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EXECUTIVE SESSION

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COMPARISON OF PROPOSED RULES OF THE SENATE

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OF THE UNITED STATES WHEN SITTING AS A COURT

5

OF IMPEACHMENT AND PRESENT RULES OF PROCEDURE

6

AND PRACTICE IN THE SENATE WHEN SITTING ON

7

IMPEACHMENT TRIALS

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THURSDAY, AUGUST 1, 1974

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United States Senate,
Committee on Rules and Administration,
Washington, D. C.

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The Committee met in executive session in Room 301 of
the Old Senate Office Building at 10:05 a.m., the Honorable
Howard W. Cannon (The Chairman), presiding.

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Present: Senators Cannon, Pell, Byrd, Allen, Cook, Scott,
Griffin and Hatfield.

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Staff present: William M. Cochrane, Staff Director;
Hugh O. Alexander, Chief Counsel; Joseph E. O'Leary, Pro-
fessional Staff Member (Minority); John P. Coder, Professional
Staff Member; Jack L. Sapp, Professional Staff Member; James
H. Duffy, Chief Counsel, Subcommittee on Privileges and Elec-
tions; James F. Schoener, Minority Counsel, Subcommittee on
Privileges and Elections; Peggy Parrish, Assistant Chief
Clerk.

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1 Senator Byrd. The Subcommittee will come to order. A
2 quorum is present. The door is closed.

3 Gentlemen, I don't feel right in chairing this proceed-
4 ing. The Full Committee is here, the Full Committee votes--
5 and I think I am preempting your position, Mr. Chairman, if
6 I chair the meeting.

7 I appreciate the opportunity to do it, I appreciate your
8 telling me to do it, but I am just not going to do it. I
9 don't feel it is right, I don't feel it does you right.

10 The Chairman. I will defer to your wishes.

11 Senator Byrd. I think that the Full Committee is going
12 to do this. I think you are the Chairman and I think you
13 ought to be Chairman of the proceedings. I will cooperate
14 with you and be with you as much as I can be with you.

15 The Chairman. All right. Gentlemen, you have a copy of
16 the comparative prints before you now--and I am wondering,
17 as long as we had yesterday Dr. Riddick starting to explain
18 some of the matters that we are concerned with--I wonder if
19 we might ask him--first perhaps I can ask him now: doctor,
20 are you familiar with the proposed rules in the so-called
21 Mansfield proposal?

22 Mr. Riddick. No, sir. I have just seen it. I have not
23 even had a chance to read it carefully.

24 The Chairman. I see. Well, I wonder if perhaps we
25 could call on you to read the--go through the proposed rules,

1 article by article. Then, when we come to the present rules,
2 you can comment on--by reading these, if you feel that you
3 can at that time--on the differences between the proposed
4 rules and the new rules.

5 Mr. Riddick. I am afraid that I am not familiar enough
6 with the new ones to make a recommendation, Mr. Chairman.

7 Senator Byrd. Mr. Chairman, I suggest we proceed in the
8 way you directed and the rest of us can comment. I think that
9 is the right way to proceed.

10 The Chairman. Very well. Doctor, why don't you just
11 start down that proposed rules--if you don't mind reading,
12 it is just a reading job at first, and you can call on Bob
13 Dove to assist you there if the reading gets too much for
14 you, and we will ask any of the Members to make any comments
15 or to ask any questions as they go along.

16 But the first portion of these, until we get down to
17 page 2, the proposed rules are not covered in the present
18 impeachment rules that are in existence before the Senate.

19 So would you go through those, doctor?

20 Mr. Riddick. Well, the first two sections ---

21 Senator Byrd. Before we begin, Mr. Chairman, where are
22 we beginning?

23 The Chairman. At the beginning.

24 Mr. Riddick. The first two sections, General Provisions
25 and Definitions, werenot covered in the rules that we already

1 have.

2 Rule 1, General Provisions, (a) Scope. "These rules
3 govern the proceedings of the Senate of the United States
4 when sitting as a Court of Impeachment, subject to the excep-
5 tions and limitations stated herein."

6 Senator Byrd. Are we to comment on that?

7 The Chairman. If you have any comments.

8 Senator Byrd. My comment is--I realize that we are not
9 taking action on this today, but I want to make this comment
10 for the record at this point. This seems that right at the
11 beginning we are going to get ourselves locked into the iden-
12 tical language of Rule 1 of the Federal Rules of Civil Pro-
13 cedure and Rule 1 of the Federal Rules of Criminal Procedure.
14 I think this would be a mistake. The will of the Committee
15 and the Senate will prevail, but I want to make that observa-
16 tion right at this point.

17 In the very first rule and sub-section of that rule,
18 proposed new rule, we are going to start guiding ourselves by
19 the Federal Rules of Civil and Criminal Procedure, and I think
20 that will be a serious mistake, as far as I am concerned.

21 The Chairman. And I may say that I think this is one of
22 the questions that we will ultimately have to resolve. And
23 when you get to rule 2 on the definitions, as to whether there
24 really is a need for definitions. There are a number of those
25 definitions that I disagree with, if we do decide there is a

1 need for them.

2 Mr. Riddick. (b) Purpose. "These rules are intended to
3 provide for the fair trial and just determination of any im-
4 peachment adopted by the House of Representatives of the
5 United States. They shall be applied ---

6 Senator Byrd. Wait a minute. He said "fair trial"--my
7 copy says "just trial."

8 The Chairman. We are looking at the comparative print.
9 It says "for the fair trial and just determination."

10 Mr. Riddick. "...just determination of any impeachment
11 adopted by the House of Representatives of the United States."

12 Senator Scott. Before Floyd goes on, just in com-
13 menting upon what Bob has said, I don't read rule 1 or rule
14 2 as knocking us into either the Federal Rules of either Civil
15 or Criminal Procedure. They don't say so. They may say so
16 later in some other rule. But I guess I want it noted that
17 I differ on that, although this is not the time to consider
18 amendments on this thing.

19 Senator Byrd. No, but I want to say that, according to
20 the analysis, it was provided--I will read from it. "This
21 sub-division is derived from the virtually identical language
22 of Rule 1 of the Federal Rules of Civil Procedure and Rule 1
23 of the Federal Rules of Criminal Procedure."

24 And I realize that we are not at the decision-making
25 point and we don't lock ourselves in here, but I wanted to

1 observe that this is the track we are starting down on.

2 Senator Scott. This would be a matter of much debate,
3 I think, on the two points of view. One is that we do need
4 some evidentiary standards to govern our proceedings, and
5 then the other point of view that we don't.

6 So I just want the record at the beginning to show that
7 I favor our establishing or at least making clear the fact
8 that the Senate will have some guide to its conduct from an
9 evidentiary standpoint.

10 Mr. Riddick. "They shall be applied and constructed to
11 effectuate such purpose."

12 (c) Source. "These rules are promulgated by the Senate,
13 pursuant to its authority under the Constitution to determine
14 the rules of its proceedings, including impeachment proceedings
15 which the Senate is given the sole power to try."

16 (d) Effective Date. "These rules take effect on the
17 date on which they are adopted by the Senate. They govern any
18 impeachment proceeding thereafter commenced in the Senate
19 and, so far as just and practicable, any further proceedings
20 in any case of impeachment then pending in the Senate."

21 Senator Byrd. Mr. Chairman, I note in the analysis the
22 following language: "This sub-division, which has no counter-
23 part in the present rules, is derived from Rule 86 of the
24 Federal Rules of Civil Procedure and from the second sentence
25 of Rule 59 of the Federal Rules of Criminal Procedure. If an

1 impeachment proceeding is pending in the Senate on the date
2 that these rules take effect, the decision as to whether and,
3 if so, the extent to which, these rules will govern that
4 trial are decisions that would be made by the Senate in its
5 judicial capacity in accordance with Rule 4(d)(1) regarding
6 the procedure for making decisions on all questions other
7 than --- questions."

8 Here we are saying that if an impeachment proceeding is
9 pending on the date that these rules take effect, the decision
10 as to whether the rules will govern that trial are decisions
11 that would be made by the Senate in its judicial capacity in
12 accordance with Rule 4(d)(1)--and my question would be, how
13 could the decision as to whether the rules will govern be
14 made in accordance with Rule 4(d)(1) prior to the adoption
15 of such rule?

16 The Chairman. As I read that, I would interpret that to
17 mean to envision sort of a situation in the Johnson case where
18 the rules purportedly had been adopted first, but then the
19 Chief Justice said the court has not been organized--and
20 after they were organized, the question was whether they
21 adopted additional rules.

22 Senator Byrd. I agree that that happened. That is not
23 what this analysis is talking about. The analysis is saying
24 that the decision as to whether these rules will govern the
25 trial are the decisions that will be made by the Senate in

1 accordance with Rule 4(d) of this rule, which will not have
2 been adopted.

3 The Chairman. Oh, I am sorry. I thought that was rela-
4 ted to ---

5 Senator Scott. What page is the analysis?

6 Senator Byrd. Page 4. The reason I refer to the analy-
7 sis, Mr. Chairman, I take it that whoever drew up this reso-
8 lution put a tremendous amount of time in drawing up of this
9 resolution, and I should think--and in the preparation of the
10 analysis--knew pretty well what he was talking about.

11 And if we are going to get ourselves into the position
12 of this resolution, I think it is well that we know how the
13 person or persons who drew up the resolution analyzed it, be-
14 cause it would reflect their intent.

15 But that is a minor thing at this point.

16 Senator Scott. I read the first line, Bob--"If an im-
17 peachment proceeding is pending..." But what about the situa-
18 tion where no impeachment proceeding is pending?

19 Senator Byrd. Well, this says if an impeachment proceed-
20 ing is pending in the Senate on the date that these rules
21 take effect, the decision as to whether and, if so, the
22 extent to which, these rules will govern that trial are
23 decisions that would be made by the Senate in its judicial
24 capacity in accordance with Rule 4(d)(1) regarding the pro-
25 cedure for making decisions...

1 How can the decisions be made in accordance with rules
2 that have not been adopted, is what I am saying.

3 And also the analysis says "In any situation in which it
4 is not just and practicable to apply these rules, the present
5 rules would continue to be used."

6 Well, who will decide--who will decide what is just and
7 practicable?

8 Apparently the Senate can't be trusted to reach a just
9 decision under the old rules. How can it be trusted to
10 determine a situation in which it is not just and practicable
11 to apply these rules?

12 Senator Scott. Well, I think the answer to that is two-
13 fold. First, the Senate does make a decision by majority
14 vote, if it wishes, on any of these matters, as was pointed
15 out yesterday.

16 And, second, these rules do not incorporate Rule 4(d)(1).
17 They simply say that the effect of the adoption of these rules
18 would be that the interpretation would follow the same inter-
19 pretation which is made in judicial proceedings under Federal
20 codes.

21 Senator Byrd. I am just calling your attention to the
22 fact that the whole purpose of this resolution is to provide
23 that the Senate act in a just and fair way, because apparently
24 it can't do it under the old rules.

25 Yet the analysis says in any situation in which it is

1 not just and practicable to apply these rules, the present
2 rules will continue to be used.

3 Who is going to decide whether it is just and practicable,
4 if the Senate can't be trusted to act in a just and practicable
5 way under the old rules?

6 Senator Pell. Mr. Chairman, may I offer just one
7 thought here?

8 The Chairman. Senator Pell.

9 Senator Pell. I am wondering if you should back up a
10 little bit, because we seem to be moving on the procedure
11 that the proposed rule should be the basic document that we
12 should examine, as if we were going into an impeachment
13 trial for the first time in the Senate's life.

14 Wouldn't we do better to back up and see what is wrong
15 with the present rules and where they should be changed,
16 rather than working from the proposed rules?

17 The Chairman. That is really what we were intending
18 here, but we are going to go through the proposed rules.
19 These items are not covered in the present rules. When we
20 get down to page 2 we will be getting to the present rules
21 and then we can discuss in that context.

22 So my purpose was to just have us go through here and
23 see items that are set out in these proposed rules that are
24 not even covered in the existing rules. And then when we
25 get to where the existing rules are comparable, we will have

1 the two of them laid out side by side.

2 Senator Pell. But the basic, in terms of reference,
3 would be the present rules, I would think.

4 The Chairman. That is right. Senator Allen.

5 Senator Allen. Getting back to this Rule 4(d)(1), it
6 seems to me that this does have an area of operation, Senator
7 Byrd. It says that if an impeachment proceeding is pending
8 in the Senate on the date these rules take effect--then not
9 the United States Senate as judicial and executive body, as
10 a legislative and executive body, but the U. S. Senate sitting
11 as a court of impeachment under Rule 4(d)(1) would determine
12 whether the rules would be applicable to the pending case.

13 Senator Scott. If you would yield, 4(d)(1) says by a
14 majority vote.

15 Senator Cook. And that says "The Court shall act, issue
16 orders and decide all questions other than final questions
17 by majority vote of the Judges present." Which, again, is
18 the majority vote of the Senate.

19 Senator Scott. I would like to make one point before
20 we get started, because I am liable to get into the position
21 of protagonist here--and I don't want to do that. This is
22 the Mansfield trial or working draft. I am making certain
23 arguments partly in order to bring them to the attention of
24 the Committee. I don't want it to be assumed that I am the
25 person offering the Mansfield draft. As the Chairman said

1 yesterday, we all have differences, but since there may be
2 times when there is no one else to make the case for the so-
3 called proposed rules, I feel obliged to do that. And any
4 time anybody else wants to do it, I will be delighted to have
5 them do it.

6 The Chairman. All right.

7 Mr. Riddick. "As used in these rules, unless the con-
8 text otherwise requires, the term--

9 "(1) 'articles' means articles of impeachment adopted
10 by the House, and 'article' means any section or part thereof
11 which avers conduct that constitutes a separate impeachable
12 offense;

13 "(2) 'clerk of Court' means the Secretary of the Senate
14 when the Senate is sitting as the Court;..."

15 The Chairman. I may say on that personally I have very
16 grave reservations about that terminology. I don't like the
17 idea of the clerk of the Court or the Court, the comparison
18 being applied--it is the Senate of the United States sitting
19 as an impeachment body, and it is not a court and the Secretary
20 of the Senate should not be considered a clerk of the court
21 in my judgement.

22 So at the proper time I will ---

23 Senator Cook. I think we ought to get into this discus-
24 sion right now, because--and I agree with the Chairman. Some-
25 how or other it offends me to read that we are going to have

1 deputy chief judges and chief judges--and I have got to say
2 to you that this is what--I hope that it reached the degree
3 of distaste with the Chairman that it did with me.

4 The Chairman. It did.

5 Senator Cook. As I said yesterday ---

6 Senator Scott. I am glad I spoke when I did.

7 Senator Cook. All right, I said yesterday that there
8 isn't any question about it, that in essence we constitute
9 one hundred judges with the Chief Justice as the moderator.
10 But that is a theory. And in practicality we represent one
11 hundred members of the United States Senate who are given
12 the authority pursuant to the Constitution to make a judge-
13 ment on impeachment.

14 And we do not lose our role as Senators. We do not lose
15 our role as duly elected individuals of our respective states.
16 And the term "judge," the term "chief judge," the term "deputy
17 chief judge," is offensive to me in relation to that legisla-
18 tive and constitutional process, because the judges of the
19 United States court system are appointed--they are appointed
20 by the President of the United States and subject to the con-
21 firmation of this body.

22 And to that extent I do not want to put myself in the
23 position of being a judge. I do not want to refer to the
24 Minority Leader as a chief judge or a deputy chief judge, as
25 the case would be to our colleague on the Rules Committee.

1 And I must say to you that in basic concept of the divi-
2 sion of the system, that truly does bother me very, very
3 much.

4 Senator Byrd. Mr. Chairman, the whole section on defini-
5 tions bothers me. If Senators don't know what articles mean,
6 and if they don't know what House means, and if they don't
7 know what an impeachment offense means when it is spelled
8 out in the Constitution, and if they don't know what managers
9 means, and if they don't know what an oath means, and if they
10 don't know what a respondent means, what the Sergeant-at-
11 Arms means--they are not going to be capable of fulfilling
12 their role as jurors in an impeachment trial.

13 Senator Cook. May I say ---

14 Senator Byrd. There may be some definitions that are
15 needed.

16 Senator Cook. That is correct.

17 Senator Byrd. But I don't subscribe to these.

18 Senator Cook. May I say that there are a number of
19 things in here that I would be on the side of my colleague
20 from Pennsylvania, but relative to the theory that somehow
21 or other we are all going to walk in, all one hundred of us,
22 and get fitted for black robes so that we can fulfill the
23 requirements of being judges and chief judges and deputy
24 chief judges just is not within the tradition of the elective
25 process in the United States on the Federal level.

1 Senator Scott. Well, I think wearing blue shirts is
2 enough for this process.

3 [Laughter]

4 I have to admit--and of course the Committee knows that
5 I had no part in drafting these rules--I have to admit that
6 the whole process of entitlement strikes me as pretentious,
7 so that I make no case for it.

8 Senator Cook. Good.

9 Senator Scott. I expect to make sure in all fairness
10 that it is considered, that is all.

11 Senator Cook. I will get interested in these when we
12 get to pleadings and when we get to the answers and when we
13 get to the conferences and when we get to discovery, and so
14 on.

15 Senator Scott. We all are going to be interested in
16 that.

17 Senator Cook. That is when I will be interested, but
18 up to that point I must say, in all fairness, that I find
19 this rather pretentious indeed.

20 Mr. Riddick. I might say, Mr. Chairman, that during
21 the consideration of the rules for the trial of Johnson,
22 they voted to strike the word "Court" out of the rules because
23 they didn't want to appear as a court.

24 Senator Cook. May I raise a question to all of my
25 colleagues? If in fact we turn ourselves into a court pursuant

1 to these rules, aren't we playing rather dangerously with the
2 theory that if this court, quote, as a result of our own rules,
3 makes a decision--where is the decision of that court appeal-
4 able?

5 Senator Byrd. No, not in my judgement.

6 Senator Cook. Well, I know in your judgement, I am
7 merely raising the question.

8 Senator Byrd. No. I know the question can be raised--
9 all kinds of questions can be conjured up, Marlowe--and I
10 am not reflecting on your question. Ral Berger, a constitu-
11 tional scholar, one of the most outstanding, raises that
12 question.

13 Senator Cook. He does.

14 Senator Byrd. I am not concerned about the term "Court"
15 from that standpoint.

16 Senator Cook. I am only reflecting the theory of Ameri-
17 can jurisprudence that "court" means an appealable body until
18 such time as one gets to the Supreme Court of the United States.

19 Senator Byrd. Yes, but I hope that we will not get
20 carried away with the idea that we are dealing in jurispru-
21 dence here.

22 The Chairman. Well, that is one of the very reasons
23 that I want to get away from these terms. That is one of
24 the reasons that I won't go along with the term "clerk of
25 the Court" or "Court" or "Court of Impeachment" or a

1 "conviction" or "finding by two-thirds of the Judges"--this
2 is not a conviction by a group of judges in any way, shape or
3 form, as set forth in item 4.

4 And those are the reasons that I don't want to see this
5 kind of language used to give the wrong impression to the
6 American public. I think we should keep away from that sort
7 of thing.

8 Mr. Riddick. Do you want to read any more of these?

9 The Chairman. Go ahead.

10 Mr. Riddick. "(3) 'conduct' means an action or omission,
11 or a series of acts or omissions, or both;..."

12 Senator Scott. Mr. Chairman, I move that we waive the
13 formal reading down through (17). We are all aware of those
14 definitions.

15 The Chairman. Very well. All right, doctor, now if
16 you would go to the present rules, then.

17 Mr. Riddick. "IV. When the President of the United
18 States or the Vice President of the United States, upon whom
19 the powers and duties of the office of President shall have
20 devolved, shall be impeached, the Chief Justice of the Supreme
21 Court of the United States shall preside;..."

22 The Chairman. Excuse me, may I interrupt for just a
23 moment? We have a request from the Senate Recording Studio
24 to be permitted to come in and take five minutes of silent
25 footage for historical purposes, either now or on Monday.

1 Does anyone have any objection to that?

2 Senator Byrd. Why don't we do it on Monday when Senator
3 Griffin and Senator Williams are here?

4 Senator Cook. I would be delighted to do it right now,
5 because I may not be here on Monday.

6 Senator Pell. I would rather, if it is for historical
7 reference, to do it when I am here, too, which would maybe
8 make it the middle of the week.

9 The Chairman. Then let's let them shoot two or three
10 minutes now and two or three minutes next week both.

11 Senator Cook. Bob, what is the distinction between
12 these two sections? You have been over them. We are on page
13 2 now, (a) Notice from the House--"Whenever the President of
14 the Senate receives a formal notice..." "Whenever the Senate
15 shall receive notice from the House of Representatives that
16 managers are appointed on their part to conduct an impeach-
17 ment..."

18 The distinction here is that the House notifies the
19 Senate that impeachment proceedings have been sustained, is
20 that correct--and that is the difference between notifying
21 the Senate ---

22 Senator Byrd. Well, right off I see an important differ-
23 ence. In the present rule, it says "Whenever the Senate
24 shall receive notice from the House..."

25 Now, in the proposed rule, it would tie it down to one

1 or two men--it would be the Vice-President or the President
2 Pro Tem or it could be the Acting President Pro Tem. And I
3 don't think we ought to do that, because ---

4 Senator Cook. No, we don't do that on anything.

5 Senator Byrd. No.

6 Senator Cook. When the clerk comes to the House, he
7 reports to whoever is in the chair.

8 Senator Byrd. Of course. It ought to be the Senate.

9 Senator Cook. And the Senate is then on notice.

10 Senator Byrd. Because all of those three men--at least
11 two of them--could be away.

12 Senator Pell. What was the reason for the change, out
13 of curiosity?

14 Senator Byrd. I don't know.

15 Senator Cook. I don't know. I don't see any objection
16 to the point that Bob has made here. I should tell you that
17 I know this much--statements that Senator Mansfield may have
18 made publicly--and I know he has made it to groups of us--he
19 feels that the oath of office should be administered to the
20 Chief Justice by the President Pro Tem of the Senate rather
21 than by the senior assistant Justice of the United States.

