would not be applied so strictly. In addition, since the underlying rules are the same, some of the arguments against using the criminal rules would apply to the civil rules as well.

A second alternative is to apply the proposed Federal Rules of Evidence which were passed by the House and are now pending before the Senate Judiciary Committee. These rules have the advantage of conciseness and ready availability. However, it is unlikely that they will be passed and signed into law before the trial begins, and they will not become effective in federal courts until 180 days after adoption.

A third possibility is to adopt the rules of evidence used in administrative agency proceedings. These rules are much looser than the rules in criminal or civil trials. All evidence which is relevant and not misleading or overly time-consuming is admissible. These rules would allow the admission of key evidence that would be excluded under the criminal rules, including testimony before the Watergate Committee, the House Judiciary Committee, and in court proceedings, and nearly all documentary evidence. They would simplify the determination of evidence questions, since very little evidence would be excluded. However, these rules would be subject to a charge of unfairness, since the President would be accorded very few of the safeguards he would have in either a criminal or a civil trial.

A fourth alternative is to adopt no particular system of rules of evidence and to simply rely on past experience and precedent from past impeachment trials. This alternative would provide maximum flexibility and allow each issue to be considered on its own merits. However, the lack of any clear standard for resolving evidentiary questions would in all likelihood lead to numerous disputes over evidence and greatly prolong the trial. In addition, it would subject the trial to the charge that the proceedings were being conducted in an unfair, ad hoc manner. It could potentially result in the frequent overruling of the Chief Justice by the Senate, as occurred several times during the impeachment trial of President Andrew Johnson.

A final possibility is to adopt a compromise solution, under which the federal criminal or civil rules would be used with special modifications approved by the Senate. The modifications could take the form of an agreement to admit certain evidence that was considered particularly important or trustworthy but which might not be admissible under the strict rules. Such evidence might include testimony under oath before Congressional committees, including the Watergate and House Judiciary Committees (particularly if the witness was not available to testify at the Senate trial), transcripts of tapes, most documents, and perhaps statements of close Presidential assistants. The reason behind using such a framework is to adopt a set of rules that would provide the basic procedural protections applicable to federal trials but to avoid the objections to using the strict rules discussed above. Such a set of rules would provide some standard of decision and yet some flexibility and would save considerable time.

The principal objection to such a framework is that it might appear to be unfair, because special exceptions would be created that do not apply in criminal or civil trials. In addition, it would require Senate agreement on the nature of the modifications to be adopted. The Senate has the power to adopt such modifications by vote, since under existing Senate rules the Senate can overrule the Chief Justice by majority vote on questions of evidence.

#### SENATE HANDLING OF EVIDENCE QUESTIONS

*8. Are there any steps the Senate can take to expedite the handling of evidence questions?*

Yes. First, as soon as the articles of impeachment are presented by the House, the Senate could request that the opposing parties (i.e., the President's counsel and the House managers) get together and try to work out as many potential evidence problems as possible before the trial begins. This could be done with the Chief Justice and perhaps the Senate leadership present. For example, each side could be requested to present a listing of all evidence it planned to introduce, ranging from tapes and transcripts to witnesses, documents and testimony at earlier hearings. The other side could then be requested to indicate which items of evidence it planned to object to and to agree or stipulate to the admissibility of the others. With respect to the items of evidence objected to, the Senate could seek to resolve the major disagreements before the trial. This procedure is analogous to the routine pre-trial conference and pre-trial order in federal cases, the idea being to narrow the issues and avoid evidentiary battles during the trial.

There are also certain procedural difficulties that could be ironed out before the trial. For example, the parties could agree to the accuracy of most documents and transcripts, avoiding the need to call stenographers and transcribers at the trial. With respect to transcripts of tapes, it would be desirable to have the parties indicate in advance of the trial which portions of which transcripts they were going to contest as being inaccurate. The Senate might consider the appointment of a special committee before trial to analyze those portions and

produce an authoritative Senate transcript for use during the trial. Of course, particular portions of disputed tapes could be played during the trial, and tapes could be made available for listening by individual Senators.

If these procedures were not successful, the Senate should be prepared to attempt to resolve broad questions of evidence before the trial. This might, for example, involve the submission of supplemental rules or modifications of rules for debate and vote, to dispose of as many potential questions as possible before the start of the trial.

This type of procedure before trial would greatly reduce the possibility of the Senate's being tied up in protracted technical debates on evidentiary questions during the trial. It would also be important to the parties to know ahead of time as precisely as possible what evidence will be admissible, so that they can prepare their cases accordingly.

The Committee has also considered the possibility of a special committee to investigate the evidence before the trial. This would be a committee of the Senate, and its members would be appointed by the Senate. The committee would have the authority to subpoena witnesses and to conduct its own investigations. It would report to the Senate on its findings.

The Committee has also considered the possibility of a special hearing before the trial. This would be a hearing of the Senate, and it would be held in public. The hearing would be held to hear the testimony of witnesses and to hear the arguments of the parties. The hearing would be held before the trial begins.

The Committee has also considered the possibility of a special procedure for the trial. This would be a procedure that would be used if the other procedures were not successful. It would be a procedure that would be used to resolve the questions of evidence before the trial.

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APPENDIX

MIKE MANSFIELD  
MONTANA

United States Senate  
Office of the Majority Leader  
Washington, D.C. 20510  
July 30, 1974

Honorable Howard W. Cannon  
United States Senate  
Washington, D. C.

Dear Howard:

Enclosed herewith is a draft proposal in the nature of a substitute for the present Senate rules and procedures covering the trial of an impeachment. I have included as well a section-by-section analysis explaining each proposed revision and the rationale therefor.

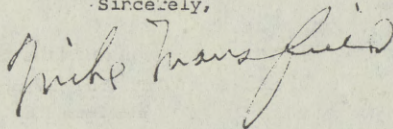
As you are well aware, the Senate Rules on impeachment have not been revised in 106 years; a couple of minor amendments were made almost 40 years ago prior to the trial of Judge Ritter. Since that trial, there have been major developments in the law of procedure. In 1938, the Federal Rules of Civil Procedure were adopted followed in 1946 by the Federal Rules of Criminal Procedure. Prior thereto, there were no procedural codes in the Federal courts. These procedural codes, which included far-ranging innovations and improvements, were formulated pursuant to Congressional authorization and became effective with Congressional acquiescence. They have been applied in all of the trial courts of the United States, where they are generally recognized to have produced fairer and more equitable trials. The draft revision reflects the higher standards of fundamental fairness and sensitivity of the Supreme Court and the Nation to individual rights and due process that have evolved over the past 106 years.

I believe these revisions will specify in greater detail than the present Rules on Impeachment the powers of the Senate and the determination of the Senate to maintain control of its own proceedings rather than to delegate to the Presiding Officer powers that should remain with the Senate.

July 30, 1974  
Page Two

I hope that this draft proposal will be of help to you and the Committee during your deliberations pursuant to the Senate Resolution. By copy of this letter I shall furnish the proposal and its explanation to all members of your Committee.

Sincerely,

A handwritten signature in cursive script that reads "Mike Mansfield". The signature is written in dark ink and is positioned below the typed word "Sincerely,".

PROPOSED RULES OF THE SENATE OF THE UNITED STATES WHEN SITTING  
AS A COURT OF IMPEACHMENT

RULE-BY-RULE ANALYSIS

RULE 1. GENERAL PROVISIONS

This rule declares the scope of the rules, defines their purpose, states the date upon which they become effective, and indicates the authority pursuant to which they are promulgated.

Subdivision (a) - Scope:

Subject to the exceptions and limitations set forth in the rules themselves, these rules are to govern the proceedings of the United States Senate when it is sitting to conduct a trial of a case of impeachment. There is no comparable provision in the present rules. This subdivision is derived from the virtually identical language of Rule 1 of the Federal Rules of Civil Procedure and Rule 1 of the Federal Rules of Criminal Procedure. Even though, by the nature of a case of impeachment and because of the character of the tribunal that conducts the trial of such a case, there are more "exceptions and limitations" than in the Federal civil and criminal procedure rules, the scope of these rules is the same as that of the Federal Rules.

These rules "govern" the proceedings. They are not intended to be interstitial in character, but rather primary and comprehensive. The present rules may be viewed as a product of 19th century legal theory, which frowned upon rules or codes of procedure as deviations from the common law. These rules, like the civil and criminal rules of procedure for Federal courts (upon which they are substantially modelled),

are a product of 20th century legal thinking, which favors comprehensive and detailed procedural rules on the ground that they are more conducive to a fair trial and a just result.

Subdivision (b) - Purpose:

The purpose of these rules is to provide for the fair trial and the just determination of an impeachment that is adopted by the U.S. House of Representatives. Under section 3 of Article I of the Constitution, the Senate has "the sole Power to try all Impeachments". The Senate is also bound, in light of decisions holding that a Federal job is a "property" right, to comply with the requirement that "No person shall...be deprived of life, liberty, or property, without due process of law" since those words in the Fifth Amendment were added to the Constitution after the ratification of the main body of the Constitution and therefore qualify the grant of power in Article I, section 3.

This subdivision relates the detailed provisions of these rules to the broad general duties of the Senate in its judicial capacity. The trial of an impeachment must be a fair one, and the final determination of whether or not to sustain the impeachment by the House must be a just one. All of the rules are to be applied and construed to effectuate this general purpose.

This subdivision is derived from the second sentence of Rule I of the Federal Rules of Civil Procedure and from Rule 2 of the Federal Rules of Criminal Procedure.

Subdivision (c) - Source:

These rules are to be adopted by the Senate in the exercise of its general authority, under section 5 of Article I of the Constitution, which provides that "Each House may determine the Rules of its Proceedings". The trial of an impeachment adopted by the House is a Proceeding of the Senate inasmuch as Article I, section 3 of the Constitution grants the Senate "the sole Power to try all Impeachments."

The present Rules were debated and adopted in 1868 during the regular legislative and executive business of the Senate, prior to the receipt of articles of impeachment from the House, and in spite of the following criticism by the then Chief Justice of the Supreme Court of the United States, Salmon P. Chase: "...When the Senate sits for the trial of an impeachment it sits as a court...Rules for the government of the proceedings of such a court should be framed only by the court itself."