22 And, by the way, the title is Chief Justice of the United
23 States, not Chief Justice of the Supreme Court.

24 So he feels that this is a Senate function and that the
25 Senate should keep control of its function and that the

1 President Pro Tem should administer the oath.

2 Whether that is reflected here or not, I am not in a po-
3 sition to say.

4 Senator Cook. Well, why would that be of great concern,
5 because throughout these rules he takes away practically
6 everything of the Chief Justice of the United States except

7 ---

8 Senator Scott. I don't know. I think you ought to know
9 that that statement has been made, that is all, in case it
10 throws any light on what we are talking about.

11 Senator Byrd. Additionally, the proposed rule here speaks
12 of a formal notice. Well, I don't know of any kind of notice
13 other than a formal notice that could possibly be envisioned
14 in the present rules--"Whenever the Senate shall receive no-
15 tice from the House..."

16 It is always messaged over as a notice. We don't read
17 it in the newspapers--that doesn't constitute a notice under
18 either.

19 I realize that is nit-picking, but I was asked to dis-
20 tinguish the differences.

21 And then, as we go on down, we say that the Senate, by
22 a vote of the majority of the Senators present.

23 Senator Cook. Shall resolve to organize as a Court
24 of Impeachment--maybe that is the reason for it, Bob, because
25 of the strong feeling throughout this resolution that we are

1 a court, we are each judges, you are a deputy chief judge and
2 so on--maybe that is the theory that brought that language
3 about, is that conceivable?

4 Senator Byrd. It is, it is conceivable. And I have my
5 personal objections to that, Marlowe. I think we have got to
6 get away from this impression that is building up in the
7 people's mind that an impeachment trial is a criminal pro-
8 ceeding, which it is not--we all know that.

9 And, secondly, under the present rules, Mr. Chairman,
10 the Senate will organize as a court on the day after the
11 articles of impeachment are brought over and exhibited by
12 the House, or earlier, if the Senate orders.

13 So under the present rules the longest we could wait
14 would be the next day. And we could even do it the same day
15 if the Senate so ordered.

16 And I don't see how you can get much faster than that.

17 Senator Scott. You said--and I agree with this--the
18 Senate shall organize as a court.

19 Senator Byrd. Well, that was a slip of the tongue--no,
20 it isn't.

21 Senator Scott. I don't think so.

22 Senator Byrd. No, it isn't.

23 Senator Scott. I think it is fair that we are a court
24 of impeachment. We certainly are going to be called that by
25 the press. We have been called that in many of the impeachment

1 cases. The question has been raised in discussion whether it
2 is a court or not.

3 I think, in deference to what I suspect is going to be
4 the wishes of the majority of the Senators, their own surest
5 protection from unjust or unfair criticism by their constitu-
6 ents is that they are in effect serving on a court, and
7 therefore they are held to the responsibility of behaving
8 like members of a court, whether you call it a criminal pro-
9 ceeding or a civil proceeding or no proceeding except impeach-
10 ment.

11 I think it is valuable to have some references to being
12 a court of impeachment.

13 What I was pointing out was that these entitlements,
14 these fancy titles involved in the proposed rules, were pre-
15 tentions. But there is nothing pretentious in our being what
16 the Constitution contemplated our being--and that is a court
17 of impeachment.

18 The Chairman. I think this might be a good point for me
19 to point out a sentence in this comparative print, in the
20 analysis of the proposed new rules. "The rules were adopted
21 by the Senate but not until after"--and here the author of
22 this takes some editorial license--"but not until after the
23 Radical majority had succeeded by Floor amendment in deleting
24 all references to the Senate functioning as a court or high
25 court during the trial of an impeachment."

1 Now, I hope I will not be considered as a part of the
2 "Radical majority" when I take action to attempt to delete
3 all references to the Senate functioning as a court or a high
4 court during the trial of impeachment.

5 Senator Pell. Mr. Chairman, there is one thought here
6 that I think you cited, that this should not in any way be
7 analogous to a criminal court or proceedings, because then
8 the defendant is liable to double jeopardy. And the Constitu-
9 tion says very definitely that all that we can do is remove
10 him from office--he is still liable to trial on criminal
11 counts.

12 And if we start comporting ourselves like a criminal
13 court, I think that then we are violating one of the basic--
14 right of double jeopardy here.

15 Senator Scott. That is why he is not a defendant, but a
16 respondent.

17 Senator Pell. Right.

18 Senator Cook. I think that is true. May I add to what
19 you are saying, Clay, that I don't mind the term "Court of
20 Impeachment" as long as the significance of the term is one
21 the phrase "impeachment" and not "court."

22 Senator Pell. Exactly.

23 Senator Cook. In the definition, for instance, of "im-
24 peachment" in the American College Dictionary, it uses the
25 term "tribunal," which obviously far more fits the situation

1 that we are really talking about. It has four or five defi-
2 nitions, none of which ever refer to it as "court."

3 So, you know, I don't disagree that that is what we will
4 probably be referred to.

5 Senator Pell. Maybe we ought to start using this term,
6 because I think the appearance is as important as the reality
7 of what we do. And we don't want the appearance that we want
8 to have a criminal court that we are going into here.

9 Senator Cook. Maybe the phrase "impeachment tribunal"
10 would be just a little bit better.

11 The Chairman. It might be.

12 Senator Byrd. The other addition here is the reference
13 to a vote of the majority. Of course, the Standing Rule an-
14 ticipates that action, by vote of the majority. I don't
15 think a vote of the minority of those present is going to
16 organize the court.

17 Senator Cook. Well, my theory, Robert, is that first
18 of all, as long as we are going to work on this, I would just
19 like to say that for purposes of clearing the air that, if
20 we are going to move in that direction, that (a) Notice From
21 the House, that that language be stricken and the present
22 language of the rules of the Senate be inserted therein--
23 "Whenever the Senate shall receive notice from the House of
24 Representatives that managers are appointed on their part to
25 conduct an impeachment against any person and are directed

1 to carry articles of impeachment to the Senate, the Secretary
2 of the Senate shall immediately inform the House of Represen-
3 tatives that the Senate is ready to receive the managers for
4 the purpose of exhibiting such articles of impeachment,
5 agreeably to such notice."

6 Senator Byrd. What you are saying is that we should let
7 the old rules stand.

8 Senator Cook. Exactly.

9 The Chairman. The old rules apply.

10 Senator Allen. I don't want to get the cart before the
11 horse here, trying to use this resolution as the vehicle, but
12 it might be much more practical to keep the present rules
13 and work on that as the vehicle to see if there is something
14 in the resolution that could be brought over into the present
15 rules.

16 The Chairman. Well, you have a good point there. The
17 only reason that I suggested we start on the others is because
18 there was no comparable provision in the old rules, and I
19 just started on page 1 of this comparative print, but we
20 are down now to the present rules--and I think Dr. Riddick
21 could go through that and he might have some comments that
22 might be helpful to us--one, with respect to whether these
23 proceedings were followed in each instance of the impeachment
24 trials, and whether there were any particular issues raised
25 on these--and, if so, what the determinations were.

1 Senator Byrd. I am glad you are proceeding in that way,
2 Mr. Chairman. This is a working piece of Mr. Mansfield, he
3 is not wedded to--it was only intended to be a working piece.
4 I would imagine he would disagree with some of it himself.

5 Senator Cook. Would the Senator yield?

6 Senator Byrd. Yes.

7 Senator Cook. I would like to throw a tennis ball in
8 your court, if you don't mind.

9 Senator Byrd. All right.

10 Senator Cook. And I know in all of the things that you
11 read and in some of the things that I have read there is a
12 disagreement with some of Black's definitions.

13 Senator Byrd. Yes.

14 Senator Cook. But I would like to, unfortunately, read
15 into the record Black's definition of "impeachment." It says
16 "a. criminal proceeding against a public officer before a
17 quasi-political court instituted by written accusations called
18 articles of impeachment."

19 That is when they went from--and I think we ought to
20 make this distinction--that is when they went from and es-
21 tablished the bill of attainder, because of the theory that
22 the impeachment proceeding was indeed a criminal proceeding.

23 Senator Byrd. It was.

24 Senator Cook. They then went to a bill of attainder
25 which moved away from that basic concept of a criminal

1 proceeding, which was allocated to the phrase "impeachment."

2 Senator Byrd. They could take a man's head off in an
3 impeachment trial.

4 Senator Cook. They did. So I think we ought to make
5 that distinction.

6 Senator Byrd. We have separated the two. All right.

7 The Chairman. All right, doctor.

8 Mr. Riddick. Well, we have discussed rule 1 of the
9 present rules and rule 3 of the proposed rules. Do you want
10 me to read them both again now?

11 The Chairman. Well, I think just address yourself there
12 to the present rule I. Now, was that followed in all of the
13 impeachment trials now?

14 Mr. Riddick. I think so. Now, the one in the case of
15 Blount (?), the first trial, they had not really established
16 any procedure that was definite at that stage, because they
17 really did not get into a real trial on the basis that they
18 didn't have jurisdiction, because they weren't going to allow
19 a Senator to be impeached.

20 But all of the recent ones--or, at least, all of the
21 cases since the adoption of this rule--have been pursuant to
22 this provision.

23 I was thinking, while you were discussing the matter
24 of whether this is a court or not court, that the language--
25 and the use in the various trials, had used the term "court,"

1 but if you go back to the Constitution, they avoided the
2 word "court" and they said the Senate shall have the sole
3 power to try all impeachments. And I think the word "court"
4 developed on the basis that you were trying--that is as near
5 as they get to using the word "court" in the Constitution.

6 All right, Rule 3, (a) Notice From the House. "When-
7 ever the President..." ---

8 Senator Byrd. I thought you were reading Rule 2 of
9 the standing rules.

10 The Chairman. Why don't you go down that page ---

11 Mr. Riddick. Of the existing rules, all right. "When-
12 ever the Senate shall receive notice from the House of Rep-
13 resentatives..." ---

14 Senator Byrd. Of the existing rules, Rule 2?

15 Senator Scott. That is Rule 1.

16 Senator Byrd. I thought we read that and talked about
17 it.

18 Mr. Riddick. We talked about it, but it hadn't been
19 read. That is the reason I asked the question, did you want
20 it read now?

21 Senator Byrd. I beg your pardon.

22 Senator Cook. I thought I read it into the record. Yes,
23 I read it into the record, isn't that correct?

24 Mr. Riddick. Then we will go to Rule VII.

25 The Chairman. The reason that I think that Rule VII was

1 put here in this part of the comparative print is because it
2 says "The Presiding Officer of the Senate shall direct all
3 necessary preparations in the Senate Chamber." And the Rule
4 3(b) of the proposed rules that were there for comparison
5 says "The Secretary of the Senate shall direct preparations
6 in the Senate chamber and shall give notice to the House of
7 the time and date..." and so on.

8 "So I think that is why Rule VII appears right there, just
9 as a cross-reference to the other Rule 3(b).

10 Mr. Riddick. Do you want to follow the comparative
11 text or do you want to go back to the rules, the existing
12 rules, or what?

13 The Chairman. I think that for the purpose of working
14 here that we ought to stick pretty much to this comparative
15 print, so that we can take a look at what we are comparing
16 it against.

17 Mr. Riddick. All right. Rule VII. "The Presiding Of-
18 ficer of the Senate shall direct all necessary preparations
19 in the Senate Chamber.

20 "I. Whenever the Senate shall receive notice from the
21 House of Representatives that managers are appointed on their
22 part to conduct an impeachment against any person and are
23 directed to carry articles of impeachment to the Senate,
24 the Secretary of the Senate shall immediately inform the
25 House of Representatives that the Senate is ready to receive

1 the managers for the purpose of exhibiting such articles of
2 impeachment, agreeably to such notice."

3 Senator Byrd. Now, Mr. Chairman.

4 The Chairman. Yes.

5 Senator Byrd. This is a new wrinkle in my horn, that
6 the Secretary of the Senate shall immediately inform the
7 House that the Senate is ready to receive the managers. This
8 is a ministerial function, but I think that it should be a
9 Senator--I am talking about President Pro Tem. The Secretary
10 of the Senate may be directed.

11 Senator Cook. I was going to say--if the Senator would
12 yield.

13 Senator Byrd. Yes.

14 Senator Cook. The Secretary of the Senate obviously
15 can't immediately inform the House of Representatives that
16 the Senate is ready until the Senate or an officer of the
17 Senate has so empowered the Secretary to notify the House.

18 So I am wondering if that is a serious problem. I see
19 what the Senator is getting at, but the only thing that bothers
20 me is obviously the Secretary of the Senate can't do it until
21 the Senate so informs him or somebody in the Senate who has
22 that authority.

23 So I am wondering if that really is that serious a point.

24 Mr. Riddick. The Senate has adopted orders heretofore
25 to direct the Secretary to inform the House.

1 The Chairman. They adopted an order directing the Se-
2 cretary to do this?

3 Mr. Riddick. Yes.

4 The Chairman. So if the old rule were followed, it
5 should perhaps read "The Senate shall direct the Secretary
6 of the Senate to immediately inform the House of Representa-
7 tives."

8 Senator Allen. I am wondering if that change is worth
9 making the change. I would like to be able to say, well, look,
10 we preserved every one of these rules in toto, except this
11 rule or that rule. These can be held to a minimum.

12 Senator Cook. As a matter of fact, that is correct,
13 Senator. May I say, if you really want to make any changes,
14 you do it as the Senator from West Virginia said--and you
15 would say "The Secretary of the Senate shall be directed to
16 inform..." then you don't have to do that.

17 The Chairman. If I understand correctly what Dr. Riddick
18 is saying here, we have a precedent that under that language
19 the Senate orders the Secretary--adopts an order directing
20 the Secretary to notify the House, is that correct?

21 Senator Scott. I would say in all fairness, really
22 arguing Bob's point, that the more nit-picking amendments
23 you adopt, the more you attempt the Senate to adopt still
24 more nit-picking amendments.

25 Senator Byrd. Of course. Precedents mean something

1 around here and we have got ample precedents.

2 The Chairman. All right, doctor.

3 Mr. Riddick. No. IV. "When the President of the United
4 States or the Vice President of the United States, upon whom
5 the powers and duties of the office of President shall have
6 devolved, shall be impeached, the Chief Justice of the Supreme
7 Court of the United States shall preside;..." ---

8 Senator Byrd. Where is that?

9 The Chairman. At the bottom of the comparative text.

10 Mr. Riddick. This is in the present rules.

11 Senator Cook. Yes, but they are out of order.

12 The Chairman. They are out of order.

13 Senator Scott. They are out of order for the purpose
14 of enabling us to compare to the proposed changes.

15 Senator Byrd. Mr. Chairman, I guess I am simply confused,
16 which may not be a surprise to anyone--it is a surprise to
17 myself.

18 Senator Cook. Bob, let me say what they have done.

19 Senator Byrd. I didn't know that we had even read Rule
20 II.

21 Senator Cook. Let me tell you what they have done, Bob.
22 They have taken the applicable rules in here and placed them
23 in the applicable position in the comparison to the Mansfield
24 resolution--and that is why they are out of order.

25 Senator Scott. We will be even more confused if we

1 simply go by Rules II, III and IV, and then have to search
2 through this comparative print for every one of these things.

3 Senator Byrd. Well, I though, Hugh--if I may beg to
4 differ with you--I thought we were going to start with the
5 premise that these are the rules that we are going to deal
6 with and make changes to.

7 Senator Griffin. They started with the proposed rules
8 as the basis of the comparative, they should have started with
9 the present rules.

10 Senator Cook. That is what we asked them to do, didn't
11 we?

12 Senator Byrd. I understood Senator Allen a moment ago
13 to suggest that we work from the present rules.

14 The Chairman. Well, what are your desires, gentlemen,
15 we can proceed in whatever fashion you prefer.

16 Senator Byrd. Just straighten me out and I will proceed
17 any way you gentlemen want to go.

18 Senator Scott. Well, I don't know how we are going to
19 follow these proposed changes if we alter the parallelism here
20 by going over here, because the moment you start reading Rule
21 II out of the manual, then every one of us is going to have
22 to search through every one of these to find out where Rule
23 II is changed. Then you get to Rule III--I mean, this parti-
24 cular parallelism doesn't give you a choice. I agree that it
25 might have been better--and I think it was our fault generally,

1 but not any individual--but I think the Committee did direct
2 the parallelism which would justify the way they did it. It
3 would have been a better way probably to start with present
4 rules and put proposed rules over here.

5 But the only document we have to work with, outside of
6 the manual itself, is this one. And I would have to go to
7 page 4 to find Rule III as it is now and to see what the
8 formal rules do. Then I would have to go back to page 2 to
9 find Rule IV. And then to find Rule V I would have to go on
10 page 3.

11 It seems to me it is better to go right on down here
12 and see whether or not any of these rules have been changed.

13 The Chairman. Very well.

14 Senator Scott. I think it would be more confusing the
15 other way.

16 The Chairman. All right, just go right down the line
17 there on the present rules--Rule IV.

18 Mr. Riddick. "...and in a case requiring the said Chief
19 Justice to preside notice shall be given to him by the Presi-
20 ding Officer of the Senate of the time and place fixed for
21 the consideration of the articles of impeachment, as aforesaid,
22 with a request to attend; and the said Chief Justice shall
23 preside over the Senate during the consideration of said ar-
24 ticles and upon the trial of the person impeached therein."

25 Senator Byrd. Now, how do we propose to change that?

1 Mr. Riddick. This just says on the comparative or
2 the proposed rule that if the person impeached is the President
3 of the United States, the Secretary of the Senate shall give
4 notice of such time and date to the Chief Justice of the
5 Supreme Court of the United States.

6 The Chairman. In other words, the proposal spells out
7 some precise duties for the Secretary of the Senate that are
8 not given to him under the existing rules.

9 Mr. Riddick. Now, in the case of the Johnson trial, the
10 Senate adopted a resolution to be submitted--or an order, at
11 least, they called it at that time--an order informing the
12 Chief Justice when he was to come. As I mentioned yesterday,
13 there was quite a fight between the Chief Justice and the
14 Senate as to when he was to show.

15 Senator Scott. Yes, whether he had a right to come to
16 those earlier proceedings.

17 Mr. Riddick. Preliminaries.

18 Senator Griffin. Mr. Chairman, may I ask the Parliamen-
19 taxian a question?

20 The Chairman. Certainly.

21 Senator Griffin. Now, in the existing rules on the
22 right here, under IV, it specifically says "...and in a case
23 requiring the said Chief Justice to preside..." and so forth,
24 "and the said Chief Justice shall preside over the Senate
25 during the consideration of said articles and upon the trial

1 of the person impeached therein." Looking to the left, the
2 proposed rules, the language which makes clear that the Chief
3 Justice shall preside is not there.

4 Is it anywhere else? Or is it omitted?

5 Mr. Riddick. I would assume. As I said at the beginning,
6 I have not had these rules to study, so I don't know what the
7 proposed rule changes are, but I would assume that they have
8 assumed here that the Constitution takes care of that.

9 The Chairman. It is in the Constitution, so there is
10 really no point ---

11 Senator Griffin. Well, if it is in the existing rule
12 and says what is in the Constitution, it is also a little
13 strange to drop it out, if that is what we are doing. We
14 are trying to find out first of all if that is what the pro-
15 posed rule proposed.

16 The Chairman. The proposed rule would drop that provi-
17 sion out, presumably because it is in the Constitution.

18 Senator Byrd. Are you satisfied, Bob?

19 Senator Griffin. Well, I am not necessarily satisfied
20 with the explanation, but I would like to be sure what it is
21 that is being proposed. They are proposing that that language
22 be eliminated. It is not somewhere else, I take it.

23 Mr. Ticer. It is in the Definitions, Senator.

24 Senator Griffin. Can I get an answer to this? The
25 answer is you don't know what is in the proposal.

1 Mr. Riddick. No, I haven't had a chance to see them.

2 Senator Griffin. That is not a very satisfactory answer.

3 How about the staff? Can somebody else answer this?

4 Mr. Cochrane. We were just handed this, Senator, and
5 we don't have any ---

6 Mr. Riddick. The Legislative Counsel says that it is
7 in the Definitions.

8 Mr. Ticer. In part, Senator.

9 Senator Pell. Mr. Chairman, while I am no enthusiast
10 for the proposed rules, should there be a protagonist, in
11 addition to Senator Scott, here to explain them or push them
12 or what do you think of that idea?

13 Senator Scott. I think it is a good idea, because I
14 don't really want to---off the record.

15 (Briefly off the record.)

16 Senator Scott. I think somebody has to be, in a sense,
17 the protagonist, otherwise they could be ruled out out of
18 hand without our knowing the motivation. Therefore, if you
19 brought over somebody from Senator Mansfield's staff, you
20 will know what they are getting at much better than I will."

21 Senator Byrd. Mr. Chairman, I don't think Mr. Mansfield
22 is necessarily protagonist of this. It is a working piece.
23 I think he is willing to leave it up to the judgement of the
24 Members of this Committee, and they have supplied an analysis
25 here which is supposed to explain the changes.

1 The proposed rule here strikes out this phrase: "...
2 with a request to attend;..." Under the present rule, the
3 presiding officer of the Senate will notify the Chief Justice
4 as to the time and place for the consideration of the articles
5 and will provide a request to attend.

6 Now, under the proposed rule, there won't be any request.
7 I think we ought to stick with the old rule in that regard.

8 Senator Allen. I think we ought to stick with the old
9 rules altogether at this point.

10 Senator Scott. You mean on this rule?

11 Senator Allen. I don't see that the proposed rule is an
12 improvement over the existing rule. As a matter of fact, I
13 think it is poorer.

14 Senator Griffin. It raises issues unnecessarily. It
15 raises the issue as to whether or not you are trying to keep
16 the Chief Justice from presiding.

17 Senator Allen. Let the Chief Justice come over with his
18 Constitution in hand and say, well, look, fellows, the Con-
19 stitution here says that I am supposed to preside--I know the
20 rules don't say it. But don't you see, it says right here.

21 [Laughter]

22 Senator Griffin. Even though you took it out of your
23 rules.

24 Senator Allen. I believe the existing rule is all right.
25 It covers the situation. I think we ought to visualize this

1 thing. Here is the bill of impeachment, which we are opera-
2 ting under the assumption it will come over--well, let's
3 trace this in our minds, as it makes its course through the
4 legislative process and what happens to it then and who does
5 what to it.

6 And if the existing rules can carry that through to a
7 conclusion, as obviously it did, because it has been carried
8 to a conclusion under these rules, I don't see a whole lot of
9 need of changing it. I think the public generally is going to
10 wonder, what's up here, why change all of these rules, if the
11 existing rules have been in effect for 106 years, have done
12 the job all this while, what's the use of manufacturing some
13 new rules?

14 That is the way it appears to me.

15 Senator Scott. Well, Rule IV seems to be all right to
16 me. I think I ought to point out something. The opening of
17 the proposed rule is "The Secretary of the Senate shall direct
18 preparations in the Senate chamber, etc."

19 I would think the Majority Leader would want the Secre-
20 tary of the Senate to have something to say about the house-
21 keeping. And up to now, in fact, he has. At this point, the
22 Secretary of the Senate has been presiding over an ad hoc
23 staff committee to work out problems like space for the
24 Members of the House of Representatives, space for the press
25 and so forth.

1 Couldn't we cover this by some sort of a resolution in
2 the Senate of some kind, that the Secretary of the Senate is
3 authorized, under the direction of the Majority Leader, to
4 make such physical preparations as necessary, if he needs such
5 a resolution. He may not even need it.

6 The Chairman. I don't think he would even need it.

7 Senator Cook. May I say I think there is latitude in
8 the language, Senator Scott, that the Secretary of the Senate
9 shall immediately inform the House of Representatives that
10 the Senate is ready to receive the managers--and the point
11 of it is if he is not ready, if he does not have space, if
12 he does not have facilities, then the Senate is not ready.

13 Senator Scott. Yes. Ready is probably your answer
14 there.

15 The Chairman. All right.

16 Senator Byrd. What is the judgement of the Committee?

17 The Chairman. To answer Senator Griffin's question, I
18 had counsel check with the drafters in Senator Mansfield's
19 office and the reason they left that out is because it is
20 stated in the Constitution, that is why they did not repeat
21 it.

22 Senator Griffin. I think it is unfortunate, especially
23 when there is no real change being made.

24 The Chairman. Well, the chances are that we may make
25 no change there in that rule, you see.

1 Mr. Riddick. I think perhaps the reason for the provi-
2 sion in the present rules on that basis was to take care of
3 both the President and the Vice-President, the reason they
4 specified--because, you see, the Constitution doesn't provide
5 for the Chief Justice to preside when the Vice-President is
6 to be impeached, just merely for the President.

7 Senator Scott. Again, I am not at all anxious to be
8 a protagonist--but I think here I have some insight into the
9 mind of the Majority Leader, but he is the best judge. Either
10 he or his staff can tell us what is in his mind.

11 If you look at present Rule VII--"The Presiding Officer
12 of the Senate shall direct all necessary preparations in the
13 Senate Chamber."

14 Senator Mansfield was asked by the press the other day
15 what happens if Mr. Justice Berger does not want television
16 and he does--and he said there will be television, we will
17 decide that.

18 Senator Byrd. Well, the presiding officer of the Senate
19 is not the presiding officer of the trial.

20 Senator Scott. Well, but this is the Presiding Officer
21 of the Senate "shall direct all necessary preparations in
22 the Senate Chamber."

23 Senator Byrd. That is not the presiding officer of the
24 trial.

25 Senator Cook. But let me ask, are you raising the

1 question of the Chief Justice being the presiding officer?

2 Senator Scott. I am raising the question that if you
3 don't stick with this "Court of Impeachment" concept, the
4 Presiding Officer of the Senate here may be interpreted--or
5 there may be an argument on the Floor as to whether that is
6 the Chief Justice or whether it is the ---

7 Senator Byrd. Well, it is set forth in the present rules
8 that it isn't. The present rules define that.

9 Senator Griffin. Couldn't we clarify ---

10 Senator Scott. You can clarify it in the Committee re-
11 port, but this question has already been raised by a Chief
12 Justice of the Supreme Court.

13 Senator Griffin. You could amend existing Rule VII to
14 make that clear.

15 Mr. Riddick. In the Johnson trial, the President Pro
16 Tem amends the arrangements, because they did the preliminaries
17 before the Chief Justice came over.

18 Senator Scott. But the Chief Justice protested on the
19 grounds that that was an infringement on his constitutional
20 powers. That is why I say we should avoid it.

21 Senator Cook. Well, now, Robert, let me read this to
22 you--and I am concerned. "The Presiding Officer of the
23 Senate shall direct all necessary preparations in the Senate
24 Chamber, and the Presiding Officer on the trial shall direct
25 all the forms of proceedings while the Senate is sitting for

1 the purpose of trying an impeachment, and all forms during
2 the trial not otherwise specially provided for; and the
3 Presiding Officer on the trial may rule all questions of
4 evidence and incidental questions, which ruling shall stand
5 as the judgement of the Senate unless some Member of the
6 Senate shall ask that a formal vote be taken thereon."

7 Senator Scott. That argues against this being anybody
8 but Berger.

9 Senator Allen. They use two terms--Presiding Officer of
10 the Senate and Presiding Officer of the trial.

11 Mr. Riddick. Yes, they differentiate.

12 Senator Scott. Well, the only point I am making is, that
13 if everyone shares my concern over it, we ought to cover it
14 in the Committee report.

15 The Chairman. Well, isn't it well covered in precedents
16 at the present time.

17 Senator Cook. Let me read you that again. "The Presi-
18 ding Officer of the Senate shall direct all necessary prepara-
19 tions in the Senate Chamber, and the Presiding Officer on
20 the trial..." ---

21 Senator Byrd. That is Berger.

22 Senator Cook. "...on the trial shall direct all the
23 forms of proceedings while the Senate is sitting for the
24 purpose of trying an impeachment..."

25 Senator Byrd. Now, forms of proceedings, that is not

1 whether or not we have television.

2 Senator Cook. Suppose he says it is.

3 Senator Byrd. No, no, no. The precedents won't back
4 him up.

5 Senator Scott. Well, there are no precedents on tele-
6 vision.

7 Senator Byrd. Well, the precedents back up the fact
8 that the Presiding Officer of the Senate is one man and the
9 Presiding Officer on the trial is another, and that the Pre-
10 siding Officer of the Senate directs all the preparations.

11 Senator Scott. The Presiding Officer on the trial di-
12 rects the form of the trial, he directs all the forms. And
13 if the form of the trial is that it shall be in the Senate
14 Chamber, he directs it. If the form of the ---

15 Senator Cook. Now, let me ask you something else. Is
16 the Presiding Officer the Vice-President of the United States?

17 Senator Scott. I think including television--that
18 worries me.

19 Senator Byrd. Mr. Chairman, it is as clear as daylight
20 on---what is it Sam says? noon on a cloudy day?--the Presiding
21 Officer on the trial shall direct all the forms of proceedings
22 while the Senate is sitting for the purpose of trying an
23 impeachment.

24 Now, that is after the Senate organizes as a court. And
25 all these preparations that are going to be made are preliminary

1 to the organization of the court. They are directed by the
2 Presiding Officer of the Senate.

3 Senator Scott. Let me ask you another question, just to
4 further confound it here, because I think it is confounding--
5 the Presiding Officer of the Senate under the Constitution
6 is the Vice-President. I think for the record that his view
7 is--his informal view--that it should be televised. But
8 suppose he, as Presiding Officer, took the position that it
9 should not be televised--the Senate would overrule him,
10 wouldn't it?

11 And how would they go about overruling him? Wouldn't
12 they have to have a vote?

13 Senator Byrd. Well, he doesn't have a vote except in
14 the case of a tie.

15 Senator Scott. He directs the forms, though, as the
16 Presiding Officer of the Senate.

17 The Chairman. Well, why don't we call on Dr. Riddick
18 for the precedents on this for a moment?

19 Senator Scott. You see, my concern is, Mr. Justice
20 Chase challenged this concept ---

21 Senator Byrd. He didn't challenge this concept.

22 Senator Allen. Somewhere down the line we are going to
23 have to cover the television question. And at that time you
24 could have another rule, that notwithstanding any provision
25 of the rules, the Senate may have the right to decide this

1 question. That would be an added rule to fill in the gap,
2 as I see it.

3 Senator Scott. You would clarify it if you passed Bob's
4 resolution in the Senate before you passed any of these rules.

5 The Chairman. Doctor?

6 Mr. Riddick. That is the case, because you can't tele-
7 vise it unless you get the Senate approval. If the Senate
8 adopts the resolution to direct that it be televised, I doubt
9 that the Presiding Officer can overrule the wishes of the
10 Senate in that regard.

11 But as far as the Johnson trial is concerned, the preli-
12 minaries were taken care of by the President Pro Tem, Andrew
13 Johnson having been the Vice-President down at the White
14 House. And the only problem of conflict between the Senate
15 and Chase was as to when he was going to come over. I don't
16 think the question was raised, even intimated, as to the
17 right he would have to making the arrangements on the Senate
18 Floor.

19 Senator Griffin. Mr. Chairman.

20 The Chairman. Senator Griffin.

21 Senator Griffin. If we were at the point, Mr. Chairman,
22 where we were going to offer amendments, I would say that the
23 existing Rule VII should be amended to read perhaps like
24 this: that except as otherwise provided by rule or resolution
25 of the Senate, the Presiding Officer of the Senate shall

1 direct... That would leave him only to make such incidental
2 preparations or arrangements as might not otherwise be covered.
3 And we could have all kinds of things covered, which we should
4 do--I mean, you know, who is going to stand where and which
5 galleries are going to be assigned here--I mean, that could
6 all be approved at some point by a simple resolution. And
7 that would be it.

8 I am not against clarifying the existing rules--and I
9 think that is what you want.

10 Senator Byrd. Mr. Chairman, I am certainly not opposed
11 to amending this rule to provide that the Secretary of the
12 Senate shall direct preparations in the Senate chamber. In
13 the final analysis, he is the man who is going to carry that
14 out anyway. And I think this would relieve the Vice-President
15 and the President Pro Tem, who are busy men, of those addi-
16 tional duties.

17 I see nothing wrong with that.

18 Senator Scott. I see nothing wrong with amending that
19 part, because I am as certain as I can be of anything that
20 that is what the majority wants, in this aspect.

21 The Chairman. All right, shall we go on to the next
22 item?

23 Senator Griffin. We are not amending that?

24 Senator Byrd. We are not amending that.

25 The Chairman. No.

1 Mr. Riddick. "IX. At 12:30 o'clock afternoon of the
2 day appointed for the return of the summons against the per-
3 son impeached, the legislative and executive business of the
4 Senate shall be suspended..."

5 Rule III. "...Before proceeding to the consideration
6 of the articles of impeachment, the Presiding Officer shall
7 administer the oath hereinafter provided to the members of
8 the Senate then present and to the other members of the
9 Senate as they shall appear, whose duty it shall be to take
10 the same."

11 The Chairman. All right, now, does the Presiding Officer
12 there under those rules mean the Chief Justice?

13 Mr. Riddick. The Chief Justice will administer the oath,
14 yes.

15 The Chairman. To the Senators?

16 Mr. Riddick. That is right.

17 The Chairman. Now, who, in turn, administered the oath
18 to the Chief Justice?

19 Mr. Riddick. The Chief Justice brought with him the
20 Associate Justice to do it. The argument was to the effect
21 in that case that there was not any requirement that he take
22 the oath, that only the Members of the Senate had to take the
23 oath. The Chief Justice on his own brought the Associate
24 Justice with him to administer the oath.

25 The Senate also appointed a committee to bring the Chief

1 Justice in. Three Senators, as I recall, were appointed as
2 a committee and, after a few days, only the chairman of the
3 committee escorted the Chief Justice in each day.

4 The Chairman. All right, any questions on that? Do you
5 want to go to Article II.

6 Senator Scott. I would just mention that Senator Mans-
7 field has made the statement that he thinks personally the
8 President Pro Tem of the Senate should administer the oath
9 rather than the Associate Justice. Others might argue the
10 Vice-President should administer the oath. I would not be
11 one of those who so argue.

12 But we ought to perhaps consider clarifying it either
13 by amendment or by Committee report.

14 The Chairman. As to who swears in the Chief Justice?

15 Senator Scott. As to who swears in the Chief Justice.
16 Or at least who has the authority to determine.

17 Senator Byrd. I can tell you one thing, Mr. Chairman,
18 we are going to run into a barrage of questions on this, if
19 we adopt the proposed rule.

20 Under the present rules, each Member is sworn to do im-
21 partial justice in all things appertaining to the impeachment
22 trial under the Constitution and the laws, so help me God.

23 Now, in this proposal, the word "Constitution" is left
24 out and all reference to the deity is left out.

25 Senator Griffin. They can have a lot of fun with that.

1 Senator Byrd. We can have all kinds of fun with that
2 one.

3 [Laughter]

4 Senator Griffin. Why anybody would propose a change like
5 that I can't understand.

6 Senator Scott. Separation of church and state rears its
7 ugly head again.

8 The Chairman. All right, do you want to go on now to
9 Article II.

10 Mr. Riddick. I think one of the reasons that Chief
11 Justice Chase brought the Associate Justice with him, there
12 was some question as to whether he should take the oath or
13 not. And to avoid it all, there are a number of instances
14 during that trial, the Senate being unable to agree just what
15 to do, why, the Chief Justice took it on his own, subject to
16 an appeal by the Senate, like, for example, putting the ques-
17 tion to the Senate. They couldn't agree just how he should
18 put the question.

19 And finally they left it to him to make the decision on
20 his own.

21 Well, do you want to read this oath to be administered?

22 The Chairman. I think we have covered that adequately.
23 Go to item II there.

24 Mr. Riddick. "When the managers of an impeachment shall
25 be introduced at the bar of the Senate and shall signify that

1 they are ready to exhibit articles of impeachment against any
2 person, the Presiding Officer of the Senate shall direct the
3 Sergeant at Arms to make proclamation, who shall, after
4 making proclamation, repeat the following words, viz: 'All
5 persons are commanded to keep silence, on pain of imprisonment,
6 while the House of Representatives is exhibiting to the Senate
7 of the United States articles of impeachment against [said
8 person];' after which the articles shall be exhibited, and
9 then the Presiding Officer of the Senate shall inform the
10 managers that the Senate will take proper order on the subject
11 of the impeachment, of which due notice shall be given to the
12 House of Representatives."

13 The Chairman. How many managers of an impeachment were
14 appointed in the Johnson case?

15 Mr. Riddick. I believe it was seven.

16 Senator Byrd. Seven, five representing the counsel for
17 the respondent.

18 Mr. Riddick. Of course, I would say that is up to the
19 House.

20 The Chairman. And were there different numbers in the
21 other impeachment trials?

22 Mr. Riddick. We have had variations.

23 The Chairman. So that that matter is one that would be
24 a matter for the House to determine and we will have to provide
25 for the seating for whatever number there are.

1 Mr. Riddick. I don't think they have had any problems
2 on those in any of the trials.

3 "VI. The Senate shall have..." ---

4 Senator Byrd. Wait just a minute, I think we are going
5 just a little too fast, Mr. Chairman.

6 The Chairman. All right.

7 Senator Byrd. I suppose we are wanting to raise certain
8 objections and make comments at this point that would help us
9 in the future.

10 The Chairman. Certainly.

11 Senator Byrd. I note here that the proposed rules would
12 leave out the proclamation by the Sergeant at Arms. And I
13 personally think there ought to be that proclamation. The
14 analysis here explains it in this way: "The requirement of
15 the present rule II that the Sergeant at Arms make a procla-
16 mation commanding everyone to keep silence on pain of impri-
17 sonment has been deleted as histrionic, pretentious and un-
18 enforceable."

19 Well, my comment on that is that it has been used in
20 eleven impeachment trials. And I see no reason to drop it
21 for the next one. I am not sure that it isn't enforceable,
22 the Senate can put people who are in contempt of the Senate
23 in jail.

24 And it is still used in the courts, I suppose. And while
25 I want to avoid any implication that this is a criminal

1 proceeding or a civil proceeding, I think that that proclama-
2 tion has some good impact upon the people in the galleries--
3 and upon Senators themselves.

4 And I would hope we would leave it in.

5 Senator Griffin. I am going to join you, Bob. I see
6 no point in changing that.

7 The Chairman. I must say I agree with you on that as
8 well.

9 All right.

10 Mr. Riddick. "VI. The Senate shall have power to com-
11 pel the attendance of witnesses, to enforce obedience to its
12 orders, mandates, writs, precepts, and judgements, to preserve
13 order, and to punish in a summary way contempts of, and diso-
14 bedience to, its authority, orders, mandates, writs, precepts,
15 or judgements, and to make all lawful orders, rules, and
16 regulations which it may deem essential or conducive to the
17 ends of justice..."

18 The Chairman. Now, have any of those provisions been
19 contested in any way in any of the proceedings?

20 Mr. Riddick. Yes. One witness was subpoenaed and he
21 refused to show. Later, after the subpoena had been served,
22 he did show and the Presiding Officer was informed that he
23 was in the hallway, so he had him brought in and dressed him
24 down in front of the Senate at the bar. Then they proceeded
25 to question him.

1 They finally got their will. But I didn't see any
2 other.

3 The Chairman. Any questions there?

4 Senator Allen. He could have done the same under the new
5 language, couldn't he? I mean, just not responding.

6 Mr. Riddick. I would say it is his decision whether he
7 wants to run up against the law or not.

8 Senator Allen. But there is no ruling that the present
9 rules were inadequate to handle the situation.

10 Mr. Riddick. No. To the contrary. I forget what the
11 situation was at the time, but they stated in the debate that
12 if it were necessary for the Sergeant at Arms to use force,
13 that he could take a posse comitatus with him to enforce the
14 situation that he wanted, to get what he wanted.

15 Senator Byrd. The rules say that, the present rules.

16 Mr. Riddick. They have allowed for this, yes. "V. The
17 Presiding Officer shall have power to make and issue, by himself
18 or by the Secretary of the Senate, all orders, mandates, writs,
19 and precepts authorized by these rules or by the Senate, and
20 to make and enforce such other regulations and orders in the
21 premises as the Senate may authorize or provide."

22 That just sort of supplements that other.

23 The Chairman. I may say that those two articles in
24 the proposed rules get to this issue that I raised a question
25 on earlier, that the attempt to define this as a court and make

1 it sound like it is in the nature of a criminal proceeding--
2 and I would be unalterably opposed to that proceeding myself.

3 All right.

4 Mr. Riddick. "VI...And the Sergeant at Arms, under the
5 direction of the Senate, may employ such aid and assistance
6 as may be necessary to enforce, execute, and carry into effect
7 the lawful orders, mandates, writs, and precepts of the Senate."

8 The Chairman. Well, the comparative provision there now,
9 the proposed rule, the distinction that I see that is offered
10 there is to permit the so-called judges, which means the
11 Senators, "...may designate or appoint not to exceed three
12 qualified individuals to serve as his law clerks."

13 I suppose the Senator would have the right to appoint
14 any number of persons he wanted to serve as law clerks, as
15 long as he has adequate salary to pay them, if he is going
16 to hire--or, if not, to get as many voluntarily as he could.

17 But I think that there might be an implication here that
18 these people would have some official position with respect to
19 right to the Floor, or things of this sort, which they would
20 not.

21 Senator Byrd. Well, I hope we will not adopt this pro-
22 posed rule, because I think that the Sergeant at Arms has a
23 great history that is steeped in the roots of antiquity. And
24 it is the semblance and the emblem of authority.

25 And I think that the Senate ought to enforce its edicts,

1 whatever you want to call them, through the Sergeant at Arms.
2 I think when it gets to the point where we can designate any
3 employee of the Senate and may appoint any other person to
4 serve as a court officer or as an attorney to assist the
5 court, I think we are opening up a Pandora's box.

6 Senator Allen. I agree on that. I think we ought to
7 work through the Sergeant at Arms.

8 The Chairman. Have there been any precedents involved
9 on that authority for the Sergeant at Arms?

10 Mr. Riddick. Not at all.

11 The Chairman. Never questioned at all?

12 Mr. Riddick. The Sergeant at Arms is used as an assis-
13 tant on occasions, but that has never been a problem.

14 The Chairman. All right, VII.

15 Mr. Riddick. "...and the Presiding Officer on the trial
16 shall direct all the forms of proceedings while the Senate
17 is sitting for the purpose of trying an impeachment, and all
18 forms during the trial not otherwise specially provided for
19 ..."

20 Senator Scott. On that proposed rule, "He shall be
21 responsible for assuring that the trial is conducted expe-
22 ditiously and with the impartiality, fairness, and integrity
23 expected of a Court of Impeachment."