This subdivision is derived from such Senate precedents, although there is no comparable provision in the present Rules. The 1868 critique of the method of adoption, together with its inference that the source of authority for rules is the Senate's status as a court, are questionable since the Senate in its judicial capacity, sitting for the trial of an impeachment, is still the Senate of the United States and as such is bound to "determine" rules pursuant to its specific authority under Article I, section 5 rather than under some undefined but inherent authority. It may be noted, parenthetically, that the rules for the government of the

proceedings of the trial courts of the United States in 1974 (i.e. the Federal Rules of Civil/Criminal Procedure) were not framed by the applicable "court itself", as Chief Justice Chase would have it, but by a higher court, the Supreme Court, pursuant to Congressional authorization and with subsequent Congressional acquiescence.

Subdivision (d) - Effective Date:

These rules are effective upon the date of approval by the Senate. If an impeachment trial is pending in the Senate on that date, they will govern any further proceedings in that case "so far as just and practicable." The term "just and practicable" is intended to have the same meaning in this provision as the more cumbersome phrase which is used in the Federal Rules of Civil Procedure; the civil Rules provide that new provisions shall not apply to pending actions if it "would not be feasible or would work injustice."

This subdivision, which has no counterpart in the present Rules, is derived from Rule 86 of the Federal Rules of Civil Procedure and from the second sentence of Rule 59 of the Federal Rules of Criminal Procedure.

If an impeachment proceeding is pending in the Senate on the date that these rules take effect, the decision as to whether, and if so the extent to which, these rules will govern that trial are decisions that would be made by the Senate in its judicial capacity in accordance with Rule 4(d)(1), regarding the procedure for making decisions on all questions other than final questions. In any situation in which it is

not "just and practicable" to apply these rules, the present Rules would continue to be used.

RULE 2. DEFINITIONS

This rule defines terms that are used in more than one of these rules. The use of general definitions as an aid to precision and simplicity of expression is a modern drafting technique that was not employed in 1868 when the present Rules were formulated. There is thus no comparable provision in the present Rules.

Some of the definitions and terms defined are self-evident and need no explanation: Paragraph (8) defines "House" to mean the House of Representatives of the United States. Paragraph (17) defines "Sergeant at Arms" to mean the Sergeant at Arms of the Senate. Paragraph (18) defines "trial" to mean the trial of a case of impeachment by the Senate sitting as a Court.

Some of the definitions and terms defined relate primarily to, and are descriptions of forms and terms that originate with, the House in its exercise of its Constitutional "sole Power of Impeachment". Paragraph (1) defines "articles" to mean articles of impeachment that are adopted by the House, and "article" to mean any section or part of such articles in which conduct is averred that constitutes a separate impeachable offense. ("conduct" is defined in paragraph (3) to include a failure to act as well as acts.) Paragraph (12) defines "managers" to mean the members of the House whom it selects to represent it in the

Senate at the trial of an impeachment adopted by the House. Paragraph (16) defines "respondent" to mean the person impeached by the House in articles; it was the term used in the course of the last Senate trial, that of Judge Halsted L. Ritter in 1936. The term respondent is routinely used in private legal actions to designate a person whose removal from office is sought, because of derelictions as an executor, trustee, or fiduciary, and it is therefore a more accurate designation for a person impeached than a term such as 'accused' or 'defendant'. The latter terms suggest that damages, fines, or prison terms can be imposed in the event of a judgment, and since this is not true of a judgment in a case of impeachment, the use of such terms can be misleading. Removal from office and disqualification therefrom are the only judgment that can Constitutionally be imposed by the Senate in the event of conviction. The term "parties" is defined in paragraph (14) to mean the managers and the respondent. By application of normal rules of construction, a "party" means either the managers or the respondent. Paragraph (9) defines "impeachable offense" to mean treason, bribery, or other high crimes and misdemeanors (the standard in the Constitution) which are designated as such by the House, in the exercise of its "sole Power of Impeachment" in any article in the articles of impeachment.

Paragraph (15) defines "presiding officer" in such a way as to take account of the Constitutionally-mandated difference between a Presidential impeachment trial and any other impeachment trial, and by

doing so in a definition the paragraph makes a substantive provision such as the first clause of present Rule IV unnecessary. The term "presiding officer" means, in the case of impeachment of the President, the Chief Justice of the Supreme Court of the United States, and in the case of any other impeachment, the President or the President pro tempore of the Senate.

Some of the other definitions and terms defined in this rule are more substantive. Their meaning and justification will therefore be discussed later in this Analysis, in conjunction with the analysis of a rule or provision that employs the term in a significant or substantive meaningful way, or which appears to provide a convenient nexus for such discussion.

### RULE 3. ORGANIZATION OF COURT

This rule sets forth the process, and the procedures to be followed, in transforming the Senate from a legislative body concerned with bills, treaties, and confirmation of appointments into a judicial body concerned with exercising an exclusive Constitutional "Power to try all Impeachments".

The rules refer to the Senate in its judicial capacity as the "Court of Impeachment" or simply as the "Court". These references to the Senate as a Court, while it is trying an impeachment, mark a change from the present Rules. In 1868, a Select Committee of the Senate reported favorably to the full Senate proposed "Rules of Procedure and

Practice in the Senate when Sitting as a High Court of Impeachment" (Senate Report No. 59, 40th Congress, 2d Session). The rules were adopted by the Senate, but not until after the radical majority had succeeded by floor amendment in deleting all references to the Senate functioning as a court or high court during the trial of an impeachment. The rules, as thus amended by Senators whom history has judged harshly for their political approach to impeachment, are the present Rules with but a few minor changes. The proposed rules would restore the rejected recommendation of the 1868 Select Committee, although without use of the pretentious adjective "high", and refer to the Senate in its judicial capacity as a "Court of Impeachment". This position is a better and more accurate one in light of Senate precedents, the apparent intent of the Framers of the Constitution, and the need to assure due process of law.

Prior to the adoption of the present Rules in 1868, the terms "court of impeachment" and "high court of impeachment" were used routinely to refer to the Senate in its judicial capacity. In the first impeachment trial, that of United States Senator William Blount in 1799, one of the House managers reported the opinion of the Senate dismissing the impeachment for lack of jurisdiction in a document that began as follows, after the preamble: "UNITED STATES OF AMERICA, FRIDAY, JANUARY 11, 1799, HIGH COURT OF IMPEACHMENT." In the second such trial, that of District Judge John Pickering in 1804, the Senate approved a resolution, reported by a Senate committee, that began as

follows: "Resolved, That, at 12 o'clock tomorrow, the Senate will resolve itself into a court of impeachment,...." Prior to conducting the next impeachment trial, that of Supreme Court Justice Samuel Chase in 1803-1804, the Senate adopted 19 formal rules to govern the trial "by the high court of impeachment". Although the rules themselves, which are the basic source for the present (1868) Rules, do not refer to the Senate during an impeachment trial as a "court", the Senate Impeachment Journal for that period suggests that such was the general understanding; the Secretary of the Senate during that impeachment began formal communications to the House of Representatives as follows: "In Senate of the United States--High Court of Impeachments, [date]." There have been references to the Senate as a Court in the other trials as well, including trials conducted after the 1868 floor debate. In the last impeachment proceeding, the trial of District Judge Halsted L. Ritter in 1936, the Senate agreed to a motion designating Senator Borah of Idaho "to administer the oath to the presiding officer of the court of impeachment", and the counsel for the respondent addressed his request for a time extension to "the honorable Senate, sitting as a Court of Impeachment". The designation of the Senate in its judicial capacity as a "Court" or a "Court of Impeachment" [rule 2(5)], and the designation of a United States Senator in the performance of his constitutional responsibility during an impeachment trial as a "Judge" [rule 2(10)] are more than an exercise in semantics. They reflect a recognition of the

ideals of the Constitutional Convention of 1787: the Convention voted to make the Senate rather than the Supreme Court the tribunal for the trial of impeachments because, in the words of Alexander Hamilton in Federalist Paper No. 65, "Where else than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel confidence enough in its own situation to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused and the representatives of the people, his accusers?" "A well-constituted court for the trial of impeachments", wrote Hamilton in that Paper, is critically important but also highly difficult to obtain; upon consideration, the Convention "thought the Senate the most fit depository of this important trust." While Hamilton was speaking of a Senate that was appointed by State legislatures rather than elected by the people, the point he makes about the importance of impartiality between an individual (who is impeached) and the House of Representatives (who impeach) is just as valid today as it was then. In fact, an approach that is more formal (i.e. "Court"; "Judge") may be even more required in 20th century America with an elected Senate than in 18th century America with an appointed Senate. The terms "Court" and "Judge" connote fairness, impartiality, and reasoned decision, qualities that the Senate and its members must exercise if they are to discharge "this important trust" properly and constitutionally.

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Subdivision (a) - Notice from the House:

Upon receipt of a formal notice from the House advising that it has adopted articles of impeachment and appointed managers, the Senate by majority vote shall resolve to organize as a Court of Impeachment and shall set a time and date therefor.

This subdivision is derived from present Rule I, but with the difference that the Senate is to convene as a Court before it admits the managers from the House to receive the articles. This change is based upon the logic and common sense of Chief Justice Salmon P. Chase's criticism of the contrary position when it was adopted in 1868 in the present Rules. Chase wrote, in a letter to the Senate: "...That when the Senate sits for the trial of an impeachment it sits as a court seems unquestionable....It does not seem to me an unwarranted opinion, in view of this constitutional provision, that the organization of the Senate as a court of impeachment, under the Constitution, should preclude the actual announcement of the impeachment on the part of the House...Articles of impeachment should only be presented to a court of impeachment...."

Subdivision (b) - Preparations:

The necessary preparations for a trial in the Senate chamber are to be directed by the Secretary of the Senate. The Secretary is also directed to give notice to the House, and in a Presidential impeachment to the Chief Justice also, of the time and date upon which the Senate

will organize to sit as a Court. The Secretary of the Senate is to advise the House that upon such organization, the Senate may admit managers to permit them to present and file the articles.

This subdivision is derived from the first clause of present Rule VII, from present Rule I, and from present Rule IV to the extent that the latter is not covered by the definition of "presiding officer" in paragraph (15) of proposed Rule 2. The only significant change that this subdivision makes from the present Rules (other than changes in style and form) is to substitute the Secretary of the Senate for the presiding officer as the person to direct preparations in the Senate chamber. This purely ministerial function of making preparations is a chore that need not be imposed upon an official who has the burdens and time demands of the Vice President of the United States or the Chief Justice of the Supreme Court of the United States.

Subdivision (c) - Organization and Oath:

This subdivision derives, with only technical variations, from the first clause of present Rule IX, from the last sentence of present Rule III, and from the form of oath to be administered to Senators in present Rule XXV. The requirement in present Rule IX that the proceedings start at "12:30 o'clock afternoon" has been deleted on the ground that it restricts the Senate unnecessarily in its scheduling. The form of the oath is simplified in keeping with the form used by Senators in the early impeachment trials. "Oath" is defined in rule 2(13) to

an affirmation, and the form set forth in this subdivision is applicable to either in keeping with the Constitutional direction that the Members be "on Oath or Affirmation" (Article I, Sec. 3).

Subdivision (d) - Presentation of Articles:

This subdivision derives from present Rule II and from Rule 3 of the Federal Rules of Civil Procedure.

The requirement in present Rule II that the Sergeant at Arms make a proclamation commanding everyone "to keep silence, on pain of imprisonment" has been deleted as histrionic, pretentious, and unenforceable. The term "filing" is adopted from the Federal Rules of Civil Procedure in place of the term "exhibit" or "exhibited" in the present Rule, on the ground that it is more accurate.

This subdivision is the first to make specific reference to the "Chief Judges" and the "Deputy Chief Judges", a concept for which there is no counterpart in the present Rules. A "Chief Judge" is defined in rule 2(10) to mean a Judge who is, during the normal legislative and executive business of the Senate, the Majority Leader, or the Minority Leader, of the Senate. A "Deputy Chief Judge" is defined in the same paragraph of rule 2 as a person who is, during normal Senate operations, the Assistant Majority Leader, or the Assistant Minority Leader, of the Senate. Collectively, the Chief Judges and the Deputy Chief Judges are the "joint leadership" of the Senate during legislative and executive business; it is appropriate that the same individuals

should exercise the same kind of responsibility when the Senate is sitting in its judicial capacity. The Senate in its judicial capacity is as much in need of representative leadership as it is in its legislative capacity. It is easier to designate the elected leadership of the two major parties as "Chief" and "Deputy Chief" Judges than to devise a new procedure for selecting Members to perform leadership functions during the trial of a case of impeachment. The fact that there is no equivalent mechanism under the present Rules has led to unfortunate consequences in previous Senate trials, in terms of the prerogative of the Senate. It is the Senate's "sole Power" to try impeachments, but the need for leadership in previous trials led the Senate to delegate unconsciously some of the authority inherent in its "sole Power to try", thereby damaging the efficacy of the impeachment process and raising questions about constitutionality. That will no longer be necessary under the proposed Rules.

RULE 4. THE COURT

This rule sets forth most of the housekeeping provision governing the trial of an impeachment by the Senate in its judicial capacity.

Subdivision (a) - Powers:

Paragraph (1) of this subdivision is a simplified restatement of the broad declaration of authority in present Rule VI. The Constitutional power of the Senate to try all impeachments includes, necessarily, all powers "which the Court finds necessary or proper and which may

assist or contribute, directly or indirectly, to the just determination of an impeachment".

Paragraph (2) is a more precise statement of present Rule V, with respect to the issuance of orders and other documents, but with modification to eliminate a latent ambiguity in the word "power" in the present Rule. The issuance of orders and other documents in the name of the Senate in its judicial capacity is a ministerial rather than a discretionary act. The present Rule states, however, that "The Presiding Officer shall have power to make and issue...all orders...authorized... by the Senate". Since the power to make and issue impliedly includes the power to decline to make and issue, the present Rule could be misapplied. Paragraph (2) removes any possibility of discretion on the part of the issuing officer, and it transfers that responsibility to the clerk of Court. ("Clerk of Court" is defined in rule 2(2) to mean the Secretary of the Senate when the Senate is sitting as a Court). This paragraph also authorizes the Sergeant at Arms, upon a decision by the Court, to seek and obtain the assistance of any officers or employees of the Federal Government where necessary "to enforce, execute, and carry into effect any such orders." This provision is derived from the last sentence of present Rule VI.

Subdivision (b) - Presiding Officer:

In addition to stating the Constitutional authority, this subdivision makes the presiding officer specifically responsible "for

assuring that the trial is conducted expeditiously and with the impartiality, fairness, and integrity expected of a Court of Impeachment." The presiding officer may, as under present Rule VII, make a preliminary ruling on disputed questions, subject of course to that ruling being set aside by a vote of the Court.

The subdivision does not, however, retain the present provision that "...the Presiding Officer on the trial shall direct...all forms during the trial not otherwise specially provided for...." This general grant of authority has been deleted because (1) the proposed Rules, unlike the present Rules, are comprehensive rather than incidental in scope and therefore provide for all such matters; (2) under present practice the power of a presiding judge of any multi-judge court, such as a three-judge Federal district court, a court of appeals, or a State or U.S. Supreme Court, does not include the power to instruct judges on the applicability and meaning of the law; and (3) the Constitution gives the Members of the Senate, sitting as the Judges of the Court of Impeachment, the "sole Power to try" and the presiding officer is not a Member of the Senate.

Subdivision (c) - Sessions:

Paragraph (1) of this subdivision is based upon present Rule III, with no substantive change except for deletion of the requirement that the Senate start "at 1 o'clock afternoon". The time for commencing a session of the Senate sitting as a Court should not be fixed in

standing Rules. The proposed paragraph also articulates the reason for the "day to day" requirement in present Rule III to assure a speedy trial and an expeditious determination.

Paragraph (2) is derived from portions of present Rules XII, XIII, and XXVI with no substantive change except, once again, the deletion of stated times. Specific responsibility is placed on the Chief Judges and the Deputy Chief Judges, which is expected to be used to assure that the trial proceeds expeditiously. When not in session as a Court, the Senate, as under present Rule XIII, shall resume consideration of its legislative and executive business. The Constitutional responsibility of the Senate to try all impeachments, and the duty under paragraph (1) of this subdivision to do so expeditiously, do not supersede the Constitutional responsibility of the Senate as one of the Houses of Congress. This provision in paragraph (2) is intended to make it clear that the Senate "shall" discharge both responsibilities during the period of a trial.

Paragraph (3) is derived from present Rule XX, with only minor stylistic changes.

Paragraph (4) provides by rule that a quorum of the Senate, for purposes of a trial, is a majority of the Senate. There is no comparable provision in the present Rules, but the question was settled by the Senate in 1905 during the impeachment trial of Judge Charles Swayne. The then presiding officer ruled that a majority of the full Senate

constituted a quorum for the Senate sitting for the trial of an impeachment. The paragraph also directs each Judge who is unavoidably absent from a session of Court to "study diligently" the record of the proceedings for the sessions which he has missed.

Subdivision (d) - Decisions:

Paragraph (1) of this subdivision sets forth the decision-making procedure of the Senate sitting as a Court, on questions other than final questions. ("Final question" is defined in rule 2(7) to mean one relating to whether the Senate will sustain or reject an article of impeachment.) Such a decision shall be by majority vote; a ye and nay vote on any such question may be demanded by any Chief Judge, any Deputy Chief Judge, or one fifth of the Judges present.

This paragraph is derived from the relevant portions of present Rules VII and XXIV. It differs from them, however, in specifically providing that the presiding officer shall not vote, not even to break a tie. Present Rule VII is silent on this question, although the Chief Justice did vote to break ties in the course of the impeachment trial of President Andrew Johnson in 1868. The proposed Rule, with respect to this point, is based upon the practice in the institution upon which the Constitutional Convention modelled the Senate's role in cases of impeachment--the British House of Lords. As it was explained on the Senate floor in 1868 by Senator Howard:

"The House of Lords sit as a high court of impeachment. They are presided over when thus sitting either by the Lord Chancellor or the Lord High Steward; and the precedents are numerous and clear that the Lord Chancellor, although thus presiding, or the Lord Steward thus presiding, has no vote in the House of Lords in virtue of his presidency of the body; but if he be a peer he has, in right of his peerage, the right to vote; but it is put upon that ground, and that ground only. As president of the body he has no right even to decide questions where the body is equally divided."

The proposed paragraph also differs from the present Rules in specifically providing that the Court "may recess for a reasonable amount of time or defer any such vote" to enable each Judge to research and ponder any legal issues involved. This provision should provide additional assurance that the decisions (votes) of the Judges will be based upon knowledge and reflection rather than instinct and impression, and that they will be learned decisions. It will be the responsibility of the Chief Judges and the Deputy Chief Judges to assure that this provision is utilized in a manner that is consistent with the speedy trial and expeditious determination obligations of the Senate in its judicial capacity.

Paragraph (2) of this subdivision sets forth the decision-making procedure of the Senate in its judicial capacity, with respect to whether to enter a conviction of an impeachable offense upon impeachment thereof and trial therefor, or whether to reject the impeachment voted by the House. "Conviction" is defined in rule 2(4) to mean a finding by two-thirds of the Judges present that any article of

impeachment is sustained by clear and convincing evidence. The vote requirement (2/3rds of those present) and the term "conviction" are set forth in Article I, section 3 of the Constitution. The quantum of proof is not stated in the Constitution. The standard of "clear and convincing evidence" is adopted in the proposed rules as a logical middle ground between the burden of proof requirement in criminal proceedings ("beyond a reasonable doubt") and the burden of proof requirement in civil proceedings ("by a preponderance of the evidence"). An impeachment proceeding is not a criminal proceeding since the Court of Impeachment is barred by the Constitution from imposing any of the usual criminal law sanctions in the event of conviction, and it is not a civil proceeding because the extraordinary formality and complexity of the process and the serious consequences of a conviction and removal (in at least the case of an impeachment of the President of the United States) militate against accepting as adequate the low threshold requirement of a civil action. The burden of proof, like the terminology and various other requirements, must be unique because impeachment itself is unique. It is unique in that it is a hybrid of the legislative and the judicial, the political and the legal.