24 Senator Byrd. Well, if I were the Chief Justice, I
25 would be offended by that language--to "be responsible for

1 assuring that the trial is conducted expeditiously and
2 with the impartiality, fairness, and integrity expected of
3 a Court of Impeachment."

4 The Chairman. Is that a higher degree of responsibility
5 imposed on the Chief Justice than the capacity he is normally
6 used to functioning in?

7 Senator Byrd. I would just answer it this way, I voted
8 for his confirmation, I would vote for it again--and I per-
9 sonally think he has done one good job for the country. I
10 am not going to go along with writing any red flag here that
11 imputes to him the kind of conduct that would be any less than
12 that.

13 The Chairman. Hear, hear. All right, Dr. Riddick.

14 Mr. Riddick. "...And the Presiding Officer on the trial
15 may rule all questions of evidence and incidental questions,
16 which ruling shall stand as the judgement of the Senate,
17 unless some member of the Senate shall ask that a formal
18 vote be taken thereon, in which case it shall be submitted
19 to the Senate for decision; or he may at his option, in the
20 first instance, submit any such question to a vote of the mem-
21 bers of the Senate."

22 Senator Scott. Present Rule VII is better.

23 Senator Griffin. Certainly the proposal doesn't really
24 make any substantive change, does it?

25 Senator Scott. Not really.

1 The Chairman. No, just that it uses the court reference
2 that I find distasteful.

3 Well, we have ample precedents on this particular point,
4 do we not? The Presiding Officer has ruled in the past on
5 questions of evidence and incidental questions, and the Senate
6 has overruled him by majority vote. And he has, on other
7 instances, submitted the question to the Senate for decision,
8 in the first instance.

9 Mr. Riddick. Chief Justice Chase, as I think I mentioned
10 yesterday, in the Johnson trial got to the point that he began
11 to submit them to the Senate in the first instance, because
12 he said he had been overruled too much.

13 Senator Scott. He said what?

14 Mr. Riddick. That he had been overruled too much.

15 The Chairman. Now, that, of course, may raise the issue
16 that I am sure we will discuss at some length later on, and
17 that is whether we are going to adopt any rules of evidence
18 to guide the court, to guide the Presiding Officer in ruling
19 on the questions of evidence.

20 Senator Byrd. I think it does raise that right at this
21 point. In the proposal, the proposed new rule is to the
22 effect that any such preliminary ruling may be set aside and
23 the question decided by the court in accordance with these
24 rules.

25 Now, I don't know what "these rules" is going to mean

1 when we get through. I think the present rule is clearer
2 and with precedents to back it up, it seems to me it is the
3 better guideline.

4 The Chairman. All right, any more further on that?
5 Next item, doctor.

6 Senator Byrd. There is one tricky thing that we have
7 glossed over--that we have passed by here and which we will
8 have to come back to at some point. Under the proposed rules
9 --let me go back to the present rules. Under the present
10 rules, the House notifies the Senate that it has impeached
11 the President. In some cases, especially in recent years,
12 it has coupled that notice with the articles. In the Johnson
13 trial, it impeached the President on the 24th of February,
14 notified the Senate on the 25th of February and brought over
15 the articles of impeachment on the 4th of March.

16 Senator Scott. Even wrote them after that.

17 Senator Byrd. Yes.

18 The Chairman. Wrote them up after.

19 Senator Byrd. Yes. Now, managers on the part of the
20 House exhibited the articles on the 4th of March. On the
21 5th of March the Senate organized as a trial court, as a
22 court of impeachment, with the President taking the oath and
23 he, in turn, administering it.

24 On the 6th of March, the Senate issued a summons to the
25 President to appear.

1 Now, let's go back to that period of time between the
2 exhibition of the articles of impeachment and the organization
3 of the Senate into a court.

4 In all the precedents, the Presiding Officer did not--
5 in all the precedents, the court did not organize--the Senate
6 did not organize as a court until after the articles of im-
7 peachment had been exhibited.

8 The Chairman. Correct.

9 Senator Byrd. Now, here in the proposed rules--I don't
10 know whether we have covered that yet, but implicit in them
11 already thus far, and if we haven't gotten to it thus far,
12 we will--we are going to change that. The Senate is going to
13 organize as a court before the articles of impeachment are
14 brought over and read.

15 We are going to have to make a decision as to whether
16 or not to stick with the old rules. I see great danger--I
17 see embarrassing, I see situations in which the Senate could
18 put itself into an embarrassing position if it insisted on
19 organizing as a court before the articles of impeachment
20 were brought over, because the House may reconsider those
21 articles, it may reject them, it may amend them before they
22 are brought over, it may amend them after they are brought
23 over.

24 And, incidentally, Mr. Chairman, for those who argue
25 that once a Congress has ended, that the trial has to start

1 over ab initio, the House of Representatives in the first
2 session of the 73rd Congress amended Rule V of the Articles
3 of Impeachment adopted in the last session of the 72nd Con-
4 gress.

5 What I am saying here is, that if we organize as a court
6 before those articles of impeachment are brought over, we are
7 going to look pretty bad. They may never come, we would be
8 acting prematurely.

9 Senator Scott. I don't see that in here, Bob.

10 Senator Byrd. Well, it is in there.

11 Senator Scott. Well, on this page 4 ---

12 Senator Byrd. It may not be right there, but it is in
13 there.

14 Senator Scott. It says on page 4, "Upon the filing of
15 articles in accordance with rule 3(d), the Court shall proceed
16 to the consideration of such articles," and then "shall be
17 in session for such periods..."

18 Senator Byrd. Well, the thought just occurred to me
19 here, Hugh, that somewhere in the proposed rules--I read it
20 last night for the first time--there is at least the implica-
21 tion, if not the explicit directive, that the court will or-
22 ganize before those articles are received.

23 I think we would be making a mistake.

24 Senator Scott. Well, I think it is here in 3(d) that you
25 are talking about. "Upon organization, the Court may admit

1 managers for the purpose of permitting them to present and
2 file articles with the Court."

3 Senator Byrd. Exactly.

4 Senator Cook. That is what you are saying?

5 Senator Byrd. Exactly, it is implicit. Have we passed
6 that?

7 Senator Allen. 3(a) says they can organize as a court
8 upon getting the notice--that would be without the articles.

9 Senator Byrd. Yes.

10 Senator Allen. 3(a), I think, is the first time it is
11 mentioned.

12 Senator Byrd. Where is that?

13 Senator Allen. That is on page 2.

14 Senator Scott. It says "After notice of the House action
15 but before the appearance of the managers."

16 Senator Byrd. Well, that may relieve my concern--that
17 may.

18 Senator Scott. And the analysis, I am told, covers it
19 on page 11. Yes. "Upon receipt of formal notice from the
20 House advising that it has adopted articles of impeachment
21 and appointed managers, the Senate, by majority vote, shall
22 resolve to organize as a court of impeachment and shall set
23 a time and date therefor. This sub-division is derived from
24 present Rule I but with the difference that the Senate is
25 convened as a court before it admits the managers from the

1 House to receive the articles.

2 Senator Byrd. That does not relieve my concern at all,
3 because the Senate, after it hears the articles, may decide
4 to ignore them.

5 Why should we organize as a court the open we are noti-
6 fied by the House of Representatives that it has impeached
7 the President?

8 I think we should hear the articles first. We may de-
9 cide to ignore them. In the Johnson trial, the Senate only
10 voted on three of the eleven articles--and ignored the rest.
11 And if we ignore them, the President is acquitted.

12 It is not a minor bone of contention, it is a major one,
13 in my judgement--but we don't need to settle it here.

14 The Chairman. All right, next article.

15 Mr. Riddick. "Upon such articles being presented to the
16 Senate, the Senate shall, at 1 o'clock afternoon of the day
17 (Sunday excepted) following such presentation, or sooner if
18 ordered by the Senate, proceed to the consideration of such
19 articles and shall continue in session from day to day (Sun-
20 days excepted) after the trial shall commence (unless otherwise
21 ordered by the Senate) until final judgment shall be rendered,
22 and so much longer as may, in its judgment, be needful."

23 Senator Scott. Well, I think one concern is covered by
24 some--"unless otherwise ordered by the Senate." I have heard
25 a great deal of comment from Senators that they do not want

1 Saturday sessions. They want Saturdays to consider the evi-
2 dence or Saturdays to go home or Saturdays simply to rest
3 from the enormous tensions of daily sitting without relief
4 or interval for the most part.

5 And they have made this point. We can cover that by
6 this reservation. As long as we can cover it, that is what
7 I have in mind, because I have conveyed to Senator Mansfield
8 that I have heard this from a very considerable number of
9 Senators--you were there, Bob, when a number of them said
10 that they worried about Saturday sessions for various reasons,
11 some personal and some surely very worthy with regard to some
12 period of contemplation.

13 Senator Griffin. But as I read this, it is Tweedle-Dee
14 and Tweedle-Dum. Under either version, except as otherwise
15 ordered, the court shall be in session.

16 Senator Scott. I think it is the same thing, I just
17 wanted to raise this, because you are going to get at some
18 point--the Floor Leaders are going to be asked either to go
19 through with the six-day session or to waive the sixth day.

20 The Chairman. Well, you have this as well--once the
21 articles are presented to the Senate, then the question is,
22 you really can't start the following day if you are going to
23 give the President, or whoever it may be, the opportunity to
24 prepare if they desire that time.

25 Senator Scott. The first has to be the summons, as Bob

1 has earlier pointed out. And then there is the response to
2 the summons, which may be a week or a few days. Then there
3 is an interval of a period when the respondent and his counsel
4 prepare themselves for the trial.

5 Senator Griffin. If I could just make this observation,
6 in the proposed rules, the flexibility is provided by--as I
7 read it--by "except as otherwise ordered." It isn't clear
8 who does the ordering--suppose it might be the Chief Justice.
9 Whereas in the existing rule it is clear--"unless otherwise
10 ordered by the Senate."

11 And I would think we would prefer the existing rule.

12 Senator Byrd. I would suggest at least one change in
13 the existing rule, and that would be, Mr. Chairman, that we
14 lift the words "shall continue in session from day to day
15 (Sundays excepted)"--that we lift those out of the sentence
16 at that point and insert them after the word "commence," so
17 that it will read "...proceed to the consideration of such
18 articles and, after the trial shall commence, shall continue
19 in session from day to day (Sundays excepted)...," because
20 the reading of that is somewhat ambiguous, especially when
21 taken in context with experience. As Senator Scott has pointed
22 out in the Johnson trial there was that request for 40 days
23 and the Senate allowed ten days, including Sundays, then
24 the House submitted its replication, then the counsel for the
25 defense requested 30 days to prepare for the trial and was

1 allowed five--and the Parliamentarian may disagree with me
2 on that, six--but I say five full days, because the request
3 by the defense was on the 23rd, the Senate acted on the 24th
4 and gave him the 25th, 26th, 27th, 28th and 29th, which are
5 five full days, including a Sunday--and on the 30th the
6 trial began.

7 But what I am saying here is that here all of this time
8 elapsed before the trial actually commenced on March 30, 1868,
9 and yet a reading of the articles--this present rule is con-
10 fusing, because it says 1 o'clock in the afternoon of the
11 day following such presentation of the articles,"proceed to
12 the consideration of such articles and shall continue in
13 session from day to day..."

14 But the key word is "after"--after the trial shall have
15 commenced. And if we could revise it to say "after the
16 trial shall commence, shall continue in session from day to
17 day (Sundays excepted)..."

18 It would be clearer and it would have meaning in the
19 light of actual experience, wouldn't it, Dr. Riddick?

20 Mr. Riddick. Yes, this is the simplest motion in the
21 book, this procedure has caused them a lot of trouble in the
22 past. For example, it has been ruled twice, because I guess
23 they wanted to accommodate legislative procedure or something
24 to that effect--they would want to meet, say, at 10 o'clock
25 and the Presiding Officer ruled the motion was out of order,

1 because the rules stipulated that they had to meet at 12 each
2 day.

3 They perhaps overcame that in part by adopting a special
4 order in the Ritter trial as to the hours they were going to
5 meet.

6 Senator Byrd. We are talking about two different things,
7 doctor. I am not talking about the time of day. I just want
8 to make it clear that when we talk about meetings from day
9 to day, Sundays excepted, we are talking about that period
10 after the trial shall commence.

11 Mr. Riddick. I was just going to carry that a step fur-
12 ther. What I am saying is that that is something that should
13 be covered, because they made a difference between the day
14 to day meetings and the hour of the meetings. And in order
15 to accommodate the leadership so that they can go over a day
16 or meet at a different hour every day--that is a point that
17 might be something the Committee will want to consider.

18 Senator Byrd. You are getting afield of my question.
19 Do you agree that the change in the context of this sentence--
20 moving the clause--makes for much clearer reading and better
21 understanding?

22 If the other Senators don't have a problem with that ---

23 The Chairman. You make a very good point.

24 Senator Allen. You have two parenthetical provisos
25 there--1 o'clock is qualified by "or sooner if ordered by the

1 Senate."

2 Senator Byrd. Yes.

3 Senator Allen. And then meeting day to day after the
4 trial shall commence "(unless otherwise ordered by the Se-
5 nate)."

6 So it looks like the power still reposes in the Senate
7 to set the time of the meeting and to set the days on which
8 they shall meet.

9 That is the way it seems to me.

10 Senator Byrd. I will tell you that when I first read
11 this rule--and I have read it many times--and it has always
12 given me a problem until I came to understand it better. I
13 couldn't understand--well, one has to distinguish between
14 proceeding to the consideration of articles and commencing
15 the trial.

16 And a reading of this would appear to mean that once you
17 start considering those articles, then you shall continue in
18 session from day to day.

19 Senator Allen. What do you do with the parenthetical
20 "(unless otherwise ordered by the Senate)"?

21 Senator Byrd. Well, that just has to do--I think that
22 should be at the beginning of the article. "Unless otherwise
23 ordered by the Senate, upon such articles being presented
24 to the Senate, the Senate shall at 1 o'clock afternoon of
25 the day following such presentation..."

1 Or you could repeat it twice, you could repeat it--after
2 the reference to the time of day and after the reference to
3 the day to day.

4 Well, it is repeated twice, it is in there twice now.

5 Senator Scott. It is in there twice.

6 Senator Byrd. So I think if we simply shift the clause,
7 the phrase, Mr. Chairman, "shall continue in session from
8 day to day (Sundays excepted)" to follow the word "commence,"
9 with appropriate commas, it would make for a clearer reading
10 of it.

11 At such time as we get down to that, I would again bring
12 that up, if nobody else does.

13 The Chairman. All right. Doctor?

14 Mr. Riddick. "XII. At 12:30 o'clock afternoon of the
15 day appointed for the trial of an impeachment, the legislative
16 and executive business of the Senate shall be suspended, and
17 the Secretary shall give notice to the House of Representa-
18 tives that the Senate is ready to proceed upon the impeach-
19 ment of [said party], in the Senate Chamber, which chamber
20 is prepared with accommodations for the reception of the
21 House of Representatives."

22 Senator Griffin. The last part there is going to be
23 kind of difficult.

24 Senator Allen. It ought to be for reception of the
25 managers.

1 Senator Byrd. At such time as we are revising the rules,
2 I shall move to strike all after the comma and insert a period.
3 It should be "...in the Senate Chamber," period.

4 The Chairman. All right.

5 Mr. Riddick. "XIII. The hour of the day at which the
6 Senate shall sit upon the trial of an impeachment shall be
7 (unless otherwise ordered) 12 o'clock meridian; and when the
8 hour for such thing shall arrive, the Presiding Officer of
9 the Senate shall so announce; and thereupon the Presiding
10 Officer upon such trial shall cause proclamation to be made,
11 and the business of the trial shall proceed...."

12 Senator Griffin. You can work with that.

13 Senator Byrd. There is some language in the--no, I am
14 thinking of another area, Mr. Chairman.

15 The Chairman. Well, I think what the intent here is in
16 part--it has been pointed out to me that one of the reasons
17 for the present wording is to point up the fact that the body
18 is continuing as a body considering the impeachment, unless
19 otherwise ordered--and if it were otherwise ordered, and we
20 had the other part of the day, it would permit the leadership
21 to take care of other business of the Senate, for example,
22 in the morning, ten to 12 o'clock, something of that sort.
23 And then, at the appointed hour, then, resume as a body of
24 impeachment.

25 Mr. Riddick. This is one of the things that I started to

1 suggest a while ago when we were talking about adjournment.
2 In the previous trials, they made a definite distinction
3 between "order" and "motion." If they had an "order" adopted
4 by the Senate to the effect that you meet at 12 each day, you
5 would meet at 12. But if you made a "motion" to adjourn until
6 11 tomorrow, they would rule it out of order.

7 Now, they have tolerated such motions without a point of
8 order being made, but we have had rulings to the contrary.
9 That is what I was suggesting, the distinction between an
10 order adopted by the Senate to accomplish a situation as op-
11 posed to a specific motion to adjourn to an hour certain the
12 next day.

13 The Chairman. All right.

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

19 Now, this would take care of allowing a respondent to
20 prepare his case.

21 The Chairman. All right.

22 Mr. Riddick. "XIII. The adjournment of the Senate
23 sitting in said trial shall not operate as an adjournment of
24 the Senate; but on such adjournment the Senate shall resume
25 the consideration of its legislative and executive business."

1 So the way that operates, if you are sitting as a court
2 from 12 and at 4 o'clock you adjourn, you don't go out right
3 that minute. You just go right back into legislative or
4 executive business.

5 Senator Scott. Wouldn't we be a little better off if
6 we said any recess or--there is considerable distinction in
7 practice over there between recess and adjournment. If some-
8 body didn't want you to adjourn or didn't want you to recess,
9 as the case might be, might raise the fact that recess is not
10 covered by this.

11 I don't know how important that is. I notice the proposed
12 rule said any recess or adjournment.

13 Senator Byrd. The only thing there, Hugh, that would
14 bother me is the fact that the Senate does often recess during
15 the trial--for 15 minutes or for 30 minutes. And if we said
16 in the rule that on such adjournment or recess, the Senate
17 shall resume the consideration of its legislative or executive
18 business, we might have some problems.

19 Senator Scott. Yes, I see that. There is a possibility
20 of a way out. The Senate shall determine whether to resume
21 the consideration of its legislative and executive business.
22 I just offer that, because you may get into some arguments
23 on that.

24 Mr. Riddick. "XX. At all times while the Senate is
25 sitting upon the trial of an impeachment the doors of the

1 Senate shall be kept open, unless the Senate shall direct the
2 doors to be closed while deliberating upon its decisions."

3 Senator Scott. Present rules do not take into consider-
4 ation the necessity for having the quorum to proceed. Nor do
5 I think that the present rules permit the Presiding Officer of
6 the Senate to defer any vote until the next day, to permit the
7 Senators to research the applicable law.

8 But perhaps the most important thing is the absence of
9 any provision for a quorum.

10 The Chairman. Was that question ever raised in the
11 precedents, doctor?

12 Mr. Riddick. Yes, sir. Except for one precedent, I
13 think, they called the quorum as they liked. In the last
14 several trials, the leader called quorums just as they do
15 in the Senate, in the regular procedure.

16 But in one instance--and I think that is the only pre-
17 cedent I found on it--it was suggested the absence of a
18 quorum, and the Chair took it upon himself to count a quorum
19 and announced that a quorum was present. The quorum call
20 was in order.

21 So that is the only exception to the regular procedure,
22 when the leader or whoever cares to have a quorum call ---

23 Senator Scott. If one assumes that there is no appeal
24 from any decision of the Senate in an impeachment proceeding,
25 there is all the more reason for us to comply with the

1 Wisconsin case and the rest of these cases which held where
2 there was the right of appeal--that the action of the senate
3 was null and of no effect, unless it appeared in the proceed-
4 ings of the committee that a quorum was present.

5 Now, here, of course, we are confronted with the fact
6 that the Senate can do anything it wants, and five Senators
7 could vote on an article of impeachment. Practically speak-
8 ing, the leadership would, I believe, call for a quorum every
9 morning as we open.

10 But I don't see anything wrong with providing that a
11 majority of the Members of the Senate constitute a quorum and
12 that a quorum shall be present when the Senate begins the
13 consideration of each day's debate, or some other phraseology.

14 Senator Allen. What about subsequent loss of a quorum?

15 Senator Scott. Or that a quorum call can be made on
16 subsequent loss of a quorum.

17 Senator Byrd. Where are we, Mr. Chairman?

18 The Chairman. On Rule XX at the top of page 5.

19 Senator Scott. We haven't gone anywhere since you left
20 except to read Rule XX.

21 The Chairman. The question was raised as to what happens
22 if you don't have a quorum.

23 Senator Scott. I really believe that we ought to address
24 ourselves to this question of a quorum, what is the best way
25 to provide for it.

1 Mr. Riddick. This question has been raised, what con-
2 stitutes a quorum, and the ruling, the nearest thing I get
3 to it, is a quorum of the Senate, not a quorum of those who
4 have been sworn for the trial.

5 Senator Scott. Well, normally that would be about the
6 same thing, wouldn't it?

7 Mr. Riddick. Well, if they were all here, but say, for
8 example, that ten are not available to take the oath.

9 Senator Scott. I see.

10 Mr. Riddick. They have raised that question.

11 Senator Scott. Or three or four have been recused.

12 Mr. Riddick. Yes. But before anyone can participate in
13 the trial, he must take the oath. If he was not there when
14 the oath was administered generally, he must take it before
15 he can participate.

16 Senator Scott. Another provision not in the present
17 rules is the one in the proposed rules that would permit the
18 court to recess for a reasonable time or to defer any vote
19 till the next day to enable any Senator to research applicable
20 law.