Historically, impeachment proceedings were used in England by the Parliament, during the absolutist Tudor and Stuart monarchies, to accuse, try, judge, and make subject to the rule of law those high government officials who could not otherwise be held accountable under

the law. Since impeachment was a substitute for ordinary civil or criminal law proceedings, it would be a mistake to label and govern the proceedings in a case of impeachment by the standards or requirements of either the ordinary civil or the ordinary criminal proceeding. Impeachment may well have been viewed by members of the Constitutional Convention of 1787, the same men who had a few years earlier made a successful revolution against King George III and absolute monarchy, as a special mechanism to assure that in the new republic of the United States no man would be above the law. If impeachment was intended as a constitutional process for the protection of the rule of law itself, how can it be pigeonholed into any existing classification for lesser proceedings? Since impeachment is sui generis, it is appropriate that the burden of proof requirement be distinct from the basic alternatives of the civil and criminal law, and that the word "conviction" in this context be defined in neutral and descriptive rather than criminal-law terms.

The same reasoning leads, in paragraph (2) of subdivision (d) of this rule, to the provision declaring that each Judge shall vote to "sustain" or to "reject" each article of impeachment adopted by the House, after trial on the relevant issues. The terms sustained and rejected have been used in the Senate in previous impeachment trials, but not for purposes of framing the final questions. The present Rule on this point is Rule XXIII and it is somewhat imprecise. The

present Rule calls for "the yeas and nays" to be taken on each article, and then declares that if the impeachment is not "sustained" by the votes of two-thirds of the members present a judgment of acquittal shall be entered. In the impeachment trial of Supreme Court Justice Samuel Chase in 1804, the Senators were specifically directed to vote "guilty" or "not guilty" on each article, a form that has been used in other Senate trials as well. The guilty or not guilty form was the appropriate one in England, since the impeachment trial judgments of the House of Lords could include the death penalty, life imprisonment, exile, forfeiture, and heavy fines. This form ceased to be appropriate, however, when the impeachment mechanism was adopted by the American Constitutional Convention in 1787 but with an amendment that limited the maximum sanction for "conviction" to removal from office and disqualification from holding future Federal office. That limitation made the use of the terms "guilty" and "not guilty" quaintly irrelevant if not misleading, but the "yea" or "nay" form in the present Rule is equally inaccurate as a description of the decision that each Senator as Judge must make. It would be fairer, as well as more accurate, to call for a vote to "sustain" or to "reject" the allegations of the House.

Paragraph (3) of this subdivision has no counterpart in the present Rules, since the "Chief Judge" and "Deputy Chief Judge" mechanism for recommending and initiating decisions by the Court is a novel one. This

paragraph provides that the determination or recommendation of a majority of such Judges is the determination of such Judges. In the event that these Judges are equally divided, the question at issue shall be resolved under paragraph (1) of this subdivision without the benefit of any such determination or recommendation.

Subdivision (e) - Questions of Law:

This subdivision, which has no analogue in the present Rules, establishes a procedure pursuant to which the Court can obtain enlightenment on disputed issues of law, beyond the briefs and arguments of the managers and the respondent and their counsel. The interest of the Senate in its judicial capacity is not necessarily identical with the combined interests of the House and the respondent. The impeaching authority (the House) and the person impeached (the respondent) may both be more interested in "winning" the case than in the correctness of the decisions made. As part of the extraordinary because there is no judicial review obligation of the Senate as a Court of Impeachment to guarantee "due process of law", this subdivision authorizes the inviting of "attorneys other than counsel for any of the parties" for purposes of submitting written briefs or oral arguments or both, on any question of law as to which the Court desires enlightenment or on any other legal issues which arise or which may arise in the course of the proceedings in the Senate.

Subdivision (f) - Statements of Judges:

Paragraph (1) of this subdivision, which is derived from present Rule XXIV, sets limitations on oral statements by Judges in the course of a trial. The Rule XXIV limitation of 15 minutes per Senator "for the whole deliberation on the final question" has been changed to 10 minutes on each final question, to assure adequacy of deliberation and colloquy with respect to each impeachable offense charged and tried. The time limitations in this subdivision may be modified by the Court upon recommendation of the Chief Judges and the Deputy Chief Judges. It is expected that any such recommendations will be made in light of the purpose of the rules as expressed in rule 1(b).

Paragraph (2) of this subdivision is a restatement in part of present Rule XIX. It provides that if a Judge wishes to offer a motion or order, other than a motion to adjourn, it shall be reduced to writing and read to the Court by the presiding officer.

Subdivision (g) - Special Panels:

This subdivision authorizes the appointment of special panels of Judges for particular purposes. It provides for the appointment by the Chief Judges and the Deputy Chief Judges, with the approval of the Court, of any Panels of Judges "for such purposes as the Court may prescribe." This paragraph is intended to incorporate by reference the authority declared to exist in the Senate under present Rule XI to "appoint a committee of twelve Senators to receive evidence and

take testimony at such times and places as the committee may determine...."

RULE 5. PLEADINGS

This rule defines the pleadings in the trial of a case of impeachment; the procedure for serving the articles, together with a summons; the requirements for an answer to articles; and the standards for permitting the pleadings to be amended.

Subdivision (a) - General:

This subdivision provides that there shall be only two forms of pleadings in a case of impeachment: the articles of impeachment and the answer to articles. The Court, however, upon recommendation of the Chief Judges and Deputy Chief Judges, may permit or order additional written presentations or responses to be filed in the interests of justice.

There is no comparable provision in the present Rules, but the present Rules do in substance make the same provision. Limited and simplified pleading requirements have been the practice in Senate trials.

The source for the language of this subdivision is Rule 7(a) of the Federal Rules of Civil Procedure.

Subdivision (b) - Summons and Articles:

This subdivision sets forth, in three paragraphs, the procedure (1) for preparing a summons to be directed to the person who is impeached by the House; (2) for serving this summons and a copy of the articles of impeachment upon the respondent; and (3) for setting forth who may

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serve such process, the proof of service requirement, and the area within which service of such process can be made.

The subdivision is derived from present Rule VIII, other than the last two sentences thereof; the last sentence of present Rule XXV; the form of return of service in present Rule IX; and the form of summons to be issued and served upon the person impeached and the form of precept to be indorsed on said writ of summons in present Rule XXV.

It should be noted that the proposed rules do not set forth any prescribed forms, other than the form for the oath or affirmation by Senators, which is Constitutionally mandated. This failure to include model forms is based upon the conclusion that such forms are unnecessarily rigid and restrictive, and that it is better to describe the elements that are required in the text of rules than by way of illustration in model forms. It is expected that under the proposed rules the required forms in the present Rules will continue to be used, with but limited modifications.

Paragraph (1) of this subdivision, setting forth the issuance and form requirements for the summons, is derived also from Rules 4(a) and 4(b) of the Federal Rules of Civil Procedure. Paragraph (2), which provides how service may be made, is derived from Rule 4(d) of the Federal Rules of Civil Procedure as well as the present Rule. Paragraph (3) is also based, in part, on the following provisions in the Federal Rules of Civil Procedure: Rule 4(c) (By whom served); Rule 4(g) (Return); and Rule 4(f) (Territorial limits of effective service).

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The provision in paragraph (3) that service of process may be made, inter alia, by "any other person specially appointed for such purpose by the Court", as well as the equivalent provision with respect to the service of subpoenas which is contained in rule 9(c), includes the authority to appoint the officers of the Federal Government who normally serve process, and who are the most experienced persons in this regard—the United States Marshalls.

Subdivision (c) - Answer to Articles:

This subdivision sets forth the elements of the answer, which the respondent is to prepare to the articles. There is no counterpart in the present Rules, although present Rule X and the last part of present Rule VIII require the person impeached to answer the articles against him.

The simple form requirements for an answer are set forth in paragraph (1) of this subdivision. They are derived from Rule 8(b) of the Federal Rules of Civil Procedure.

Paragraph (2) of this subdivision provides, in the interest of expeditious determination, that the answer to articles shall be served within 10 days after the service of the summons and articles under subdivision (b) of this rule. There is no time-for-answering requirement in the present Rules, but there is strong Senate precedent for a 10-day requirement for the answer. While this time period is shorter than the 20-day period which is allowed for the filing of an answer under Rule 12(a) of the Federal Rules of Civil Procedure, a case of impeachment is quite different from a civil action. Prior to the

presentation of the articles of impeachment to the Senate and prior to their service upon the respondent, these articles will have been the subject of extended public consideration in the House of Representatives. In all probability, the respondent will have prepared his answer to the charges long before the articles are formally served upon him. To allow a significant amount of extra time for the preparation of a formal answer would thus be superfluous, unnecessary, and (in light of the need for expeditious determination) unwise.

Subdivision (d) - Amendments:

In accordance with (1) the practice of the Senate in previous impeachment trials, and (2) the provision of Rule 15(a) of the Federal Rules of Civil Procedure, this subdivision provides that the Court "shall grant" to the managers to amend articles and to the respondent to amend the answer to the articles leave freely when justice so requires."

The provisions of this subdivision permit amendment directly, or by implication when "issues not raised by the pleadings are tried by express or implied consent of the parties or the Court". The subdivision also provides for continuances, supplemental pleadings, and responses thereto, in order to prevent any party from deriving an advantage as a consequence of the liberal amendment rules.

This subdivision is derived from Rules 15(b) and 15(d), as well as Rule 15(a), of the Federal Rules of Civil Procedure.

RULE 6. CONFERENCE AND TRIAL ORDER

This rule, which has no counterpart in the present Rules, is based upon and derived from the concept and procedure set forth in Rule 16 of the Federal Rules of Civil Procedure and in Rule 17.1 of the Federal Rules of Criminal Procedure.

The concept of a "pre-trial conference" between the parties and the judge to limit the issues for trial and to reach agreements which will expedite the actual trial of a case is one that has worked well in practice. In fact, it may be the most valuable procedural innovation of the rules reform movement of the 1930's and 1940's. Its advantages are so considerable that the proposed Rules include provision for a modified form of such conference and order.

Since it would be obviously unworkable for the parties to meet in conference simultaneously with all 100 Judges of the Court of Impeachment, the rule provides for the Chief Judges and the Deputy Chief Judges to meet with the parties on behalf of the Court. No provision in any proposed order, however, may become binding until the Court itself has decided to adopt it, as submitted or with modifications. The proposed order, and the Trial Order that is approved, will go beyond agreements reached with the parties in order to encompass the full Constitutional responsibility of the Senate in a case of impeachment. The order, upon recommendation of the Chief Judges and

the Deputy Chief Judges, is to include all "matters necessary or appropriate to secure a just and expeditious determination of the impeachment".

RULE 7. DISCOVERY

This rule adapts the discovery provisions of the Federal Rules of Civil Procedure (Rules 26 through 37) to impeachment proceedings in the Senate, to the extent necessary.

By the time an impeachment is presented to the Senate, there has already been a great deal of "discovery". A proceeding in the House of Representatives culminating in the adoption of articles might be characterized as almost exclusively an inquiry or discovery proceeding. Thus, it is not surprising that this rule has no counterpart in the present Rules.

There may be a legitimate need, however, in the interest of a fair trial and a just determination, for some additional discovery to be available for the use of the person impeached and the managers. It should be possible to allow some such discovery, without jeopardizing the goal of speedy determination. The unrestricted, and potentially very time-consuming, discovery permitted under the Federal Rules is unnecessary and could, to the extent that it caused delay, be pernicious in a case of impeachment.

This rule therefore incorporates by reference the discovery provisions of the Federal Rules of Civil Procedure, but makes their

use a matter solely within the discretion of the Court.

Subdivision (a) - General:

Subject to other provisions of these rules, this subdivision permits either party to obtain discovery "by any method that is authorized by the rules governing the procedure in suits of a civil nature in courts of the United States" (the Federal Rules of Civil Procedure). Such discovery may be obtained, and the results thereof used, in accordance with those rules.

No such discovery may be obtained or used, however, except "with the approval of the Court upon recommendation of the Chief Judges and the Deputy Chief Judges." The subdivision specifically provides that such approval shall not be granted if its effect "may be delay in the determination of an impeachment". Despite the danger of delay, the Court may approve discovery when "the interests of justice are compelling". Any approval shall be qualified by Court-imposed terms and conditions.

Subdivision (b) - Scope:

This subdivision is derived from Rule 26(b) of the Federal Rules of Civil Procedure, on scope of discovery. The breadth of Rule 26(b) and the limitation barring discovery of an attorney's work product are adopted from the civil rules, with technical adaptation. The broad scope of the discoverable subject matter is qualified, of course, by the prior approval requirement for any discovery which is set forth

in subdivision (a) of this rule.

RULE 8. EVIDENCE

This rule sets forth the evidentiary principles that are applicable to the trial of a case of impeachment.

Subdivision (a) - General:

This subdivision is derived from Rule 43(a) of the Federal Rules of Civil Procedure. It provides, first, that testimony shall be taken orally in open court, except as provided; and, second, that all evidence shall be admitted which is admissible under any Federal or State law as enumerated. According to one provision therein: "In any situation, the rule, statute, or decision which favors the reception of the evidence governs, and such evidence shall be presented to the Court according to the most convenient method prescribed in any such rule or statute."

This subdivision would incorporate by reference the rules contained in the pending Federal Code of Evidence (subject to other provisions in these rules), if that Code is passed by both Houses of Congress and signed into law prior to an impeachment trial in the Senate. This incorporation would occur through the second sentence provision that declares that all evidence is to be admitted "which is admissible under... (2) any statute of the United States" since the evidence rules will become statutes of the United States upon enactment.

There is no counterpart in the present Rules to this subdivision,

nor are there counterparts to any of the other subdivisions in this rule except to some of the narrow points grouped together in subdivision (b). The trial of an impeachment case should be governed by the same principles and should be conducted with the same latitude to determine the truth as are routinely employed in the courts of the United States to determine truth in civil and criminal proceedings. Inasmuch as a Senate trial is not a jury trial, it should not be governed by evidence limitations that developed historically as a result of doubts as to the capacity of jury members to sift and weigh evidence of limited probative value. The Judges of the Court of Impeachment are capable of assessing and rejecting evidence directly--hence the provision directing evidence to be admitted if it would be admissible anywhere else.

The Constitution places the most awesome power, the power to remove from office the highest official of the Nation, in the hands of the Senate. It would be inconsistent with the magnitude and enormity of such a responsibility to deny the Members of the Senate the opportunity to hear all the evidence, regardless of the impediments imposed in ordinary legal proceedings.

Subdivision (b) - Witnesses:

Paragraph (1), limiting the number of persons who may examine and cross-examine witnesses, is a modified version of present Rule XIX. Under the present Rule, the role of the Judges of the Court of Impeachment is entirely passive, so far as examination of witnesses is concerned,

since all questions by Members must be put in writing and be propounded by the Presiding Officer. The gravamen of the present Rule is retained because it would be impracticable to permit each of 100 Judges to interrogate witnesses, and even if it were practicable it would unduly prolong the trial. There is no such justification, however, for requiring that the written questions be asked by the Presiding Officer. Since the Presiding Officer is not a Member of the Senate in its judicial capacity, paragraph (2) would have the questions asked instead by any of the Chief Judges or Deputy Chief Judges. Such questions may not be asked of a witness until the conclusion of both direct and cross-examination.

Paragraph (3), which has no counterpart in the present Rules, authorizes the Court itself to call any party or person "to testify or provide other information designated by the Court" and provides that the Court may appoint attorneys to question any such witness. This provision is unusual and may never be employed. But it provides the Senate in its judicial capacity with a residual authority to ensure that it hears all the witnesses and receives all the evidence that it considers necessary or appropriate to the exercise of its Constitutional power. Since the Senate has an affirmative obligation "to try" and to assure "due process", and an unspoken obligation to do justice and discharge a vital trust, it must be capable, where necessary, of acting more affirmatively than an ordinary court in terms of calling and questioning witnesses.

Paragraph (4), with respect to testimony by a Senator, is derived from present Rule XVIII:

Subdivision (c) - Scope of Examination and Cross-Examination:

This subdivision provides that the scope of examination of witnesses, on direct examination and on cross-examination, shall be the same as that in the civil courts of the United States under Rule 43(b) of the Federal Rules of Civil Procedure.

Subdivision (d) - Privilege:

Paragraph (1) provides that there may not be any withholding of evidence, in the case of a Presidential or Vice-Presidential trial of impeachment, on the ground that the evidence could endanger national security or national defense. The paragraph specifically declares, however, that the "Court may order the doors of the Court closed and all persons who are not directly involved therein excluded prior to receiving any such testimony." The Senate is obligated to perform its Constitutional responsibility, but to the extent possible the duty to try an impeachment should be performed in the manner least likely to cause injury to other interests of the United States.

Paragraph (2) makes it a matter for the Judges to decide "in the interests of justice" whether there is a privilege to decline to testify or produce evidence in any situation. There is no counterpart to this provision in the present Rules, but that omission means that approximately the same result has obtained in previous trials pursuant to present

Rule VII under which the presiding officer makes an initial ruling on evidence and other incidental questions followed by a ye and nay vote by the Members. The principles should be included in the rules explicitly, however, to avoid argument before the Court on the extent of its authority or lack thereof.

Subdivision (e) - Hearsay:

This subdivision provides that hearsay evidence is not admissible, but, by incorporating subdivision (a) of this rule, it makes such evidence admissible if it would be admitted under any exception to the hearsay rule in effect in any of the categories listed in subdivision (a).

RULE 9. SUBPOENA

This rule sets forth the requirements for a subpoena with respect to form, method of modification, and service, and the sanction for noncompliance therewith.

Subdivision (a) - For attendance of Witnesses; Form; Issuance:

This subdivision is derived from the Form of a subpoena be issued on the application of the managers of the managers of the impeachment, or of the party impeached, or of his counsel in present Rule XXV and from Rule 45(a) of the Federal Rules of Civil Procedure.

Subdivision (b) - For Production of Documentary Evidence:

This subdivision is derived from Rule 34(b) of the Federal Rules of Civil Procedure, except that it limits the unrestricted (except

for unreasonable and oppressive demands) subpoena duces tecum power in the civil rules to the authority to obtain tangivle material that is relevant to the impeachment that the Senate in its judicial capacity is trying.

Subdivision (c) - Service:

This subdivision is derived from the last sentence of present Rule XXV.

Subdivision (d) - Contempt:

This subdivision is a restatement of the provision in present Rule VI which declares that "The Senate shall have power to ... punish in a summary way contempts of, and disobedience to, its authority, orders, mandates, writs, precepts, or judgments...." The proposed subdivision, however, cures a basic ambiguity in the present Rule provision, an ambiguity that could be interpreted as granting the Senate the authority to determine and sentence an offender for criminal contempt since the term "punish" is usually used in a criminal context. The Senate as a court of impeachment does have the Constitutional authority to punish for criminal contempt, unless of course, the House declares such conduct to be a high crime and misdemeanor and even then its authority would be limited to punishment by removal from office and disqualification. The proposed subdivision is preferable because it indicates unequivocally that the Court is empowered to declare and set sanctions for civil contempt.