21 I just raise that as a possibility. But it is the quo-
22 rum one that really worries me.

23 The Chairman. Well, in this analysis that we have been
24 given, paragraph 4 provides by rule that a quorum of the
25 Senate, for the purpose of the trial, is the majority of the

1 Senate.

2 There is no comparable provision in the present rules,
3 but the question was settled by the Senate in 1905 during the
4 impeachment trial of Judge Charles Swain. The then Presiding
5 Officer ruled that a majority of the Full Senate constituted
6 a quorum for the Senate sitting for the trial of impeachment.

7 Senator Scott. What page is that?

8 The Chairman. That is page 17.

9 Senator Byrd. Well, the Constitution ought to be clear
10 enough on that point. The Constitution speaks of a quorum--
11 it doesn't necessarily confine to an impeachment trial. But
12 you can't do any business without a quorum being present.
13 And all the precedents would indicate what a quorum is--and
14 that is a majority of the Senators elected and sworn.

15 Senator Scott. Well, my point is there is no provision
16 for a quorum at all in the rules, of the impeachment.

17 Senator Byrd. Well, we couldn't do business without it.

18 Senator Scott. For example, in Rule VII right behind
19 it--"...unless the yeas and nays be demanded by one-fifth of
20 the members present..."

21 Again, what is wrong with inserting "a quorum being
22 present"?

23 Well, of course, you don't want that, I guess, because
24 of our present practice where you get the yeas and nays with
25 very few people present.

1 Senator Byrd. Mr. Chairman, could I interrupt for a
2 moment. I should have introduced to the members of the Com-
3 mittee the staff from the Library of Congress. And I beg
4 their pardon for that oversight.

5 Tom--Tom Hart is my staff man on the Judiciary--would
6 you introduce these gentlemen, because members of the Commit-
7 tee may want to call on them?

8 Mr. Hart. Mr. Ray Celada.

9 Senator Byrd. Mr. Ray Celada--I am sure all of you have
10 had some contact with him.

11 Mr. Hart. Bob Thornton and Bob Tienken.

12 Senator Byrd. Thank you, Tom. Thank you, Mr. Chairman.

13 The Chairman. Thank you, Bob. Of course, the Constitu-
14 tion, as Bob pointed out, does provide with respect to a quo-
15 rum, so that each House should be the judge of the --- quali-
16 fications of its own members and a majority of each shall
17 constitute a quorum to do business.

18 Now, I presume that that would be a binding quorum on
19 us.

20 We have a vote on. And I am wondering, would you want
21 to recess now until time certain this afternoon and have an
22 opportunity to have lunch?

23 Perhaps 1:30 or 2 o'clock?

24 Senator Byrd. 2 o'clock.

25 The Chairman. 2 o'clock?

1 Senator Byrd. Mr. Chairman, where will we meet at 2
2 o'clock?

3 (Off the record.)

4 The Chairman. Is there objection to meeting in Senator
5 Mansfield's office?

6 All right, we will attempt to make it in 207, then. The
7 Committee will stand in recess until 2 o'clock this afternoon.

8 (Whereupon, at 12:01 p.m., the Committee recessed until
9 2:00 p.m., the same day.)

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AFTERNOON SESSION

(2:05 p.m.)

Present: Senators Cannon, Peil, Byrd, Allen, Scott
and Griffin.

Staff present: Messrs. Alexander, Swearinger, Duffy,
Sapp, Coder, Cochran, and Ms. Parrish.

- - -

Senator Cannon. The committee will come to order.

All right, Doctor, do you want to take over where we
discontinued this morning?

Dr. Riddick. I think we finished with rule XX; VII
is the next.

Senator Cannon. All right.

Dr. Riddick. "And the Presiding Office 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 decision; or he may at his option, in the first in-
stance, 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."

XXIV.

1 Do you want to go further?

2 Senator Cannon. Any discussion?

3 Senator Scott. Ho, I started to raise this morning
4 whether you wanted to say "quorum being present" as distinguish-
5 ed from our present rule.

6 I just raise it so we can consider it. I do not press it.

7 For the sake of the public viewing, they may wonder how
8 we do this, with 11 Senators present.

9 While it looks better to have a quorum present, it is
10 entirely in keeping with our present rules to do it the way
11 rule VII says.

12 Dr. Riddick. I might say something, Senator, there, on
13 the vote incidentally, under the examination of the precedent,
14 without a division, they allow in this regard only two kinds
15 of votes, one voice vote or without objection, and the other
16 by yea and nay.

17 You do not have division standing and counting, and so
18 forth. This shuts out that.

19 Whether you want division votes as we can have them now
20 or leave as it is another question.

21 Senator Scott. I think we ought to make a note if there
22 is no division.

23 Dr. Riddick. It is either voice or without objection,
24 or with yeas or nays.

25 Senator Byrd. Say the vote shall be by voice, either voce

3
1 or unless the yeas and nays be-- that takes out the word
2 "division" which creates some question as to whether or not it
3 means standing and being counted.

4 Senator Scott. Or whether you provide for all three, as
5 we do now; that is, voice vote, a division vote, or a roll
6 vote.

7 Dr. Riddick. Yeas and nays.

8 Senator Byrd. I would like to see the Senate able to
9 operate in this area with a division, I mean by that the
10 Senators stand and be counted.

11 This may help to avoid some time-consuming roll call.

12 Senator Scott. I do agree.

13 Senator Byrd. It would be done in closed session anyhow.
14 Just contemplate that.

15 Dr. Riddick. Well, some of these, Senator, I think could
16 be taken in the regular trial, in order.

17 Senator Byrd. Yes, you are right.

18 Senator Cannon. You could if you want that in there,
19 you could say: "Upon all such questions vote shall be by
20 voice, by division, or by division unless the yeas and nays
21 are demanded by one-fifth of the members present, when the
22 same shall be taken."

23 Senator Byrd. Yes.

24 Senator Scott. I think that is a better way.

25 Senator Cannon. All right, next one.

1 Senator Byrd. Any reason why, Doctor, we would have any
2 problems with a real division?

3 Dr. Riddick. I think what you suggested could often
4 occur that you would save a lot of time. Because a voice
5 vote, the chair has to resort to sometimes division in order
6 to be sure; the chair says he is in doubt.

7 If you feared that situation, the voice was uncertain,
8 you would either have to go to a yea and nay vote under this
9 situation, unless you change the rule so you could have a
10 division.

11 Senator Scott. That was even noted on television,
12 Judiciary proceedings, you noted on the record there were always
13 21, 22, 23 votes or more on one side of the issue, yet on the
14 voice votes sounding over television it was quite difficult
15 to understand. The chair was able to rule as he did because
16 he knew where the votes were. The public doesn't understand
17 that. That is a good reason for the division.

18 Senator Byrd. After the chair announced the vote on the
19 voice vote, the roll call was still in order.

20 Senator Scott. Still in order, yes.

21 Senator Cannon. All right.

22 Dr. Riddick. XXIV. "All the orders and decisions shall
23 be made and had by yeas and nays, which shall be entered on
24 the record, and without debate, subject, however, to the
25 operation of Rule VII, except when the doors shall be closed

1 for deliberation,..."

2 Senator Scott. Which means what, Floyd?

3 Dr. Riddick. Well, orders and decisions of the Senate
4 as opposed to the questions that occur in the Senate proper;
5 in the previous section, they will be by yeas and nays except
6 under Rule VII when we go into closed session.

7 I assume we operate under regular procedure we have in
8 the Senate today.

9 Senator Byrd. What do you mean by regular procedure in
10 the Senate today?

11 Dr. Riddick. Under our regular rules. In other words,
12 except for the fact that you do not debate the 15 minutes
13 or 10 minutes, depending on what the pending question is.

14 Rule VII --

15 Senator Byrd. Reference to Rule VII, there, is you can
16 have votes by voice.

17 Senator Cannon. By voice or by division.

18 Senator Byrd. Yes. This says "All the orders and decisions
19 shall be made and had by yeas and nays," without--

20 Senator Scott. Rule VII above is only part of the rule.

21 Dr. Riddick. Rule VII is the one we just read above.

22 Senator Cannon. Well, is that all of Rule VII?

23 Dr. Riddick. That is all of Rule VII.

24 Senator Scott. It is.

25 Mr. Dove. No, it is not.

1 Dr. Riddick. Sorry. There is a little bit leading there,
2 beginning with "and" in the beginning of the paragraph, about
3 half of it.

4 Senator Cannon. Covers -- we have already covered the
5 earlier part of Rule VII. earlier.

6 Dr. Riddick. Yes.

7 Senator Scott. Could I raise a point here at the end
8 of XXIV -- I do not know where it goes -- that is, to ask
9 us to debate a little the proposed rules, suggest at the end
10 of paragraph on decisions beginning "Except that the court may
11 recess for reasonable amount of time or defer any such vote
12 until the next session in order to enable each" -- that is,
13 each Senator -- "to research the applicable law."

14 Senator Byrd. They can do that under present rule. They
15 defer vote until a member who was ill --

16 Senator Scott. I remember that.

17 Senator Byrd. -- could be present.

18 Dr. Riddick. And they frequently recess to make a deter-
19 mination before they would go on.

20 Senator Scott. Then could I ask in making a committee
21 report that this point be made? It is already covered.

22 Senator Cannon. Sorry, your last statement?

23 Senator Scott. The record shows I had requested, in the
24 committee report, the point be made this is already covered at
25 present.

7
1 Dr. Riddick. See, XXIV there, talking about orders and
2 decisions while part of Rule VII we are accepting is concerned
3 with evidence and incidental question.

4 And then except when you go behind closed doors and
5 there, again, I say when you go behind closed doors, except
6 for the limitation of debate, you would operate under the
7 regular Senate procedure.

8 Senator Scott. Executive sessions, the record is kept
9 open, isn't it?

10 Senator Cannon. They generally are, but they do not have
11 to be.

12 We have got statements to the effect where the record,
13 we are quoting in this report made for the record, where the
14 record is not available and there was no report thereon. That
15 was taken from actual proceedings in the Johnson trial.

16 And I think that we use the term "closed session" here-
17 after because in that last change of the rules changed this
18 one, "executive session, closed session."

19 I should think that any executive session would be on
20 the same basis that we follow now when we are in closed
21 session.

22 Senator Byrd. I think we ought to make clear, Mr. Chairman,
23 what we mean by "closed session," what would be required to go
24 into closed session.

25 As I recall, in the Johnson trial, majority vote was

1 required to go into closed session. The presiding officer
2 once voted to break a tie to get them into closed session.

3 We require only one Senator and the second.

4 We may want to stick to the precedents and talk of a
5 closed session in terms of having a majority, otherwise two
6 Senators could run us into closed session.

7 Senator Cannon. When was this rule of the Senate adopted
8 now with respect to closed session?

9 Dr. Riddick. Well, I think that goes way back to early
10 1900's. I know it was in the codification of 1884, and they
11 picked up -- may have varied one word, but they picked up the
12 same thing then.

13 Senator Cannon. My question would be, was that rule one
14 of the Senate rules at the time they took a vote and decided
15 it required a majority to order closed session in the Johnson
16 trial?

17 Dr. Riddick. I do not think that the rule-- I do not
18 think they were following that rule in that regard when they
19 went into closed sessions for impeachment purposes.

20 Senator Scott. When there is no rule for impeachment, then
21 the rules of the Senate apply.

22 Dr. Riddick. When no rule-- this is what Chief Justice
23 ruled once or twice, that he was going by the rules of the
24 Senate where the impeachment rules did not cover the situation.

25 Senator Scott. I remember that was said.

1 Senator Byrd. I would hope we would clarify this. I
2 would hope we would come down on the side of the majority to
3 put us into cold-- otherwise two members through dilatory
4 tactics could pass up, many times, just moving into closed
5 session. It would take a majority to get us out of closed
6 session.

7 Dr. Riddick. Where you refer to closed session just
8 by adding the words "unless determined by majority vote," or
9 "closed session determined by majority vote."

10 Senator Scott. Yes, I am not sure I want to go that
11 far. Now, I am arguing for precedence. Bob is arguing
12 against it -- reversed role.

13 I rather favor the precedence to the extent of following
14 the existing Senate rules or providing somewhat less than a
15 majority vote to go into closed session, yeas and nays vote,
16 one-fifth of the Senate could go into closed session.

17 I agree with Bob, two Senators might, through dilatorious
18 practices, indefinitely postpone the proceeding.

19 I agree, to require a majority vote on this is so strict,
20 you have already predetermined the issue you are going to
21 discuss in closed session, because you have determined a
22 majority exists, known to the others.

23 Therefore, for the same reason that you get the yeas and
24 nays, it would seem to me a fair rule would be two-fifths here,
25 or one-fifth -- I am sorry, one-fifth here, indicating that

1 there is something to be discussed just as you indicate there
2 is something to be voted on. But you have not signaled how you
3 are going to vote. And you are not bound how you are going
4 to vote when you raise your hand for seconds being demanded
5 and you demand seconds.

6 I would think it is much fairer and you run into less
7 floor controversy from other Senators who see this right
8 taken away from them.

9 Each time you take a right away from Senators, you get
10 into lengthy debate on why they are not applying it to them-
11 selves, but why it is unfair generally meaning you are apply-
12 ing it to themselves.

13 I do not think I would do it I do not think I would want
14 to say to Senators that no two of them can do this, unless
15 you give them a reasonable alternative, short of the extreme,
16 and the extreme is the majority.

17 So I would think perhaps if you want to tighten it, you
18 could prevent arbitrary and dilatory tactics, which, inciden-
19 tally, are available to those who wish them through other
20 means. I would go as far as the one-fifth vote, but I do not
21 think we ought to come down to the very harsh rule of the
22 majority. Because we have already decided what you are going
23 to go into executive session about. And your television
24 commentators will have told the general public: Senate has
25 just gone into executive session. However, the vote by which

1 the Senators asked for executive session on this issue, which
2 is as follows, indicates that when they come out of executive
3 session, they will have voted against the measure or will have
4 voted for the measure.

5 I do not think we ought to so prejudge an issue as to
6 impose the harshest rule of all any more than go into executive
7 session by two-thirds.

8 Senator Byrd. I do not necessarily agree majority vote
9 to go into into executive session would signal a prejudgment
10 of the issue.

11 The precedence support a majority vote. I am not saying
12 to you that I would not be amenable to consideration of some
13 lesser percentage than a majority. But that has worked thus
14 far.

15 Now, the rule with regard to closed doors only operates
16 where in the opinion of a Senator business may require secrecy.
17 And I think that if during the impeachment one Senator, he
18 wanted to close the doors because discussion required secrecy,
19 that rule ought to be--

20 Senator Scott. That may very well be because that is what
21 we do now when we get into classified material and that would
22 be the only one I think for certain discovery proceedings that
23 are contemplated afterwards, which at least in the proposed
24 rules require the delivery of every paper and document in the
25 possession of the executive, including secret and classified

1 documents of highest character.

2 Dr. Riddick. I was thinking there was something in
3 here, just perusing here, I find Rule XX does cover that pre-
4 cedent:

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

9 So if the Senate is going to make the determination, that
10 would be by majority vote.

11 Senator Peil. Mr. Chairman, one general comment I would
12 like to make, that is in view of the fact that we are not
13 considered criminal jurisdiction, whether to follow the custom
14 of the court or custom of the Senate, we should follow the
15 custom of the Senate.

16 One of the problems of having rules, making a court out of
17 this, we should not, no jurisdiction for punishment.

18 One other general question I want to ask Judge Riddick.
19 I think I am correct in saying impeachment is basically in our
20 Constitution? In the British Constitution, in Britain they
21 have never used it since the Warren Hastings trial, is that
22 correct?

23 Dr. Riddick. I cannot answer that positively. I know
24 it was based--

25 Senator Peil. That was disastrous seven years-- never

1 went to it again.

2 I would think we ought to look at the rules applied there
3 see that we do not make any of those mistakes as well.

4 Senator Griffin. When the court is in executive session,
5 there is a limitation on debate. No Senator can take the
6 floor and hold it.

7 Senator Cannon. Ten minutes.

8 Senator Byrd. More than once on any question.

9 Senator Griffin. We might just think about this in light
10 of Hugh's point, nobody is going to be able to hold up the pro-
11 ceedings very long. I think a majority does not want them
12 to, because after he has the floor for ten minutes, somebody
13 can move to go back into open session.

14 It might be in the interest of everybody to make it
15 reasonably easy to go into executive session. I am thinking
16 now maybe from looking at it from the point of view of -- maybe
17 myself, the Chief Justice rules on something, and you are going
18 to have to vote right away. I mean, if you challenge the
19 Chief Justice, somebody is going to have to challenge him.

20 You might want the opportunity to go into executive session.
21 Otherwise you would not have any debate and make your argument.

22 Maybe it should be relatively easy to be able to do that
23 and then if the majority does not think -- they can go back
24 into session.

25 Senator Cannon. This discussion has pointed up one thing

1 we might just keep in the back of our minds, that is do we want
2 to provide that where matters are not covered in those rules
3 relating to the impeachment, that the general rules of the
4 Senate will apply? Because there might be serious question
5 as to whether they do, because we are sitting here not as a
6 Senate but as an impeachment body. And we have adopted im-
7 peachment rules. So we might just keep that in the back of
8 our minds so that before we settle this whole issue, we may
9 want to provide either that the regular rules of the Senate
10 apply or that they not apply if they are not covered in these
11 impeachment hearings, the issues.

12 Senator Pell. I would strongly hope the regular rules
13 would apply in the Senate and for us especially, this question
14 specifically, whether majority or one or two Senators can ask,
15 the Senate's custom is one or two could do it. I would think
16 that is the position we should put forward.

17 Senator Griffin. He points out that is something highly
18 classified.

19 Senator Pell. But it rests with the Senator who makes
20 the motion; he does not have to guarantee it is secret, he
21 says it is.

22 Senator Cannon. We do have a precedent from the Johnson
23 trial where it required a majority.

24 Dr. Hisselt. Every trial.

25 Senator Scott. We did not have delicate national secrets.

5 1 as we do today, nuclear balance to be concerned with.

2 Senator Griffin. Just as a matter of courtesy, any
3 Senator who wants a roll call, he gets one. I would think that
4 would be the practice unless it were obvious he would be
5 dilatory.

6 Senator Bell. If he did it once or twice, you got the
7 feeling of the podium against him --

8 Senator Scott. I agree with that.

9 Senator Cannon. The Congressional research people have
10 just pointed out something I think is worthy of considering.
11 In the Johnson trial, a recess was taken after a ruling by
12 the presiding officer and before the decision on the ruling
13 presumably to give the members a chance to discuss it.

14 Dr. Riddick. Yes, they took recesses regularly on that
15 basis as we pointed out this morning.

16 Senator Cannon. So the members would have a chance to
17 discuss and consider the issue before the matter were actually
18 put to a vote.

19 Dr. Riddick. But that was by a majority vote as opposed
20 to what Senator Griffin was suggesting; fewer would be able
21 to make a determination.

22 Senator Scott. Recess, not executive.

23 Senator Cannon. Simply recess, not going into closed
24 session.

25 Senator Scott. I think we want to agree we want to be

16 1 very careful.

2 Senator Byrd. Mr. Chairman, I support your suggestion,
3 I hope someone will make it if I am not here, when we are
4 marking that up, that we provide, although precedence supports
5 the provision that where the impeachment rules are silent, the
6 standing rules obtain.

7 I think the presiding officer in the Johnson trial rules
8 that once-- or is one of the trials, and I think he was sus-
9 tained by the Senate -- am I not right, Bob?

10 Mr. Dove. You are correct, Senator.

11 Senator Byrd. So we have ample precedence. But I think
12 we ought to spell that out.

13 Senator Cannon. All right, Doctor. It was just pointed
14 out to me that a ruling that was made in the Johnson trial was
15 where the rules, special rules for impeachment trials are
16 silent, the general rules of the Senate are regarded as appli-
17 cable. That the Johnson trial, Chief Justice felt constrained
18 to submit to the Senate for decision question of order
19 affecting the organization, and so on. These are various
20 rulings.

21 Dr. Riddick. Rule XXXIII: "On the final question
22 whether the impeachment is sustained, the yeas and nays shall
23 be taken on each article of impeachment separately; and if
24 the impeachment shall not, upon any of the articles presented,
25 be sustained by the votes of two-thirds of the members present,

1 a judgment of acquittal shall be entered; but if the person
2 accused in such articles of impeachment shall be convicted
3 upon any of said articles by the votes of two-thirds of the
4 members present, the Senate shall proceed to pronounce judg-
5 ment, and a certified copy of such judgment shall be deposited
6 in the office of the Secretary of State."

7 Senator Gorman. That raises a question in my mind as to
8 this reference as to the articles of impeachment.

9 The House has voted three separate articles, as I under-
10 stand, and there are more than one subdivision to each one.

11 What are the precedences with respect to whether a con-
12 viction be sustained as to one or more subdivisions but not
13 as to the entire?

14 Senator Byrd. You can vote on any one segment and-- for
15 example, that first article has nine points. Someone asked for
16 division on the precedence, vote on each of the nine, and
17 if they are acquitted on eight of them and convicted on one,
18 the person stands convicted.

19 Senator Scott. That is, at least 15 separate items of
20 charge which only demands for division could be voted on.

21 Both rules, it is in the Senate rules, the Senate is
22 allowed, right for Senate rules.

23 Senator Peill. But under the present rules, if we did
24 not have proposed rules, presumably that question was referred
25 to the Senate as a whole; they would rule that division would

8
1 apply.

2 Senator Scott. Standing rule.

3 Senator Cannon. Yes, ask for division.

4 Senator Griffin. Mr. Chairman, slightly different point
5 in this that is involved in XXIII. I suppose everyone has
6 noticed that the proposed rule would not call for the yeas and
7 nays but call upon each judge to vote to "sustain" or "reject."