This subdivision provides that the Senate in its judicial capacity has the inherent power of any duly organized court, the power to hold a person in civil contempt until he purges himself of his contempt of the authority of such court by compliance with its order. The Attorney General of the United States is directed to assist the Sergeant at Arms in assuring that the sanctions for such contempt are carried out in a meaningful way. It has been objected that a directive to the Attorney General, an officer of the executive branch, is improper and unconstitutional as a violation of the principle of separation of powers. The argument ignores the incontrovertible fact that impeachment itself is an exception to the separation of powers principle, an exception that is specifically mandated in the Constitution. Impeachment is the one mechanism that can bring together all of the branches of the Federal Government in one chamber; in a Presidential impeachment trial, one House of the legislative branch brings the head of the executive branch to trial before the other House of the legislative branch which is presided over for this purpose by the highest ranking officer of the judicial branch. In granting "sole Power" to the Senate "to try all Impeachments", it must be assumed that the delegates to the Constitutional Convention intended, and that the ratifying conventions in the States assumed that it was provided, that the Senate should have all of the authority necessary and proper to the exercise of that Constitutional obligation. Since the Senate maintains no institutions

for the temporary confinement of contemnors, it may be necessary for it as the Court of Impeachment to call upon the Attorney General, the cabinet officer in charge of the Federal Bureau of Prisons, for assistance in implementing its finding of civil contempt.

RULE 10. PRESENCE OF THE RESPONDENT

This rule, which is derived from present Rule X, portions of present Rule VIII, and Senate precedents, requires the respondent to appear and to answer articles against him (subdivision (a)), and to be present in Court at every stage of his impeachment trial, except as otherwise provided (subdivision (b)). There is not, it may be noted, any sanction authorized for noncompliance with these requirements, although some Judges might consider it relevant on the final questions. Subdivision (b) is derived in part from Rule 43 of the Federal Rules of Criminal Procedure.

RULE 11. MISCELLANEOUS PROVISIONS

This rule sets forth miscellaneous provisions regarding motions, time computations and allowances, service and filing requirements for papers, and opening and closing arguments.

Subdivision (a) - Motions:

Paragraph (1) of this subdivision, other than the last sentence, is derived from Rule 7(b) of the Federal Rules of Civil Procedure. The last sentence is derived from present Rule XVI.

Paragraph (2) is derived from Rule 43(e) of the Federal Rules of Civil Procedure.

Subdivision (b) - Time:

Paragraph (1) of this subdivision is a restatement of present Rule XXI.

Paragraph (2) is a provision committing the Senate in its judicial capacity to the goal of "expeditious determination consistent with the interests of justice", in determining the amount of time available for each phase of an impeachment trial and any trial-connected activity. It is the responsibility of the Chief Judges and the Deputy Chief Judges to make recommendations to the Court for implementing this standard. There is no comparable provision in the present Rules.

Paragraph (3) is derived from Rules 6(a) and 6(b) of the Federal Rules of Civil Procedure.

Subdivision (c) - Service and Filing of Papers:

Paragraph (1) is derived from Rules 5(a) and 5(b) of the Federal Rules of Civil Procedure. Paragraph (2) is an adaptation of Rules 5(d) and 5(e) together, of the Federal Rules of Civil Procedure. This subdivision, which has no counterpart in the present Rules, is basically a statement of prior practice in the courts, including the court of impeachment. In essence, the subdivision provides an assurance, through service and filing requirements, that the parties and the Court will be kept informed at every stage of a Senate impeachment proceeding.

Subdivision (d) - Opening and Closing Arguments:

This subdivision restates present Rule XXII, but with two modifications: (1) the decision on the maximum number of persons who may argue is left to the Court rather than fixed arbitrarily at two in the rule; and (2) the Court may impose reasonable limitations on arguments with respect to the maximum time allowed therefor as well as with respect to the number of advocates on each side.

RULE 12. PUBLIC ACCESS TO INFORMATION

This rule sets forth the doctrine of full public disclosure as the guiding general principle for impeachment proceedings in the Senate. The rule also contains specific provisions as to the written record to be maintained and as to the terms and conditions under which television and other electronic media may be granted access to an impeachment trial.

Subdivision (a) - General:

This subdivision derives from, and expands upon, the principle stated in present Rule XX. The present Rule provides that at all times, except during deliberations, "the doors of the Senate shall be kept open." The intent of the language in the proposed subdivision, "a trial shall, so far as practicable and to the extent consistent with the interests of justice, be conducted in public", is the same.

This subdivision adds to the present Rule a specific directive to provide space and facilities, to the extent available, to representatives of the press and the media and to appoint court officers who

are qualified to explain any phase of the trial to such representatives and other interested persons.

Subdivision (b) - Record:

This subdivision is derived from present Rule XIV and from the clause in present Rule XXIV which provides for entering the yeas and nays on the record. The subdivision directs the clerk of Court to record the proceedings of the Court of Impeachment and to report that record in the same manner as the legislative proceedings of the Senate. Witness testimony must be reported verbatim.

Subdivision (c) - Television:

The present (1868) Rules declare that "the doors...shall be kept open". Does that mean that radio microphones and TV cameras may enjoy unimpeded access to impeachment trial proceedings? Should it mean unrestricted access to the electronic media?

The subdivision permits radio and television to be authorized for trial coverage under conditions prescribed by the Court. Live TV coverage of the impeachment trial might very well preclude a fair trial in any subsequent criminal prosecution. It is simply a matter of the public's right to know being weighed against the impairment of a future criminal prosecution.

RULE 13. ENTRY OF JUDGMENT

This rule is derived from the last sentence of present Rule XXIII and from Rule 58 of the Federal Rules of Civil Procedure.

93rd CONGRESS

2d SESSION

## S. RES. \_\_\_\_\_

(Note.--Fill in all blank lines except those provided for the date, number, and reference of resolution.)

IN THE SENATE OF THE UNITED STATES

Mr. MANSFIELD

submitted the following resolution; which was

## RESOLUTION

(Insert title of resolution here)

*Resolved,* The Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, as amended, are amended to read as follows:

"Rules of the Senate of the United States When Sitting As a Court of Impeachment.

"Rule 1. -- General Provisions

"(a) SCOPE.--These rules govern the proceedings of the Senate of the United States when sitting as a Court of Impeachment, subject to the exceptions and limitations stated herein.

"(b) PURPOSE.--These rules are intended to provide for the just trial of any impeachment adopted by the House of Representatives of the United States.

"(c) SOURCE.--These rules are promulgated by the Senate, pursuant to its authority under the Constitution to determine the rules of its proceedings, including impeachment proceedings which the Senate is given the sole power to try.

"(d) EFFECTIVE DATE.--These rules take effect on the date adopted by the Senate. They govern any trial thereafter commenced and, so far as just and practicable, any trial then pending.

"Rule 2. -- Definitions

"As used in these rules, unless the context otherwise requires, the term--

"(1) 'articles' means articles of impeachment adopted by the House, and 'article' means any section or part thereof which avers conduct that constitutes a separate impeachable offense;

"(2) 'clerk of Court' means the Secretary of the Senate when the Senate is sitting as the Court;

"(3) 'conduct' means an action or omission, or a series of acts or omissions, or both;

"(4) 'conviction' means a finding by two-thirds of the Judges present that any article is sustained by clear and convincing evidence;

"(5) 'Court' or 'Court of Impeachment' means the Senate of the United States when sitting as a Court of Impeachment;

"(6) 'court officer' means an employee of the Senate designated by the Senate to serve as such when the Senate is sitting as the Court;

"(7) 'final question' means a determination whether the Court will sustain or reject an article;

"(8) 'House' means the House of Representatives of the United States;

"(9) 'impeachable offense' means treason, bribery, or other high crimes and misdemeanors designated as such in an article;

"(10) 'Judge' or 'Member' means a United States Senator who has taken the prescribed oath, when the Senate is sitting as the Court; 'Chief Judge' means a Judge who is, when the Senate is not sitting as the Court, the Majority Leader or the Minority Leader of the Senate; and 'Deputy Chief Judge' means a Judge who is, when the Senate is not sitting as the Court, the Assistant Majority Leader or the Assistant Minority Leader of the Senate;

"(11) 'managers' means any members of the House whom the House appoints and designated as such, who are empowered by the House to appear on its behalf in Court there to take all steps necessary and proper to convince the Court to sustain an impeachment adopted by the House

"(12) 'oath' includes an affirmation;

"(13) 'parties' means the managers and the respondent;

"(14) 'presiding officer' means, in the case of an impeachment of the President of the United States, the Chief Justice of the Supreme Court of the United States, and in the case of an impeachment of any other civil officer of the United States, the President of the Senate or the President pro tempore of the Senate;

"(15) 'respondent' means any person impeached in articles;

"(16) 'Sergeant at Arms' means the Sergeant at Arms of the Senate;  
and

"(17) 'trial' means the trial of an impeachment by the Court of Impeachment.

"Rule 3.--Organization of Court

"(a) NOTICE FROM THE HOUSE.--Whenever the President of the Senate receives a formal notice from the House declaring that the House has adopted articles and appointed managers and naming the person impeached therein, the Senate, by vote of a majority of the Senators present, shall resolve to organize as a Court of Impeachment and shall set a time and date therefor.

"(b) PREPARATIONS.--The Secretary of the Senate shall direct preparations in the Senate chamber and shall give notice to the House of the time and date for organizing the Senate to sit as a Court, and shall further advise the House that upon such organization the Court may admit managers for the purpose of permitting them to present and file articles. If the person impeached is the President of the United States, the Secretary of the Senate shall give notice of such time and date to the Chief Justice of the Supreme Court of the United States.

"(c) ORGANIZATION AND OATH.--Upon the appointed time, and at such later time as the Senate determines, the Senate shall lay aside its legislative and executive business upon such terms and conditions as it may prescribe, and the President of the Senate shall retire in favor of the Presiding Officer of the Senate sitting as a Court. The presiding officer shall thereupon proclaim: "The Court of Impeachment is now in

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session." At the first session thereof, the clerk of Court shall administer the following oath to the Senators: "I solemnly swear (or affirm) that, in all things appertaining to the trial of the impeachment of (name), (title), I will do impartial justice, according to law."

"(d) PRESENTATION OF ARTICLES.--Upon organization, the Court may admit managers for the purpose of permitting them to present and file articles with the Court. Upon receipt of the articles, the presiding officer shall inform the managers that the Court will take proper measures relative to such impeachment, and that the Chief Judges and the Deputy Chief Judges will duly notify the House and its managers of the time, order of trial, and other relevant matters.