8 I think it is noteworthy that in the Johnson trial -- and
9 I am reading now from the proceedings here -- "Mr. Senator,
10 how say you, is the respondent Andrew Johnson, President
11 of the United States, guilty of a high crime, a high misdemeanor
12 as charged in this article of impeachment?"

13 Who Senators who answered "guilty" are? the Senators who
14 answered "not guilty" are:

15 They did not answer yea or nay, as the article or Rule
16 XXIII suggests, but they answered guilty or not guilty.

17 I think that is a significant change that is suggested
18 there. I am not sure that I like it. I think that here again
19 I do not know why we are changing the existing rule.

20 Senator Eyd. Now, they are not even voting yea or nay.
21 They are voting to sustain or reject. That will confuse the
22 public. I agree with you, it ought to show whether he is
23 guilty or not.

24 Senator Griffin. Every impeachment trial -- I do not know
25 whether the response of guilty or not guilty is consistently --

19 1 In others has it been yea or nay?

2 Dr. Riddick. No, everyone has been guilty or not guilty.

3 Senator Griffin. All the way through?

4 Dr. Riddick. The only difference is they ask each indi-
5 vidual Senator separately as opposed to the chair stating the
6 question so that they would answer guilty or not guilty.

7 That has been the variation.

8 Senator Fell. Did not the reason for the suggested change
9 -- what is the thinking that went into making this?

10 Dr. Riddick. I think time saving-- oh, you mean in the
11 proposed?

12 Senator Fell. Must be a reason for it.

13 Dr. Riddick. Legislative counsel showed me here:

14 "In the impeachment trial of Supreme Court Justice Samuel
15 Chase in 1804, the Senators were specifically directed to
16 vote 'guilty' or 'not guilty' on each article, a form that
17 has been used in other Senate trials as well. The guilty or
18 not guilty form was the appropriate one in England, since the
19 impeachment trial judgments of the House of Lords could include
20 the death penalty, life imprisonment, exile, forfeiture, and
21 heavy fines. This form ceased to be appropriate, however,
22 when the impeachment mechanism was adopted by the American
23 Constitutional Convention in 1787 but with an amendment that
24 limited the maximum sanction for 'conviction' to removal from
25 office and disqualification from holding future federal office.

1 That limitation made the use of the terms 'guilty' and 'not
2 guilty' quaintly irrelevant if not misleading, but the 'yea'
3 or 'nay' form in the present rule is equally inaccurate as a
4 description of the decision that each Senator as Judge must
5 make. It would be fairer, as well as more accurate, to call
6 for a vote to 'sustain' or to 'reject' the allegations of the
7 House."

8 That comes out of the analysis of the rule submitted by
9 Senator Mansfield.

10 Senator Griffin. Here, again, I do not see why we want
11 to change the rules in the middle of the impeachment proceed-
12 ings on a point like this.

13 It does not seem like a very good reason to me.

14 Senator Cannon. Any further discussion on that?

15 Senator Scott. Not on that.

16 Senator Cannon. Next one.

17 Senator Scott. Further on the proposed rule, there is a
18 provision for question of law and if we have a difference in
19 committee reference to matter for amendment:

20 "If the Court desires enlightenment on any question of
21 law, the Chief Judges shall invite counsel for the managers
22 and for the respondent, and may invite attorneys other than
23 counsel for any of the parties, to submit signed briefs to
24 the Court on such question. The Chief Judges may permit signed
25 briefs to be submitted by such persons on any other legal

1 issues which arise or which may arise in the course of the
2 proceedings." A provision for briefs would be submitted at any
3 time on the question of law.

4 I think the rules are silent on this. It may be you can
5 do it by committee decision.

6 Senator Cannon. What are the precedents?

7 Senator Scott. If people want to submit briefs on ques-
8 tions of law as we go along--

9 Dr. Kiddick. Oh, yes, we have in that brief that I pre-
10 pared questions on that, when they submit them.

11 They submit them after the arguments of both sides have
12 been filed.

13 Senator Scott. That is when it is all through. But you
14 may have an intermediate question.

15 Senator Cannon. Question of law arises.

16 Senator Scott. That arises as you are proceeding.

17 At a certain point, a question of law is raised by a
18 Senator. The Chief Justice wishes enlightenment in the form
19 of briefs on behalf of those who support it or oppose it.
20 Whether they be Senators or respondent counsel or managers,
21 I am leaving that open at the moment. There is no present
22 provision that I know of which permits the submission of
23 briefs at intervals, during that part of the process. All you
24 provide for now is everybody can submit briefs at the beginning
25 and presumably at the end.

1 A provision in the Mansfield working draft authorizes the
2 interim presentation--

3 Senator Cannon. We are in the second half of the vote.
4 The draft will have to suspend. Recess temporarily.

5 (Whereupon, a short recess was taken.)

6 Senator Cannon. All right, committee will come to order.
7 Let's go on to the next item temporarily. Senator Scott
8 will be back.

9 Senator Byrd. Mr. Chairman, I see another question here
10 that would trouble me with the closed rule.

11 Are we on Rule XXIII?

12 Dr. Riddick. That is right, Senator.

13 Senator Byrd. Another question that would trouble me with
14 the closed rule is this verbiage: "The Court may thereupon
15 enter judgment accordingly, or it may order the proceedings
16 continued until other final questions have also been determined."

17 In the case of impeachment, in my judgment, the Constitu-
18 tion says he shall be removed upon impeachment for and convic-
19 tion of. When he is convicted he is removed. He is out, right
20 in that instant.

21 I do not think it is necessary for the Senate to pass
22 judgment except that a certified copy may be sent down to the
23 Secretary of State.

24 But it seems to me we might have some problems if we allow
25 the Senate to enter judgment and--

1 Senator Cannon. Go ahead and consider.

2 Senator Byrd. Right. May go ahead and enter judgment
3 or it may order the proceedings continued.

4 Dr. Riddick. You know, that really presents a problem.
5 And a very significant thing, because there never has been a
6 President impeached. But if that is to be the moment when
7 that vote is announced, the new proposed President should be
8 taking his oath immediately in case of a crisis.

9 Senator Byrd. He should be standing outside the door.

10 Dr. Riddick. Because you have got to have a Commander-in-
11 Chief.

12 Senator Cannon. All right, Doctor, do you want--

13 Dr. Riddick. NY: "Counsel for the parties shall be
14 admitted to appear and be heard upon an impeachment."

15 There have been assistants allowed to accompany the
16 counsel; in the Ritter case they even allowed an FBI agent
17 to the privilege to the floor.

18 Senator Byrd. Mr. Chairman, I like the present rule.
19 I do not like the suggestion "and may invite attorneys other
20 than counsel for any of the parties to submit signed briefs
21 to the Court on such question."

22 I think we should draw the line.

23 Senator Cannon. Question of submission of briefs, and
24 so on. I think Senator Scott wanted us to defer on that until
25 he could come back.

1 Dr. Riddick. Here he comes now.

2 Senator Cannon. There he is now.

3 Let's stay on that.

4 Senator Byrd. I think you would have the ABA, Civil
5 Liberties Union -- all these people expecting to be invited
6 to hand in briefs if you allow it.

7 Senator Allen. Mr. Chairman, I was on the Senate floor
8 and was not here right at two.

9 What action or discussion was there with reference to
10 subsection (2) under (c)? On matters sustained or rejected
11 being the answer to ---

12 Senator Cannon. On which one?

13 There was no action taken. We did have a discussion
14 on it, and the analysis that was supporting Senator Mansfield's
15 proposed resolution was read, pointing out that I think that they
16 rejected the guilty or not guilty plea that was used initially.

17 Is that correct?

18 Mr. Ticer. Yes.

19 Senator Allen. That has been used throughout, has it
20 not?

21 Senator Byrd. Consensus here was we should stay with
22 the precedent. Am I not right, Mr. Chairman?

23 Senator Cannon. That was the consensus although no objec-
24 tion was taken.

25 Senator Allen. Yes.

1 Senator Cannon. Senator Byrd has just made a comment
2 about it permitting other lawyers to write briefs.

3 Senator Scott. I took up the tail end of that and I think
4 he is right about permitting other attorneys. I think we
5 ought to be absolutely certain of the trial proceedings, this
6 or any other trial, if entering questions warrant support,
7 through reference back to the precedents, that the parties to
8 the proceedings should have a right to submit interim briefs
9 at any time.

10 I think there, again, we get into my test, which is justice
11 proceed-- I agree with what Bob just said, if I understood it,
12 that you do not want every organization in America rushing in
13 to submit amicus curiae brief. This is not a case for amicus
14 curiae brief as I see it.

15 I would like to reserve the right for counsel for the
16 respondent to have every right which they would have in any
17 other proceeding, or adversary proceeding, and counsel for the
18 House managers equally have every right to have any other
19 adversary proceeding. So I do not know whether it takes
20 amendments or whether it is covered by precedent or whether we
21 need --

22 Dr. Riddick. It was given by consent. But one other
23 counsel -- In other words, in nearly every instance the re-
24 spondent had three, four, five counsel. But if they wanted
25 additional staff or what have you, that was by consent of the

16

1 Senate.

2 Senator Scott. I am not talking about staff.

3 Senator Byrd. Not talking about that.

4 Go ahead.

5 Senator Scott. I am talking about a situation, we are
6 ten days into a trial, a point of law is raised by a Senator
7 because they can raise either points of fact or points of
8 law. Point of law is raised by a Senator.

9 The presiding officer takes the position that he will sub-
10 mit the determination of the point of law to the Senate. Some
11 of the Senators are not lawyers. Others have had no time to
12 think of this, perhaps rather involved, point of law.

13 Counsel for the respondent or counsel for the managers
14 on the part of the House rise to say that they would like to
15 have permission, consent, to submit briefs, and ask this
16 question therefore be deferred for, say, one day until they
17 can submit briefs.

18 It seems to me that that is the kind of permission we
19 ought to allow for.

20 Point of law is decided without any knowledge on the
21 part of the Senate as to what are the implications of the
22 point of law.

23 Dr. Riddick. I was on this fifteenth and did not hear
24 you on the last one.

25 Senator Scott. Yes.

7
1 Dr. Riddick. Sorry. Here is the point I have in the
2 little brief that I prepared previously. Briefs are not
3 submitted until after the managers and the counsel for the
4 respondent have made their opening statement and have intro-
5 duced witnesses. Once such briefs have been filed, they are
6 printed in the record for the immediate use of the Senators.

7 In the trial of Robert W. Archibald, the following
8 order was adopted for that purpose: Order that such briefs
9 and citations of authorities as have already been prepared
10 by the managers on the part of the House and counsel for the
11 respondent be filed with the Secretary and printed in the
12 record for the immediate use of the Senators.

13 Now, this does not cover your intermediate-- intervening
14 problem, but I think in every instance, as I mentioned here
15 to counsel just a moment ago, it could be that that was taken
16 care of, I am sure it was taken care of in each instance by
17 then recessing or going into closed session and arguing it out.
18 But it could be something like that could be put in.

19 Senator Scott. And I have in mind something like this,
20 wherever it is, and that such supplemental or additional
21 briefs may be filed at the option of the parties concerned,
22 which permits the Senate to file the briefs too, get to this
23 counsel of the question for the Senate.

24 Dr. Riddick. That would make it clearer.

25 Senator Scott. That could be done by amendment, it could

1 be done by covering it in a legislative history which is
2 necessary -- or it could be done by having the committee
3 recommend such a trial order follow the general form. I think
4 it is up to the committee here to decide how they want to
5 pursue it.

6 The right to file interim briefs ought to be decided
7 before we get in there, so we do not lose three or four days
8 on the argument.

9 Senator Cannon. You make one point there that is rather
10 interesting when you said even in the event the Senators
11 wanted to file a brief.

12 I do not envisage the Senators acting either as a prose-
13 cutor or a defense counsel. If they are going to act as
14 jurors, I would think the last thing in the world they would
15 want to do is have the right to present a brief on that,
16 either as advocating one position or another.

17 Senator Scott. Would not have to. What I am contemplating
18 is as we go along in these rules, we may come to a point where--
19 this is the reason I suggested it, the point was the Senate
20 side, that it will retain counsel for the Senate; that has to
21 be done, has it not, Floyd? There have been counsel retained
22 for the Senate in some of these proceedings?

23 Dr. Riddick. I do not believe so.

24 Senator Scott. I thought there was.

25 Dr. Riddick. I do not believe so. I think it was just

1 for managers and the respondents.

2 Senator Griffin. For what purpose would that be?

3 Senator Scott. For the purpose of protecting the interest
4 of the Senators in case a Senator asks for clarification of a
5 point without wishing to come down on the side of either the
6 respondent or the managers on the part of the House, the
7 Senate or it would want to know.

8 Senator Griffin. Why would the two sides not argue it
9 out?

10 Dr. Riddick. He could submit questions, the Senator could
11 submit written questions to get his answer, I should think.
12 But they have never, as far as I know, had a representative at
13 any time.

14 Senator Scott. Then this question does not arise in
15 your opinion unless we should decide to come down on the side
16 of counsel for the President, later proposal here.

17 The rest of this would certainly be covered in some way
18 or another.

19 I suggested three ways it could be covered, one by amendment
20 to the rules; two, by a committee suggestion that the entire
21 order shall follow the general form of submitting briefs at the
22 beginning and end and interim or issuing briefs at the option
23 of counsel for the interested parties.

24 When I got into the question of concern for this involving
25 Senators, we got to this discussion.

30 1 I think we ought to make some effort to indicate that
2 briefs can be filed at any rate if needed.

3 I am not saying there has to be a rule in the amendment.

4 Senator Griffin. Just thinking out loud here, would it not
5 develop like this, that a question would arise, either before
6 the Chief Justice rules or after he rules, or before the appeal
7 is voted, either to go into executive session and make a motion
8 perhaps that the matter be put over for 24 hours and have time
9 for briefs to be prepared?

10 I mean, that would be, then a majority would decide whe-
11 ther to do that or not. Or is it your thought there would be
12 some automatic right for a particular period of time?

13 Senator Scott. No, I do not conceive an automatic
14 right.

15 I think the Senate might decide not to defer it. But I
16 can conceive an automatic right guaranteed in advance to
17 respondent as to the managers on the part of the House to
18 file supplemental briefs or additional briefs from time to
19 time.

20 Senator Griffin. Well, but after the question was already
21 decided? The decision at one point or the other, either by
22 the Chief Justice or by the--

23 Senator Scott. I kind of contemplate the situation as I
24 said before, you are in the tenth day of the trial. Senators
25 submit their question of law. One of the parties in this

1 adversary proceeding has permission to file a brief. The
2 Senate by majority vote can deny. The Senate by decision
3 perhaps, not by majority vote but decision, goes into closed
4 session and debates it. Or the Senate agrees to defer it until
5 the following day.

6 Senator Griffin. I think we can do that. For the purpose--
7 for any purpose, including the purpose of having the parties
8 file briefs.

9 Senator Byrd. Mr. Chairman, if the parliamentarian
10 has nothing on this point, we will get to it later. I wonder
11 if Mr. Colada or any of the people from the Library of Congress
12 could shed any suggestions on this?

13 Mr. Thornton. Brief was filed by the respondent objecting
14 to the jurisdiction of the Senate, because --

15 Senator Byrd. Would you stand and repeat that?

16 Mr. Thornton. We have thumbed past it now, but in the
17 Bellamy proceedings, there was a protest filed. It was in the
18 form of a brief to the jurisdiction of the Senate, and the
19 Senate considered it; but it does, it is the only thing we
20 have found quickly here that seems to relate to this issue of
21 filing of briefs.

22 Senator Scott pointed out this is in the nature of an
23 adversary proceeding and it is generally left up to the parties
24 to present the questions involved on both sides. You make
25 your case, he makes his case, and the judge decides who did the

2
1 job.

2 Senator Scott. Could we not cover this in a committee
3 report?

4 Floyd has referred to a question that he goes a little
5 further and says precedent has been to issue trial orders
6 covered on filing the briefs. This shall refer also to addi-
7 tional or supplementary or additional briefs.

8 I think if we mention that, it would help us to make
9 some decisions.

10 Senator Byrd. Mr. Chairman, would you object to a request
11 that the Library of Congress representatives here prepare
12 a memorandum on that for the committee, for its use at such
13 time as we--

14 Dr. Riddick. Fine.

15 Senator Scott. All right, ask them to do the same thing,
16 then, on subsection (f), statement of Senators, where the
17 worst judges instead of Senators -- next page. This is a
18 break from the present procedure. This is contemplated that
19 presumably, in reference to what has gone before, it seems
20 to apply to subsection (e), questions of law, puts in
21 capital. Permits Senators to make statements not to exceed--
22 no, it is broader than that, permits Senators generally at the
23 organization of the court, opening of the trial, to make state-
24 ments not to exceed three minutes, and not to exceed five
25 minutes on any question other than a final question and not to

33

1 exceed ten minutes on the final question unless the Senate
2 otherwise orders, or court otherwise provides, upon recom-
3 mendation of the floor leaders.

4 Now, I am getting, of course, a little weary of anything
5 that is too much interrogation of presiding officer, but it
6 seems to me that this is important enough for us to all give-
7 some thought to it before we get down to the point of actual--
8 because my own feeling, here is your first opportunity to
9 permit Senators to be heard other than their final statement
10 or other than closed session.

11 Another is that it takes a longer time if every Senator
12 has five minutes to debate any question other than the final
13 question.

14 On the other hand, it involves the Senate and proceeding
15 over and above the question of the submission of written
16 questions.

17 I submit it with both pros and cons occurred to me as
18 something we ought to ask our witnesses on Monday for their
19 reaction.

20 Senator Byrd. Mr. Chairman.

21 Are you through?

22 Senator Scott. Yes.

23 Senator Byrd. May I just make my comment at this time
24 I would hope we would not allow oral statements by Senators,
25 suggestion here is they will not achieve three minutes.

1 One hundred Senators at three minutes each -- and they would
2 all take their three minutes -- that would be five hours.

3 In the second place, this is the most solemn occasion that
4 I can comprehend in connection with our Constitutional rules.

5 I think the less visible we are insofar as yak-yakking is
6 concerned, the better impression the people are going to have
7 of this whole thing.

8 Secondly, I do not disagree with what Senator Scott has
9 said in one respect; I do believe that when it gets down to
10 both sides closing their arguments and Senate goes into closed
11 session to discuss the kind of question, I do not think the
12 Senator should be limited to fifteen minutes -- Senate
13 majority, unanimous consent -- I am not so concerned about the
14 fifteen minutes on the final question.

15 But if you have, let's take that first article, it is
16 divided into nine charges and a Senator asks for a division,
17 you divide that, and we have, as I understand it, 15 minutes
18 would be the only time for the whole deliberation of the final
19 question, not on the final question on each article.

20 I do think Senators ought to have some little time on any
21 question other than the final question as long as any ques-
22 tion is confined to the final discussion of any article or any
23 charge within any article.

24 I do not think that we ought to open it up to five minutes
25 on any question. This would mean on any interlocutory question

1 any intervening question that comes up, any question coming
2 up at any point, that if I understand the phraseology here, any
3 Senator could speak not to exceed five minutes. That would
4 provide the loophole for extended discussion.

5 Senator Griffin. Bob, could I get a clarification?

6 Senator Byrd. Yes.

7 ~~Senator Griffin.~~ It seems to me that if each article is
8 divisible, that the vote on each charge within the article
9 would be the final question. Otherwise what is the final
10 question, I ask you, Dr. Riddick?

11 Dr. Riddick. Well, the final question includes all the
12 articles of impeachment.

13 Senator Byrd. Each one is a final question?

14 Senator Griffin. Each one is a final question?

15 Senator Byrd. No.

16 Dr. Riddick. They only allow one fifteen minutes on every-
17 thing that comes here.

18 Senator Griffin. No matter how articles--

19 Dr. Riddick. Fifteen minutes here allowed shall be for
20 the whole deliberation on the final question and not on the
21 final question on each article of impeachment.

22 Senator Scott. On that we may have views. I agree with
23 Bob at least to the degree we earlier said on the subdivision
24 of final question. I think perhaps I am inclined toward some
25 Senators -- except sit there like Gummies the whole time, I

1 suspect some other Senators feel that way, therefore we might
2 want to offer them later. However, we would get a better
3 judgment of that and I request, accordingly, that this commit-
4 tee ask the opinion of our Senate witnesses on, so we get--

5 Senator Byrd. We certainly want their opinion, but-- if
6 we are going to weigh -- but those of us who have sweated
7 over this for months as some of us have already done, and
8 who have studied the precedents and see the danger of letting
9 a Senator have five minutes on any question that came up, we
10 would hope now weight given would be given to every opinion.

11 Senator Scott. I agree, but I think each Senator has
12 got to be given an opportunity if he seeks it to speak and to
13 give as much weight to his decision as he thinks it deserves
14 rather than as we think it deserves.

15 Senator Byrd. Except you are going to have to lay down
16 some guideline. Those wheels will go into closed session
17 to discuss a question involving some interjectory question
18 and every Senator, if he can speak for five minutes, you have
19 five hundred minutes there.

20 I have five minutes. I may not use them.

21 Senator Scott. Well, I just make this comment on it, Bob,
22 because I am not contesting, I am trying to find --

23 Senator Byrd. Yes.

24 Senator Scott. Each of us now has served several periods
25 in the Senate. Each of us has still a test that has yet to

1 come. To deny Senators five minutes as to discuss the most
2 important vote in their history is not -- we have discussed
3 for five hours whether or not to put a sewage plant in a small
4 town.

5 Senator Byrd. You say explain the most important vote. I
6 am for their having some additional time over fifteen minutes
7 to discuss those articles. But I am talking about the inter-
8 vening questions that may come up from day to day.