"Rule 4. -- The Court

"(a) POWERS.--(1) The power of the Senate to try all impeachments includes the authority, when sitting as a Court of Impeachment, to engage in, or to authorize or direct any person within the United States to engage in, any conduct which the Court finds necessary or proper and which may assist or contribute, directly or indirectly, to the just determination of an impeachment on the basis of the most complete and probative evidence.

"(2) The clerk of Court is authorized and directed to make and issue any subpoenas, writs, or other orders of the Court issued pursuant to these rules and the powers of the Court, and to make and enforce such other regulations and orders as the Court may authorize or direct. Upon request the Sergeant at Arms shall assist the clerk of Court in the performance of any such function. Subject to the direction of the Court, the Sergeant at Arms may employ or request such aid and assistance as may be necessary or appropriate to enforce, execute, and carry into effect any such orders. To this end, the Sergeant at Arms, upon a decision by the Court, may call upon the assistance of any officer, agent, or employee of the Federal Government, wherever located, with or without reimbursement and all such officers, agents, and employees are authorized and directed to provide such assistance.

"(b) PRESIDING OFFICER.--(1) The presiding officer shall preside during sessions of Court, in accordance with these rules. He shall be responsible for assuring that the trial is conducted expeditiously and with the impartiality, fairness, and integrity expected of a Court of Impeachment.

"(2) The presiding officer may make a preliminary ruling on any disputed question other than a final question, or he may immediately submit any such question to the Court for decision. Any such preliminary ruling may be set aside and the question decided by the Court, in accordance with these rules.

"(c) SESSIONS.--(1) Upon the filing of articles in accordance with rule 3(d), the Court shall proceed to the consideration of such articles. The Court shall continue in session each day after the trial commences (other than Sundays and legal holidays), except as otherwise ordered by the Court upon recommendation of the Chief Judges and the Deputy Chief Judges, until such time as may, in the judgment of the Court, be necessary or appropriate.

"(2) Trial shall commence at the time and date set therefor by the Court upon recommendation of the Chief Judges and the Deputy Chief Judges. Such date shall be set to fall as soon after the date prescribed in these rules for the filing of the answer to articles as is consistent with affording the managers, the respondent, and the Judges a reasonable opportunity for preparation. Toward the close of each session of the Court, the Chief Judges and the Deputy Chief Judges shall announce the time and date for the next session, subject to the approval of the Court. If the Court shall at any time fail to sit upon trial upon the appointed time therefor, the Chief Judges and Deputy Chief Judges shall announce the time and date for the next such session. Any recess or adjournment of the Court shall not operate as an adjournment of the Senate; during any such recess or adjournment, the Senate shall resume the consideration of its legislative and executive business;

"(3) At all times while the Court is sitting upon trial, the doors

of the Senate Chamber shall be kept open, except when the Court shall otherwise order in accordance with these rules.

"(4) The Court may not proceed in the absence of a quorum of the Judges. A majority of the members of the Senate constitute a quorum. In the event that any Judge is unavoidably absent from any session or sessions, he shall study diligently the record of the proceedings at such session or sessions.

"(d) DECISIONS.--(1) The Court shall act, issue orders, and decide all questions other than final questions by majority vote of the Judges present. The presiding officer shall not vote. The yeas and nays may be demanded by any Chief Judge or any Deputy Chief Judge or by one fifth of the Judges present. Such votes shall be taken with a minimum of delay in the most expeditious manner possible (as determined by the Chief Judges), except that the Court may recess for a reasonable amount of time or defer any such vote until the next session in order to enable each Judge to research the applicable law.

"(2) On the question whether the impeachment is sustained, each Judge shall vote to "sustain" or "reject" an article considered by itself. If two-thirds of the Members present vote to sustain any article, the respondent stands convicted. The Court may thereupon enter judgment accordingly, or it may order the proceedings continued until other final questions have also been determined. If two-thirds of the Members present fail to vote to sustain any article, the Court shall enter judgment rejecting the impeachment and shall so notify the House.

"(3) Whenever, pursuant to these rules, a decision of the Court is to be based upon the determination, or upon recommendation, of the Chief Judges or of the Chief Judges and the Deputy Chief Judges, the determination or recommendation of a majority of such Judges shall be deemed the determination or recommendation of such Judges. If such Judges are equally divided and are unable to make such a determination or recommendation, the decision shall be made by all of the Judges present, in accordance with paragraph (1) of this subdivision.

"(e) QUESTIONS OF LAW.--If the Court desires enlightenment on any question of law, the Chief Judges shall invite counsel for the managers and for the respondent, and may invite attorneys other than counsel for any of the parties, to submit signed briefs to the Court by such question. The Chief Judges may permit signed briefs to be submitted by such persons on any other legal issues which arise or which may arise in the course of the proceedings. A sufficient number of copies of any such briefs shall be filed with the clerk of the Court, who shall cause a copy thereof to be furnished to each Judge. Such briefs need not be printed. The Court, upon recommendation of the Chief Judges and the Deputy Chief Judges, may permit oral argument on any such legal questions or issues, in the interests of justice. A reasonable amount of time (as determined by the Chief Judges) shall be set aside for any such argument, and such time shall be divided equally between the managers, the respondent, and attorneys other than counsel for the parties, if any.

"(f) STATEMENTS OF JUDGES.--(1) Oral statements by Judges shall be restricted to a statement not to exceed 3 minutes at the organization of the Court or the opening of the trial; not to exceed 5 minutes on any question other than a final question; and not to exceed 10 minutes on a final question, unless the Court otherwise provides upon recommendation of the Chief Judges and the Deputy Chief Judges. A Judge may submit any relevant statement in writing to the clerk of Court, regardless of length, for inclusion in the record of the proceedings.

"(2) If a Judge wishes to offer a motion or order other than a motion to adjour, it shall be reduced to writing and shall be read by the presiding officer.

"(g) SPECIAL PANELS.--(1) The Chief Judges and the Deputy Chief Judges, with the approval of the Court, may appoint Panels of Judges for such purposes as the Court may prescribe.

"Rule 5. -- Pleadings

"(a) GENERAL.--There shall be articles and an answer to articles. No other pleading shall be allowed, except that the Court upon recommendation of the Chief Judges and the Deputy Chief Judges may

order any additional statements or other written presentations or responses.

"(b) SUMMONS AND ARTICLES.--(1) Upon the filing of articles in accordance with rule 3(d), the clerk of Court shall forthwith issue a summons and deliver it to the Sergeant at Arms or to a person specially appointed to serve it. The summons shall be signed by the clerk of Court, be under the seal of the Senate, contain the name of the Court and the names of the parties, be directed to the respondent, state the names of the managers and their counsel, if any, and the time within which these rules require the respondent to appear and defend.

"(2) The summons and articles shall be served together. Service shall be made by delivering a copy of the summons and of the articles to the respondent personally, or by leaving copies thereof with a responsible person or persons employed at a place at which the respondent has customarily performed his duties as a civil officer of the United States.

"(3) Service of all process governed by these rules shall be made by the Sergeant at Arms, his designated agent, or any other person specially appointed for such purpose by the Court. The person serving such process shall make proof of service to the Court promptly after service is made. Such process may be served at any place subject to the jurisdiction of the United States.

"(c) ANSWER TO ARTICLES.--(1) A respondent shall state in short and plain terms his defense or defenses to each article, and shall admit or deny any averment upon which the House relies in such article. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state, and such statement shall have the effect of a denial. Denials shall fairly meet the substance of the averments denied. If the respondent intends in good faith to deny only a part or a qualification of an averment, he shall specify so much of it as is true and material and shall deny only the remainder. Unless the respondent intends in good faith to controvert all the averments of any article, he may make his denials as specific denials of designated

averments or he may generally deny all the averments except such designated ones as he expressly admits.

"(2) A respondent shall serve his answer to articles within **10** days after the service of the summons and articles upon him pursuant to subdivision (b) of this rule. Every defense, in law or in fact, shall be asserted in such answer.

"(d) AMENDMENTS.--The managers, to the extent specifically authorized by the House of Representatives at the time of the adoption of Articles, may amend the articles and the respondent may amend his answer to articles only by leave of court or by written consent of the adverse party. The Court shall grant such leave freely when justice so requires. When issues not raised by the pleadings are tried by express or implied consent of the parties or the Court, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence, or to reflect new findings by the House, may be made upon motion of any party at any time. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the Court may allow the pleadings to be amended, and shall do so freely when the presentation of the merits of the action will be subserved thereby. The Court may grant a continuance to enable the objecting party to meet any such evidence. Upon motion of a party, the Court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions, occurrences, or events which have taken place since the date of the pleading sought to be supplemented. If the Court deems it advisable that the adverse party plead to any such supplemental pleading, it shall so order, specifying the time therefor.

"Rule 6. -- Conference and Trial Order

"At any time after the filing of articles in accordance with rule 3(d), the Court may, in its discretion, order the managers and the respondent, or their counsel, to appear for a conference with the Chief Judges and the Deputy Chief Judges to consider such matters as

will promote a fair and expeditious trial. Such Judges shall make a proposed order which recites any action taken at such conference or conferences, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limit the issues for trial to those not disposed of by admissions or agreements. Such Judges may further recommend in such proposed order a calendar or timetable for the trial, including the sequence for presentation of evidence, arguments, and voting with respect to each article; the schedule for sessions of Court; seating arrangements in the Senate chamber to reflect the fact that the Senate is sitting as a Court; and any matters as to rulings on evidence or other incidental questions, or other matters necessary or appropriate to secure a just and expeditious determination of the impeachment. Such order, which shall be approved by the Court, shall control the subsequent course of the proceedings, and shall be known as the Trial Order. The Trial Order may be amended at any time by the Court to prevent manifest injustice or for any other reason.

"Rule 7. -- Discovery

"(a) GENERAL.--With the approval of the Court upon recommendation of the Chief Judges and the Deputy Chief Judges, either of the parties may obtain discovery by any method that is authorized by the rules governing the procedure in suits of a civil nature in courts of the United States, except as otherwise provided in these rules. Such discovery shall be obtained and the information and material obtained thereby shall be used in accordance with the provisions of any such rule in effect as of the date such discovery is obtained, except as the Court may otherwise order. Except when the interests of justice are compelling, such approval shall not be granted by the Court if the effect of granting such approval may be a delay in the determination of an impeachment. The Court may condition any approval upon any terms and conditions which it deems necessary or appropriate in the interest of expeditious and just determination.

"(b) SCOPE.--Except as otherwise limited by the Court, the scope of discovery is as follows:

"(1) Parties may obtain discovery regarding any matter which is relevant to the subject matter or to any averment of any article or any portion or an answer to articles. It is not ground for objection that the information sought may not be admitted at trial, if the discovery sought appears reasonably calculated to lead to the discovery of admissible evidence.

"(2) A party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (1) of this subdivision that are prepared in anticipation of the trial by or for the other party, or by or for the other party's counsel, only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials (when the required showing has been made), the Court shall protect against public disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney for either of the parties concerning the trial. A party may obtain without the required showing any statement previously made by the other party concerning any matter which is relevant to the subject matter of, or any averment in, any article. For purposes of this paragraph, a 'statement previously made' is (A) a written statement signed or otherwise adopted or approved by the person making it; or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

"Rule 8. -- Evidence

"(a) GENERAL.--In a trial, the testimony of witnesses shall be taken orally in an open session of the Court, unless otherwise provided in accordance with these rules. All evidence shall be admitted in a trial which is admissible under (1) any of these rules; (2) any statute of the United States; (3) any of the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity; (4) any of the rules of evidence applied in the courts of general jurisdiction of any of the several States; or (5) any decision thereon by the Court upon recommendation of the Chief Judges and the Deputy Chief Judges in the interests of justice. In any situation, the rule, statute, or decision which favors the reception of the evidence governs, and such evidence shall be presented to the Court according to the most convenient method prescribed in any such rule of statute. The competency of a witness to testify shall be determined in the same manner.

"(b) WITNESSES.--(1) Witnesses called by a party shall be examined by one person on behalf of the party calling the, and thereupon may be cross-examined by one person on behalf of the other party.

"(2) If a Judge wishes a question or a series of questions to be asked a witness, he shall reduce such questions to writing and transmit them to any Chief Judge or Deputy Chief Judge. Such Judge may ask any such questions of such witness, together with any questions he may propound, at the conclusion of the direct examination and the cross-examination of such witness.

"(3) The Court upon recommendation of the Chief Judges and the Deputy Chief Judges may call any party or person to testify or provide other information designated by the Court, and the Court may appoint attorneys for the Court to interrogate any such witness by leading questions or in any other manner. Any witness thus called may be contradicted and cross-examined by or on behalf of either party upon the subject matter of his examination in chief. As used in this paragraph, 'other information' includes any book, paper, document,

record, recording, or other material.

"(4) If a Judge, in his capacity as Senator or private citizen, is called as a witness, he shall be sworn as a witness, and shall give his testimony standing in his place.

"(c) SCOPE OF EXAMINATION AND CROSS-EXAMINATION.--A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse witness, contradict him, and impugn his credibility in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and his credibility may be impugned by or on behalf of the adverse party also, but he may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

"(d) **SECRET MATERIAL.**--If the respondent is the President or Vice President of the United States, there is no privilege to refuse to give evidence or to prevent any person from giving evidence upon the basis that such evidence involves or will disclose a secret of State or any officially-protected information. Prior to admitting any such testimony, the Court may, however, after a showing of need and upon recommendation of the Chief Judges and the Deputy Chief Judges order the doors of the Court closed and all persons excluded, other than the Judges, the witness or witnesses involved, the presiding officer, the clerk of Court, and one representative of each of the parties.

"(e) **HEARSAY.**--Hearsay is not admissible in a trial, except in accordance with subdivision (a) of this rule.

"Rule 9. -- Subpoena

"(a) **FOR ATTENDANCE OF WITNESSES; FORM; ISSUANCE.**--Every subpoena shall be issued by the clerk of Court under the seal of the Senate of the United States, shall state the name of the Court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk of Court shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed, but otherwise in blank, to a

party requesting it, who shall fill it in before service.

"(b) FOR PRODUCTION OF DOCUMENTARY EVIDENCE.--A subpoena may also command the person to whom it is directed to produce the books, papers, documents, records, recordings, or other material or tangible things designated therein. Notwithstanding the foregoing, the Court may, upon motion promptly made and, in any event, at or before the time specified for compliance (1) quash or modify any subpoena if it is unreasonable and oppressive; or (2) condition denial of the motion upon payment by the party in whose behalf the subpoena is issued of the reasonable cost of producing such evidence.

"(c) SERVICE.--A subpoena may be served by the Sergeant at Arms, his designated agent, or any other person or persons specially appointed for such purpose by the Court upon recommendation of the Chief Judges and the Deputy Chief Judges.

"(d) CONTEMPT.--Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the Court of Impeachment. The Court may impose such sanctions as it deems necessary in the interest of justice until such time as such person shall have purged himself of contempt by compliance. The Attorney General of the United States shall assist the Sergeant at Arms in implementing any such sanctions, upon request.

Rule 10. -- Presence of the Respondent

"(a) ANSWER TO ARTICLES.--The respondent shall be called to appear and answer the articles of impeachment against him, in accordance with the provisions of rule 4(c). If he appear, or any attorney or attorneys for him, the appearance shall be recorded, stating particularly if by himself or by attorney, naming the person appearing and the capacity in which he appears. If the respondent does not appear, either personally or by attorney, the same shall be recorded.

"(b) GENERAL.--The respondent shall be present in Court at every stage of trial, except as otherwise provided by these rules or by a determination of the Court upon recommendation of the Chief Judges and the Deputy Chief Judges. The voluntary absence of the respondent after

the trial has been commenced shall not prevent the trial from continuing until the entry of judgment.

"Rule 11. -- Miscellaneous Provisions

"(a) MOTIONS.--(1) An application to the Court for an order shall be by motion which shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules. All motions made by the parties or their counsel shall be addressed to the presiding officer and shall be committed to writing and read by the presiding officer.

"(2) When a motion is based on facts not appearing of record, the Court may hear the matter on affidavits presented by the respective parties, but the Court may upon recommendation of the Chief Judges and the Deputy Chief Judges direct that the matter be heard in whole or in part on oral testimony or depositions.

"(b) TIME.--(1) All questions other than final questions, and all motions, may be argued for a period of time not to exceed one hour for all proponents and not to exceed one hour for all opponents, unless the Court otherwise provides upon recommendation of the Chief Judges and the Deputy Chief Judges.

"(2) The Court upon recommendation of the Chief Judges and the Deputy Chief Judges shall restrict the time available for all phases of the trial and any activity thereof in the interest of expeditious determination consistent with the interests of justice.

"(3) In computing any period of time prescribed or allowed by these rules or determined by the Court, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Sunday

or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Sundays and legal holidays shall be excluded in the computation. When an act is required or allowed to be done at or within a specified time, the Court may in its discretion order such period enlarged or extended on the ground of excusable neglect.

"(c) SERVICE.--(1) Except as otherwise provided by the Court, every pleading, order required by its terms to be served, paper relating to discovery required to be served, written motion other than one which may be heard ex parte, and written notice, appearance, demand, and similar paper shall be served upon the parties. Whenever service is required or permitted to be made upon a party, the service shall be made upon an attorney representing such party, if any, unless service upon the party personally is ordered by the Court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the Clerk of Court. Delivery of a copy within this rule means handing it to the attorney or to the party, or leaving it at his office with a responsible person or persons. Service by mail is complete upon mailing.

"(2) All papers required to be served upon a party shall be filed with the clerk of Court either before service or within a reasonable time thereafter.

"(d) OPENING AND CLOSING ARGUMENTS.--The trial shall be opened, and final argument on an article shall be opened, by or on behalf of the managers. The Court upon recommendation of the Chief Judges and the Deputy Chief Judges may impose reasonable limitations on opening and closing arguments with respect to allowable time and the maximum number of speakers.

"Rule 12. -- Public Access to Information

"(a) GENERAL.--Except as otherwise provided in these rules, or by decision of the Court upon recommendation of the Chief Judges and the

Deputy Chief Judges, a trial shall, so far as practicable and to the extent consistent with the interests of justice, be conducted in public. Space and facilities, to the extent available, shall be made available to representatives of the press and the media, and court officers shall be appointed who are qualified to explain any phase of the proceedings of the Court to such representatives and other interested persons.

"(b) RECORD.--The clerk of Court shall record the proceedings of the Court of Impeachment in the same manner as the legislative proceedings of the Senate are recorded. All testimony, arguments, orders, decisions made by yeas and nays, and other matters shall be entered on the record, except when the doors of the Court are closed for deliberation or other reason. Such record shall be reported in the same manner as the legislative proceedings of the Senate, except that no changes may be made in any transcript of the testimony of a witness other than with the approval of the clerk of Court to correct an inaccuracy in transcription.

"(c) TELEVISION.--No broadcasting, television, recording, or taking of photographs is permitted in the Senate chamber and areas immediately adjacent thereto while the Court is in session or during recesses between sessions of Court, except that the Court may upon recommendation of the Chief Judges and Deputy Chief Judges and subject to the supervision of the Sergeant at Arms authorize--

"(1) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

"(2) the broadcasting, recording or photographing of the Court of Impeachment (except when the doors of the Court are closed in accordance with these rules or by decision of the Court) on the condition that the means for such broadcasting, televising, recording or photographing will not distract participants or impair the dignity of the proceedings.

"Rule 13. -- Entry of Judgment

"Upon the concurrence of two-thirds of the Members present that an article or articles shall be sustained, the clerk of Court, unless the Court otherwise orders, shall forthwith prepare, sign, and enter the maximum judgment authorized by the Constitution of the United States, without awaiting any direction by the Court."

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