9 If we adopt this phrasology, each center may have five minutes
10 on anything.

11 Senator Scott. We have three parts to this, do we not?
12 The opening of the Senate three minutes to explain, each man
13 explain to his own constituents here in judgment on the President
14 and how he views the responsibility. That is certainly worth
15 the public's time.

16 Then he has interim one on which you raise the question,
17 then he has the final one in which he has to virtually meet
18 his Maker while he is still alive.

19 Senator Byrd. Final one.

20 Senator Scott. Let's pass it, but I think we ought to ask
21 the other Senators.

22 Dr. Riddick. And the Beiknap case I believe it was they
23 allowed each Senator one minute to explain his vote while the
24 vote was being taken.

25 Senator Byrd. Open session.

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1 Senator Scott. Well, some people -- their whole career
2 will depend on this vote, or at least they think so.

3 I am in favor of giving them some right to explicate
4 their problem to their constituents.

5 Dr. Riddick. XXIV: "All the orders and decisions
6 shall be made...without debate, subject, however, to the
7 operation of Rule VII, except when the doors shall be closed
8 for deliberation, and in that case no member shall speak more
9 than once on one question, and for not more than ten minutes
10 on an interlocutory question, and for not more than fifteen
11 minutes on the final question, unless by consent of the Senate,
12 to be had without debate; but a motion to adjourn may be
13 decided without the yeas and nays, unless they be demanded
14 by one-fifth of the members present. The fifteen minutes
15 herein allowed shall be for the whole deliberations on the final
16 question, and not on the final question on each article
17 of impeachment."

18 We have already discussed that.

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

23 That raises a question as they have done in several in-
24 stances, I do not know whether you want to consider that.

25 The chair has directed the clerk or the reading clerk to read

1 these questions as opposed to the presiding officer reading
2 them, and I was wondering if you wanted that to be allowed,
3 the question to be put by the presiding officer, clerk having
4 been directed to read it?

5 Senator Byrd. Clerk ought to continue to read it at the
6 direction of the presiding officer.

7 Dr. Riddick. You know, when we get an order under the
8 closure, for example, the Rule XXII provides that the presiding
9 officer shall read the motion when presented. And every time
10 the chair has to state without objection, the clerk will
11 report the motion.

12 I was wondering if you wanted to sanction that.

13 Senator Poell. Does the present rule say it should be
14 the presiding officer?

15 Should the questions be attributed to individual senators
16 or not?

17 Dr. Riddick. I assume the Senator submits and signs it,
18 and his statement would be Senator Jones wishes to inquire of
19 the witness, whatever the question is.

20 Senator Poell. The rule is silent on that.

21 Dr. Riddick. That is right.

22 Senator Griffin. I think it would be better if the clerk
23 read it. Then there is no possibility that the Chief Justice
24 will, by a tone in his voice or anything -- it would be, pre-
25 sumably, a reading clerk. That is his job. Not that he would,

1 but just--

2 Senator Peil. I come back to the thing, unless there
3 is wild reason to change the rule--

4 Senator Griffin. As I understand it, I mean, that is the
5 way they have been doing it.

6 Senator Peil. No, no. As of now, it shall be produced
7 in writing by the presiding officer.

8 Senator Griffin. Dr. Riddick said--

9 Dr. Riddick. Direct the clerk read the question for
10 him, you see.

11 Senator Peil. I see. I am sorry.

12 Senator Byrd. So if that is ample--

13 Senator Cannon. That is ample precedent this language
14 remain.

15 Dr. Riddick. You have had a precedent, but I believe
16 there has been a bit of contention at one time. And we have
17 had considerable contention where we have had the Senators
18 allowed to make the question orally.

19 Senator Griffin. I think we should not do.

20 Senator Byrd. Mr. Chairman, I hope we can write into our
21 rules, into the committee report accompanying the rules, the
22 general understanding, the unwritten rule here, the motion
23 to adjourn is reserved for leadership. In an impeachment
24 trial, it is going to be the desire and intent of the
25 leadership to expedite this thing and be fair. I think that

1 one motion should--

2 Senator Peil. You have read it.

3 Senator Cannon. All right, Doctor.

4 Dr. Riddick. XI. "That in the trial of any impeachment
5 the Presiding Officer of the Senate, upon the order of the
6 Senate, shall appoint a committee of twelve Senators to
7 receive evidence and take testimony at such times and
8 places as the committee may determine, and for such purpose
9 the committee so appointed and the chairman thereof, to be
10 elected by the committee, shall (unless otherwise ordered
11 by the Senate) exercise all the powers and functions con-
12 ferred upon the Senate and the Presiding Officer of the
13 Senate, respectively, under the rules of procedure and prac-
14 tice in the Senate when sitting on impeachment trials.

15 "Unless otherwise ordered by the Senate, the rules of pro-
16 cedure and practice in the Senate when sitting on impeachment
17 trials shall govern the procedure and practice of the committee
18 so appointed. The committee so appointed shall report to
19 the Senate in writing a certified copy of the transcript of
20 the proceedings and testimony had and given before such com-
21 mittee, and such report shall be received by the Senate and
22 the evidence so received and the testimony so taken shall be
23 considered to all intents and purposes, subject to the right
24 of the Senate to determine competency, relevancy, and mater-
25 iality, as having been received and taken before the Senate,

1 but nothing herein shall prevent the Senate from sending
2 for any witness and hearing his testimony in open Senate, or
3 by order of the Senate having the entire trial in open
4 Senate."

5 That has never been utilized.

6 Document 35 --

7 Senator Griffin. I can see that being utilized in case of
8 civil servant or judge. I can see this not being utilized
9 in the case of a President or Vice President.

10 Senator Byrd. My suggestion would be we strike out that
11 reference to "committee of twelve." where it says the presiding
12 officer shall appoint a committee of twelve-- never had been
13 used. But the last sentence of two could be useful. Perhaps
14 we can substitute for "a committee of twelve" "majority";
15 "would appoint an ad hoc committee for any purpose the
16 committee deemed advisable to take judicial testimony," whatever
17 you set in.

18 Then the last of it would be good, "testimony so taken shall
19 be considered to all intents and purposes subject to the right
20 of the Senate to determine competency, relevancy and materi-
21 ality, as having been received and taken before the Senate, but
22 nothing herein shall prevent the Senate from sending for any
23 witness and hearing his testimony in open Senate, or by order
24 of the Senate having the entire trial in open Senate." Leave
25 that portion in. And write in what the Senate already has,

1 the power to appoint an ad hoc committee for an ad hoc purpose.
2 They do not have to write it in, but they could. So
3 it would be there in line with precedence.

4 Senator Cannon. I would not think it would be harmful to
5 delete this whole thing.

6 Senator Allen. I would not either.

7 Senator Griffin. I could conceive of it being-- if the
8 Senate were busy with a lot of other important work and you had
9 some impeachment, minor federal official or something, you
10 might want to proceed this way.

11 We certainly would never want to do it in the case of
12 a President or Vice President.

13 Senator Byrd. I think we need something, Mr. Chairman,
14 otherwise the Senator raises a question of sending for a wit-
15 ness and hearing the testimony in open session.

16 If you do not have something in the rule, you will have
17 an argument over that. The rules do not provide for it.

18 If the rule did provide for it, then you do not have to
19 depend on precedence for the moment.

20 Strike out reference to the committee of twelve, make some
21 reference to the fact if needed, Senate may appoint an ad hoc
22 committee.

23 Senator Scott. Such committee or committees.

24 Senator Byrd. Ad hoc committee for purposes. That is a
25 thought.

1 Senator Scott. Any other committee or Senators?

2 Senator Griffin. I could conceive of a situation where
3 a witness might be ill in the hospital somewhere and would not
4 be able to appear in the Senate and they want to send a com-
5 mittee --

6 Senator Byrd. Also the Senate on occasion has appointed
7 an ad hoc committee to search the rules and precedents right in
8 the middle of the trial. Is that right?

9 Dr. Riddick. Yes, sir.

10 Senator Scott. Similar thing occurs in the middle of a
11 trial, same thing I said on opinions.

12 Senator Cannon. All right, Doctor.

13 Dr. Riddick. The next one is concerned with form.

14 Rule XIV: "All process shall be served by the Sergeant
15 at Arms of the Senate, unless otherwise ordered by the court."

16 Then you have got forms of summons, forms of precept
17 attached to the summons.

18 Senator Byrd. What rule are you looking at?

19 Senator Scott. VIII.

20 Dr. Riddick. I skipped that.

21 "Upon the presentation of articles of impeachment and the
22 organization of the Senate as hereinbefore provided, a writ of
23 summons shall issue to the accused, reciting said articles,
24 and notifying him to appear before the Senate upon a day and
25 at a place to be fixed by the Senate and name in such writ,

1 and file his answer to said articles of impeachment, and to
2 stand to and abide the orders and judgments of the Senate
3 thereon; which writ shall be served by such officer or person
4 as shall be named in the precept thereof, such number of days
5 prior to the day fixed for such appearance as shall be named
6 in such precept, either by the delivery of an attested copy
7 thereof to the person accused, or if that cannot conveniently
8 be done, by leaving such copy at the last known place of abode
9 of such person, or at his usual place of business in some con-
10 spicuous place therein; or if each service shall be, in the
11 judgment of the Senate, impracticable, notice to the accused
12 to appear shall be given in such other manner, by publica-
13 tion or otherwise, as shall be deemed just; and if the writ
14 aforesaid shall fail of service in the manner aforesaid, the
15 proceedings shall not thereby abate, but further service may
16 be made in such manner as the Senate shall direct..."

17 Senator Scott. Now, Bob has referred to two procedures:
18 one, the summons which has earlier return date, and then the
19 actual appearance of the respondent or his counsel following
20 a period which has been granted to him by the Senate.

21 Does this apply to both of those processes or not?

22 Senator Byrd. Yes, applies to both.

23 Senator Scott. Does not say so.

24 Senator Byrd. Speaks of summons. Summons does not occur.

25 In the Johnson trial, it was ordered on March 6, issued on

6
1 March 6th, he was ordered to appear the thirteenth, one week
2 later.

3 Senator Scott. Yes.

4 Senator Byrd. That is the summons.

5 Then when his counsel appeared on the thirteenth, he did
6 not appear with the answers; he appeared with a request that
7 he be given 40 days.

8 Senator Scott. The Senate gave him ten.

9 Senator Byrd. Gave him ten.

10 Senator Scott. This is very timely, telephone call, Mr.
11 Chairman, because it has to do with Rule VIII and comes from
12 Durt Jenner, on the House side. He first apologizes for seek-
13 ing in any way to interfere with our proceedings and simply
14 asks that we take note of something.

15 The thing he asked us to take note of is Rule VIII really.

16 I suspect that there is a leadership function to be sub-
17 mitted to the Senate for its judgment as in the Johnson case.
18 But here is his message, which I think ought to be kept in
19 executive session. I just do not want to embarrass him.

20 He says the House managers need a period of time for
21 conference with the presiding officer on procedures, on presen-
22 tation of evidence, discovery procedures, and then he adds
23 and all of those matters which have been caused by reason of
24 the development of procedures over the years.

25 And I said, "May I quote you?"

1 "Yes."

2 "What do you need?"

3 He said, "We need not to exceed five weeks."

4 I said, "Is that a fair estimate, around five weeks?"

5 He said, "Around five weeks."

6 So I am telling you that for whatever it is worth.

7 Senator Byrd. Five weeks for what?

8 Senator Scott. Well, I discussed with him what you and
9 I had said here regarding the time for the return of a sub-
10 poena and further time to be allowed to the respondent, and I
11 said, "Is your time frame here taking into consideration both
12 of these events?"

13 And he said, "Yes, it is."

14 I am talking about the time from the time the House, up to
15 the House, we have to appear in the Senate, managers on the part
16 of the House have to appear in the Senate, therefore includes
17 the return date of the subpoena and includes the time for which
18 the President or respondent could ask or his counsel. And his
19 estimate is that they would be not to exceed five weeks.

20 I give it to you simply on the basis of reporting a con-
21 versation.

22 Senator Byrd. We need to find out more clearly what he
23 means. Because after the answers are submitted by the Presi-
24 dent's counsel, the House may want to submit a revocation. And
25 after that, the President's attorney may ask further delay.

48 1 Who knows? Maybe a service under--- I don't think we have seen
2 that there for, but he could ask for one and ask further time
3 in which to prepare for the trial.

4 Senator Scott. I think he is pretty well aware of that.
5 He is a trial attorney.

6 Senator Byrd. That is not clear, is it?

7 Senator Scott. No, it is not clear. All he is attempting
8 to inform us is that he needs, the managers on the part of the
9 House and counsel would need an opportunity for a conference
10 with Mr. Justice Burger, to discuss the matter and have time
11 and problems involved in these things he mentioned, presenta-
12 tion of evidence, possible discovery proceedings, and so on.
13 And that they would need for that discussion plus the time
14 it takes them to walk over here, prepared to do that, execute
15 their part of this process.

16 The phrase is not to exceed five weeks.

17 Now, I am not making a judgment on that. I am just telling
18 you that is what he thought we should know before we got into
19 Rule VIII.

20 Senator Byrd. Did I understand you to say he would need
21 discussion with the presiding officer? He would need it with
22 someone other than the presiding officer. The Senate will
23 not have much time, will decide how much time to allow him.

24 Senator Scott. This is an enlightening proceeding for
25 him too, then. I am just relating the conversation that came

1 up.

2 Senator Byrd. I am not arguing with you.

3 Senator Scott. Of course, it would involve talking with
4 the Senate officials. But he feels that one of their first
5 steps, depends on when a vote is taken, is to approach the
6 presiding officer and say to him: We think you need to be
7 advised it will take us X amount of time.

8 Now, I do not think he means any discourtesy. I think he
9 probably recognizes though he did not say it, it has to go
10 to party friendship as well.

11 I wanted to know before we got into Rule VIII.

12 Senator Cannon. I am still unclear on one point, whether
13 he is talking about-- from the time the House makes the
14 decision, whether he is talking about five weeks from that
15 time until the managers come over and report to us, or until
16 they are ready to proceed to trial.

17 Senator Scott. No, he is talking of a period of time from
18 the date in which they appear here at 12:30 or one o'clock
19 and prepare articles of impeachment on behalf -- and
20 from that moment of presentation to the moment of their
21 appearance when as the phrase is used in some of these things,
22 ready, when they are ready to proceed, it is not to exceed
23 five weeks.

24 Senator Cannon. We have another vote.

25 Senator Allen. Together.

1 Senator Scott, I think the respondent has to be heard
2 from here, too. I am not prejudging; I am simply telling you
3 that is the message from--

4 Senator Cannon. We are in the second half of the vote.
5 Stand in recess.

6 (Whereupon, a short recess was taken.)

7 Senator Cannon. Committee will come to order.

8 Doctor.

9 Dr. Rindick. I was going to suggest we add here all of
10 Rule VIII. Because it does refer to information. It is also
11 on page 13. But it fits in with VIII right here:

12 "If the accused, after service, shall fail to appear,
13 either in person or by attorney, on the day so fixed therefor
14 as aforesaid, or, appearing, shall fail to file his answer
15 to such articles of impeachment, the trial shall proceed,
16 nevertheless, as upon a plea of not guilty. If a plea of
17 guilty shall be entered, judgment may be entered thereon with-
18 out further proceedings."

19 Now we get to--

20 Senator Cannon. Any discussion on that?

21 All right.

22 Senator Allan. I wonder about the use of the word "accused"?
23 This is not a criminal procedure.

24 Senator Scott. I thought we agreed "respondent" was
25 used in other cases. "respondent"?

1 Dr. Riddick. Yes.

2 Senator Scott. I suggest substitution of "respondent."

3 If you are going to stand on the position this does not
4 partake of the nature of a criminal proceeding -- I am not
5 sure I agree it is not the nature of a criminal procedure.
6 But if that is the view of the majority, then it certainly
7 should not be "accused" but "respondent".

8 Dr. Riddick. That puts the finger on him.

9 Rule XXV -- I jumped to VIII before -- is merely the
10 terms of the summons and the precept and says:

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

13 I think that is the only place it refers in the rules
14 still as the court.

15 Senator Scott. The proposed rules, here on page 8,
16 may we should seek to spell out the answer to article --
17 the right to amend is with the consent of the Senate and may
18 be amended to conform to the evidence, or reflect new findings
19 by the House, may be made upon motion of any party at any time."

20 Dr. Riddick. I think the practice has been allow the
21 House to come in. But managers would be another problem.

22 Senator Scott. Well, there is nothing forbidding the
23 Senate for including it.

24 Dr. Riddick. Pardon?

25 Senator Scott. I was asked this morning, I said I did not

52 1 think there was anything the Senate can devise the articles
2 of impeachment, they could offer a substitute for them or
3 amendment to them, could they not?

4 Dr. Riddick. No, it is a House prerogative. You are
5 only trying on the basis of what they are charging.

6 Senator Scott. You mean the Senate has no function
7 except to vote them up or down?

8 Dr. Riddick. Or to strike them; they have done that
9 several times, where I think even the Ritter case, there are
10 two or three articles that the respondent, counsel for the
11 respondent maintained that he was having to defend himself
12 on the same thing twice.

13 Senator Scott. Motion to strike and substitute?

14 Dr. Riddick. Just strike.

15 Senator Cannon. As I see it, I think the Senate would
16 have absolutely no authority under the Constitution to make any
17 change other than they could move to strike and say we are not
18 going to consider that one, but certainly they cannot add
19 to amend, modify, or substitute any provision for impeachment
20 articles turned over by the House?

21 Senator Scott. What is your precedence for that?

22 Dr. Riddick. In the Ritter case, they did not get
23 away with it. They moved to strike, but the Senate denied
24 them that right, you see.

25 Senator Allen. That would be inviting the House's

1 prerogative to have the sole power to impeach.

2 Dr. Riddick. They bring the bill of indictment. There
3 is no exception -- they did I think in two cases, they worked
4 to get rid of a certain article because it was repetitious,
5 but the Senate did not allow.

6 Oh, the House has amended several times.

7 Senator Scott. The House has no right to amend or
8 substitute.

9 Dr. Riddick. The House has; not the Senate.

10 Senator Byrd. They can send another article if they
11 wanted to.

12 Dr. Riddick. Yes.

13 Senator Scott. But you have no precedence, in the
14 Constitution itself, that you have ground this on; is that
15 right?

16 Dr. Riddick. Constitution is solid on that, except to
17 the extent it says the House shall have the sole power of im-
18 peachment; Senate has sole power of trial.

19 Senator Cannon. Read the function.

20 Parliamentary Law: "The Lords cannot impeach any to
21 themselves, nor join in the accusation, because they are the
22 judges. Nor can they proceed against a Commoner, but on com-
23 plaint of the Commons."

24 Senator Scott. Members on the part of the House may
25 amend the articles. Is that permissible or not?

1 Dr. Riddick. I should not think so.

2 Senator Cannon. I would not think so.

3 Senator Scott. Such amendment of the pleadings has made
4 it necessary to cause them to conform to the evidence or
5 to reflect new findings by the House may be made upon motion
6 of any party at any time.

7 Dr. Riddick. As a matter of fact, I think the House
8 would deny them that right.

9 Senator Scott. Suppose the House itself amends the
10 articles, whether the managers do, after they have sent them
11 over?

12 Senator Cannon. Managers, if the House themselves voted
13 to amend the managers could present amended articles to the
14 Senate. As a matter of fact, I think there was a precedent on
15 that.

16 Did not the House amend the articles on at least one
17 instance?

18 Dr. Riddick. Oh, yes, they have done it -- several
19 times.

20 Senator Cannon. Then the amended article was presented by
21 the manager to the Senate, is that correct?

22 Dr. Riddick. Yes. But the House has to take the action.

23 Mr. Thornton. Mr. Louderback gave the House 24 hours to
24 answer.

25 Mr. Canada. There was objection in the fifth article, as

1 vague, manager stated he was not authorized, could not do
2 anything about it here; that is, in the Senate Chamber.

3 He returned with it to the House.

4 The language was redrafted, made more precise, and then
5 they returned to the Senate and an opportunity was provided
6 for respondents to answer to the modified article V.

7 Senator Cannon. All right, Doctor.

8 Dr. Riddick. Well, as far as the existing rules are
9 concerned, we go over to page 10, Rule XVII:

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

13 Senator Scott. Floyé, are you just skipping all the
14 proposed rules when you read the present rules?

15 I am not asking you to read all the proposed rules.

16 Dr. Riddick. I was just following according to the
17 chairman's instructions.

18 There is no comparable proposed rules, no proposed exist-
19 ing rule on.

20 Senator Scott. Well, we have suggestion, a suggested
21 Rule 5, "Conference and Trial Order." Suggested Rule 7,
22 "Discovery." Suggested Rule 8, "Evidence."

23 Now, are you just going to skip by the whole question
24 of evidence, Mr. Chairman?

25 Senator Cannon. We are certainly not going to skip by.

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1 Those are proper matters for consideration, but I thought
2 we decided this morning we would have Dr. Riddick address
3 himself to the present rules and the precedents, so you would
4 see where in any case we need to depart from those. We will
5 certainly consider the other issues.

6 Senator Scott. Reserving?

7 Senator Cannon. Yes, sir.

8 Senator Scott. All right.

9 On Rule 8 of the proposed rules, Floyd, are there any
10 provisions in the present rules for standards of evidence or
11 rules of evidence whatsoever?

12 Dr. Riddick. They are practically silent as to admissi-
13 bility of evidence or anything of that regard, except for
14 the precedents.

15 The chair does say directly the chair shall rule on this
16 subject to the Senate; there is no definitive provisions in
17 the existing rules in that regard. However, the presiding
18 officer on different occasions --

19 Senator Scott. What are the precedents as to the rules
20 of evidence applied in different cases? You referred to that
21 the other day.

22 Dr. Riddick. Well, we have a number of cases where the
23 chair has stated that he would follow the admissibility of
24 evidence as used in the courts, in making his decision, sub-
25 ject to the decision of the Senate, few rules to that extent.

1 But there have been a number of cases where the admissibility
2 was denied and which-- had been contested and admitted.

3 Senator Scott. A number of those occurred in the Johnson
4 case, did they not?

5 Dr. Eddick. Yes, a considerable number.

6 Senator Scott. Partisan and in the view of many people
7 a fairly reprehensible proceeding.

8 Absent the Johnson case, how many occasions was the
9 presiding officer overruled on matters of admissibility of
10 evidence?

11 Dr. Eddick. Well, I do not think I would be able to
12 answer that positively. I would say this, they have rulings
13 to the extent, for example, that a person -- I mean, say the
14 response, I mean the respondent attorney wanted to oppose a
15 certain question. The chair has held that he could make the
16 question, the manager could ask the question, but then he could
17 rule as to whether or not the respondent's attorney was
18 required to answer the question.

19 So they have given some guidelines but it is rather
20 difficult to draw any statements as to the nature of that
21 admissibility of evidence except the general statement they
22 try to utilize that course.

23 Senator Scott. Is it not a fact that insofar as in the
24 standard of evidence, standard of judgment on the evidence is
25 concerned, so far as it appears in these 11 impeachment

1 proceeding? That it is usually stated to be "beyond a
2 reasonable doubt"? Does that appear generally?

3 Dr. Riddick. That has been used but I would not say that
4 that is uniform.

5 Senator Scott. What other standards have been used other
6 than "beyond reasonable doubt"? If any.

7 Dr. Riddick. The Senate has voted to overrule in a few
8 instances on the admissibility in which case there is no
9 statement.

10 Senator Scott. That means there is no standard.

11 Dr. Riddick. The chair would be reversed.

12 Senator Scott. In what cases has the Senate overruled
13 the presiding officer on questions of admissibility of evidence
14 aside from the Johnson case?

15 Dr. Riddick. I would defer to the legislative counsel, I
16 mean from the Library of Congress if they have some informa-
17 tion on that.

18 I have got some in this document that is down at the
19 printers now, but I do not recall them right at the moment.

20 Senator Cannon. Do you have something?

21 Mr. Thornton. Not necessarily. Just the fact that the
22 standard of "beyond reasonable doubt" has generally been
23 applied to the quantum of proof required to convict, rather
24 than directed to the admissibility of evidence.

25 Senator Scott. I was really getting at that, as a

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1 standard of proof required to convict the general standard
2 so far as such an effort is an answer is "beyond a reasonable
3 doubt," is that not right?

4 Mr. Thornton. Standards--

5 Senator Scott. I have read that so much I would be a
6 little bit surprised to be told by counsel it is not so.

7 Mr. Thornton. The problem is there is basically no
8 standard, each Senator has to make up his own mind.

9 Senator Scott. That we know.

10 Mr. Thornton. Only information we were able to
11 glean, ordinarily after an impeachment trial, by order
12 the Senate given an opportunity to explain their vote
13 why they voted as they did, and we gleaned from reading those
14 statements the standards that these Senators said they applied
15 in these various things. And the general standard seemed to
16 have been "beyond reasonable doubt." Because of the serious-
17 ness of the vote of guilty.

18 Senator Scott. Therefore since each Senator can apply
19 such standard as he wished. Even in the presence of rules to
20 the contrary, such Senators have expressed themselves as
21 following a given standard, have more often spoken of the
22 standard on finding of guilty as being beyond a reasonable doubt
23 than on any other test.

24 Mr. Thornton. Yes.

25 Senator Scott. And have you found any test where

1 they have used the term "clear and convincing evidence" or
2 "clear and convincing proof"?

3 Mr. Thornton. No, sir. I only found really the one,
4 the gentleman applied a lower standard. But we have to
5 remember that in most --

6 Senator Scott. Only one.

7 Mr. Thornton. In most of these impeachment trials, we
8 are talking about judges too, and there is also the good
9 behavior standard that is applied there.

10 Senator Scott. Somewhat different aspect because it is
11 a judge.

12 Mr. Thornton. Even though they said "beyond reasonable
13 doubt" and the standard words seemed to imply that.

14 Senator Scott. What I am getting at is if we follow a
15 course here of recommending that the Senate adopt no standard
16 whatever, "just and reasonable men shall imply," and such as
17 "just and reasonable men then look for precedence," they are
18 more likely to find no precedence "beyond reasonable doubt"
19 than any other precedence? The answer is yes on that?

20 Mr. Thornton. Yes.

21 The reason those standards have been developed was generally
22 to explain to juries by a judge what standard they should
23 apply. But here we are talking about the judge themselves.
24 So in a real sense it is sort of up to each individual judge.
25 And this is just used to convey the sense of seriousness, you

1 know, preponderance.

2 Senator Scott. That is my argument except that I am
3 thinking of the American people as the final jury of public
4 opinion, and they will have a-- they will either have a
5 standard by which to judge votes of the Senators or they will
6 not. And if they have a standard, I am hoping that the
7 standard will be so clear and so well understood that it is
8 accepted by the American people as a suitable standard by
9 which to judge whether or not the final outcome of the trial has
10 been a fair and just outcome. Thank you.

11 But I would offer, reserve the right to offer amendments
12 at the proper time.

13 XVIII?

14 Dr. Riddick. XVII is finished.

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

19 Senator Scott. Submit a series of questions, so the
20 question number two says if your answer to question number
21 one is "yes," what is the answer to question number two?

22 In other words, can he submit a succeeding at that
23 point in writing?

24 Dr. Riddick. That was allowed in one instance, because I
25 believe -- I forget whether it was Ritter or Lauderback, that

1 very question you raised than was raised by the Senators
2 and they allowed them to ask some questions orally so that they
3 could pursue point after point, after the first answer, to
4 give a second question.

5 Senator Scott. Yes.

6 Dr. Riddick. But there is nothing that would prohibit the
7 questions from being written rapidly so that they could keep
8 submitting them in series if they wanted to. There is no
9 instructions that he would be able to pursue it.

10 Senator Cannon. Gentlemen, we are in the second half of
11 a vote, so we will recess for ten minutes.

12 (Whereupon, a short recess was taken.)

13 Senator Cannon. Committee will come to order.

14 Doctor.

15 Dr. Riddick. We stopped on number XIX. I mean, we
16 just finished that. But all questions must be put in writing.

17 Senator Byrd. Which one is this?

18 Dr. Riddick. It is on page 10.

19 Then XXV: "Witnesses shall be sworn in the following
20 form" -- that is just the regular oath they give the witness.

21 Then XVIII: "If a Senator is called as a witness,
22 he shall be sworn, and give his testimony standing in his
23 place."

24 Senator Cannon. In the precedents, were any Senators
25 called as witnesses?

1 Dr. Reddick. Yes, we have had Senators serve as wit-
2 nesses.

3 Senator Cannon. Did they in turn sit in in making the
4 judgment or did that disqualify them from --

5 Dr. Reddick. No Senator has been disqualified except
6 at his request.

7 He was not disqualified; he was excused by the Senate
8 at his request.

9 They tried very hard to disqualify Weed, of Ohio, since
10 he was President Pro Tem, and at that time under the law
11 the President Pro Tem followed the Vice President as President
12 of the United States. They felt he should not be permitted
13 to vote; he would find his way to the White House. But they
14 still allowed him to vote.

15 Senator Byrd. The alternate proposal does not provide,
16 does it, swearing the witnesses?

17 Dr. Reddick. I did not hear.

18 Senator Byrd. The alternate proposal does not provide
19 for swearing of the witness, does it?

20 Dr. Reddick. Oh.

21 Mr. Tignor. He would already be sworn in, sir. They
22 assume one swearing would be enough.

23 Senator Byrd. I see. It says -- at some point will it
24 say somewhere that he will be sworn?

25 Mr. Tignor. Senator, I think that is assumed by reason of

1 their taking the oath, to do justice in the case at the
2 beginning of the trial.

3 Senator Byrd. The witness?

4 Mr. Ticer. No, the Senator.

5 Senator Byrd. I am talking about the witnesses.

6 I did not see any reference to his being sworn in the
7 proposed language.

8 Senator Scott. "Senator or witness" or "Senator as
9 witness." Bob.

10 Senator Byrd. A witness, though, called by either party
11 has to be sworn.

12 Senator Scott. No, I do not find--

13 Mr. Ticer. There is nothing in the analysis either,
14 sir, that indicates the witness would be sworn.

15 Senator Scott. There is a question in the proposed
16 rules on another matter.

17 Senator Allen. Here it is, Rule 8, (c) (4), where the
18 Senator takes an oath as a witness.

19 Senator Byrd. But there is no provision for a witness
20 taking the oath. Whereas, in the present rules, it even
21 describes the form of the oath that will be given to the
22 witness.

23 Senator Cannon. I am sure it is an oversight. The wit-
24 ness certainly would have to be sworn.

25 Senator Scott. That refers to some oath --

1 Senator Byrd. Oath Given to the Senator.

2 Senator Scott. I see. Initial oath.

3 That provides the first session, Senators shall be sworn
4 in the impeachment proceeding.

5 On page 10, I will just read it, question of the right to
6 cross-examine the hostile witnesses, do not put it in the
7 rules; it is pretty important, the presiding officer needs to
8 make a finding if that needs to be done.

9 Do you have precedent on it, Floyd?

10 Examination and cross-examination, "A party may inter-
11 rogate any unwilling or hostile witness by leading questions."

12 Bottom of page 10, proposed rules.

13 Dr. Riddick. Leading question -- I do not know anything
14 about hostile witnesses, cross-examination of hostile witnesses.
15 I did not think -- we have something on leading questions.

16 Senator Scott. What are your precedents on leading
17 questions?

18 Senator Cannon. We will see if we can find it again in
19 just a second.

20 Mr. Thornton. It was disallowed.

21 Senator Cannon. What was that?

22 Mr. Thornton. Recognized rules of evidence, rules on
23 the trial, admonish --

24 Senator Scott. I cannot hear you, there is so much
25 activity going on all over the world.

1 Mr. Thornton. Under recognized rules of evidence, leading
2 questions were ruled out in trial of impeachment. Witnesses
3 admonished to follow established procedure, Judge Archibald 1912.

4 Senator Scott. It is established procedure, to present
5 leading questions if the witness turns out to be hostile.

6 Just wonder whether we want to ignore it the way it hap-
7 pens? A witness is called by one party, he turns out to be
8 hostile. The party asks for privilege to cross-examine him as
9 a hostile witness. We are all familiar with that.

10 The proposed rule does not provide for that. I do not see
11 provision in the present rule.

12 Sen. Cannon. My own feeling is we are not going to have
13 to go to the extent of drafting a detailed rule concerning
14 examination of witnesses. The presiding officer shall have
15 a right to rule on that question and if the Senate does not
16 agree, appeal can be taken.

17 I think if we are going to go in that detail, we have to
18 come up with something similar to the federal rules of civil
19 procedure.

20 Discussion on that, Doctor?

21 Dr. Riddick. The next thing is on page 12, under the
22 present rules, that is form of subpoena first, which I see
23 no reason to read that.

24 But Rule XXV: "All process shall be served by the
25 Sergeant at Arms of the Senate, unless otherwise ordered by

3
1 a criminal trial.

2 I think it does partake in nature at least in part
3 of a criminal trial. If you leave the "accused" in, I would
4 still argue for application of the rules of evidence for
5 criminal court.

6 Senator Cannon. I would agree, if we took the words out,
7 row 10 below, if the person impeached after service shall
8 fail to appear, either in person or by attorney, that would
9 eliminate the question completely.

10 Senator Scott. He has been called "respondent" in
11 other trials, has he not, Floyd?

12 Dr. Riddick. Yes, sir, regularly.

13 Senator Scott. Regularly.

14 Senator Cannon. Personally I would have no objection to
15 that.

16 All right, Doctor.

17 Dr. Riddick. Rule X: "The person impeached shall then
18 be called to appear and answer the articles of impeachment
19 against him. If he appear, or any person for him, the
20 appearance shall be recorded, stating particularly if by
21 himself, or by agent or attorney, naming the person appear-
22 ing and the capacity in which he appears. If he do not appear,
23 either personally or by agent or attorney, the same shall
24 be recorded."

25 I think we have had one case in which this latter existed,

1 nobody appeared.

2 Senator Scott. Vicar?

3 Dr. Riddick. There must have been two.

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

8 Now, that is different from where the other questions
9 were to be put by the chair.

10 Senator Cannon. Put by the chair.

11 I think we are getting back to that other one, the
12 draft might want to say "put at the direction of the chair."
13 or something like that.

14 Senator Scott. That is what it said.

15 Senator Cannon. On the earlier rule, though, we were
16 talking about the question submitted by one of the Senators.

17 Senator Scott. Yes.

18 Senator Cannon. The question should be put by the chair.

19 Dr. Riddick. XXI: "All preliminary or interlocutory
20 questions, and all motions, shall be argued for not exceeding
21 one hour on each side, unless the Senate shall, by order,
22 extend the time."

23 Senator Byrd. That is argument by counsel for the parties.

24 Senator Cannon. Correct.

25 Dr. Riddick. Counsel and the managers.

1 Senator Cannon. Correct.

2 Dr. Riddick, XXII: "The case, on each side, shall be open-
3 ed by one person. The final argument on the merits may be
4 made by two persons on each side (unless otherwise ordered by
5 the Senate upon application for that purpose), and the argu-
6 ment shall be opened and closed on the part of the House of
7 Representatives."

8 Senator Byrd. It appears in the Johnson trial, two weeks
9 before the final argument, I see the proposed rules would sug-
10 gest that upon recommendation to the Chief Judges and the Deputy
11 Chief Judges, there may be imposed reasonable limitations on
12 opening and closing arguments. I should think the Senate would
13 be able to work its own will under the present rules in that
14 regard.

15 Senator Cannon. Well, the Senate has adopted orders on
16 both counts, in some cases to limit a number and in other
17 cases to limit the time.

18 Senator Scott. We have jurisdiction.

19 Dr. Riddick. The Senate did, yes.

20 XIV: "The Secretary of the Senate shall record the pro-
21 ceedings in cases of impeachment as in the case of legisla-
22 tive proceedings, and the same shall be reported in the same
23 manner as the legislative proceedings of the Senate."

24 That, of course, does not include the closed under this
25 present-- sorry.

1 Senator Scott. For our purposes -- I think if for no
2 other reason, we should provide here for the recording of the
3 executive session. We have lost some very valuable material
4 for historical purposes in cases where that was not done.
5 That is why I raise a question.

6 Senator Byrd. I agree with that. I believe you skipped
7 one, Doctor.

8 Dr. Riddick. Yes, I did. I will go back.

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

13 Senator Byrd. Mr. Chairman, I would hope we would get a
14 memorandum from the people of the Library of Congress making
15 whatever observations they may find to be appropriate and then
16 the size of the number of centers required to close the door.
17 This would appear to be the place if he wants to make it by
18 other than majority vote.

19 It might be good if we had it closed in common, as to why
20 there should be a closed--

21 Senator Scott. Both sides.

22 Senator Cannon. Would you gentlemen take care of that?

23 Senator Scott. Including the essential question of fairness
24 to all parties concerned.

25 Dr. Riddick. XXIV: "All the orders and decisions shall

1 be made and had by yeas and nays, which shall be entered
2 on the record."

3 Senator Byrd. Why should we not have them unless otherwise
4 ordered? As to their being made by yeas and nays?

5 "...had by yeas and nays unless otherwise ordered"?

6 Senator Scott. I think that is all right.

7 Senator Cannon. I think that is better.

8 Dr. Riddick. This is only part of XXIV.

9 Senator Cannon. All right.

10 Dr. Riddick. The last one, XXIII: --

11 Senator Allen. Wording on XXIV there, "had by yeas and
12 nays unless otherwise ordered", the Constitution, of course,
13 gives the right to prevent yeas and nays.

14 Dr. Riddick. Right.

15 Senator Byrd. Yes.

16 Senator Cannon. If it is ordered as a result of a re-
17 quest, unanimous consent request, then the yeas may not be
18 required. That would be "as otherwise ordered."

19 Senator Scott. You can nitpick by saying "as otherwise
20 lawfully ordered." That is confusing.

21 Senator Allen. No, the question -- maybe this "yeas and
22 nays unless otherwise ordered" --- just reverse what you have
23 there.

24 Senator Cannon. I see what you mean.

25 Senator Scott. You mean should begin unless otherwise

1 ordered.

2 Senator Cannon. "May be had by yeas and nays unless other-
3 wise ordered."

4 What Senator Allen is pointing out, you would have to go
5 through the process to order the yeas and nays under the
6 present proceeding. However, we do have a proceeding else-
7 where in here that the final decision has to be by yeas and
8 nays as well.

9 Senator Scott. That should not begin unless otherwise
10 ordered.

11 Senator Allen. I do not think that is the point.

12 Senator Cannon. Do not get to the point.

13 Senator Allen. The point is if they are not by yeas and
14 nays unless 20 percent called for them, and then they have a
15 right to do that, they have a right to demand the yeas and
16 nays, 20 percent do. You would not have any right to say they
17 should be by yeas and nays.

18 Senator Byrd. Get a voice vote here, if any Senators
19 demand yeas and nays under the Constitution, he has that
20 right.

21 Jim, are you fearful we might--

22 Senator Allen. No, I was just thinking of the wording of
23 it.

24 Here you have just got the reverse of what the Constitu-
25 tion calls for.

1 Senator Cannon. If Rule XXIV were considered in its
2 entirety, that might answer Senator Allen's question there.

3 This is only a small portion of Rule XXIV.

4 Dr. Riddick. Do you want me to read the whole?

5 "All the orders and decisions shall be made and had by
6 yeas and nays, which shall be entered on the record, and with-
7 out debate, subject, however, to the operation of Rule VII,
8 except when the doors shall be closed for deliberation, and in
9 that case no member shall speak more than once on one ques-
10 tion."

11 Then it goes on to details of the question, how much
12 debate.

13 Senator Dyer. What this is doing is requiring a yeas
14 and nays vote, which ordinarily would only be called on
15 Constitutionally -- sustained by one-fifth of those present.

16 Here if we go into this rule, this means we have to
17 have the yeas and nays unless by unanimous consent they are
18 withdrawn, do we not?

19 Senator Allen. Yes.

20 Dr. Riddick. In effect, that is what it amounts to.

21 Senator Cannon. Well, suppose we give some thought to
22 that over the weekend and we can determine what ought to be
23 done.

24 The remainder of Rule XXIV appears in two different
25 places here.

75 1 Dr. Riddick. Yes.

2 Senator Cannon. All right, Doctor.

3 Dr. Riddick. Rule XIII, only a portion of that also:
4 "but if the person accused in such articles of impeachment
5 shall be convicted upon any of said articles by the votes
6 of two-thirds of the members present, the Senate shall pro-
7 ceed to pronounce judgment, and a certified copy of such
8 judgment shall be deposited in the office of the Secretary
9 of State."

10 That is why I was raising the question even though that
11 precedent said on the portion of an article, that he is con-
12 victed of the whole article.

13 It might be clear to spell it out one way or the other.
14 It might be better, clearer, if it were spelled out.

15 Senator Allen. Let's close it -- suppose he was convic-
16 ted on the first article, that would result in conviction.
17 This would seem to indicate that-- just stop right there and
18 pronounce judgment. Of course, the rest of it would be
19 moot as far as that is concerned.

20 Would you go ahead with the other articles?

21 Senator Cannon. No, I think it is quite clear if he is
22 convicted on one article, that would end it right then and
23 there.

24 Senator Cannon. No, that is not the precedence. They
25 have gone on through every one.

6 1 Senator Scott. In Johnson's case, they went on to
2 conviction.

3 Senator Cannon. Conviction.

4 Dr. Riddick. No, I am talking about in the case of the
5 President, there was no conviction, but in other cases they have
6 convicted as many as five in one instance, five articles,
7 voted for five articles to convict a judge.

8 Senator Allen. What judge would pronounce judgment
9 on other than the actual vote?

10 Dr. Riddick. Just a minute, I am trying to find this.

11 Senator Scott. You say pronounce judgment on such, then
12 you would leave abicast a strong inference.

13 Senator Cannon. Judgment incases of impeachment shall
14 not extend further than removal from office and disqualifica-
15 tion from holding and enjoying any office of honor, trust, or
16 profit under the United States.

17 What is the Constitution.

18 Dr. Riddick. Well, there is another which it seems to
19 me the comparison here, 13 vs. XXIII there, I was just trying
20 to find or locate this other proviso in the Constitution.

21 This Rule 13 says: "Upon the concurrence of two thirds of
22 the Members present that an article or articles shall be sus-
23 tained, the clerk of Court, unless the Court upon recommenda-
24 tion of the Chief Judges and the Deputy Chief Judges otherwise
25 orders, shall forthwith prepare, sign, and enter the maximum

1 judgment authorized by the Constitution of the United States,
2 without awaiting any direction by the Court."

3 The Constitution -- the other one, the Constitution gives
4 them too as they did in this article here, order that the
5 respondent Archibald, Judge Archibald, Circuit Judge of the
6 United States from the Third District, Third Judicial Circuit,
7 and designated to serve in the Commerce Court, be removed from
8 office and forever disqualified from holding and enjoying
9 any office of honor, trust, or profit under the United
10 States.

11 So under this rule, my interpretation would be that he
12 would get both shots like that at once; that is maximum.

13 Senator Byrd. If there was anything we could be criti-
14 cised for, that would be it. Concurrence two thirds present,
15 that an article or articles shall be sustained.

16 Article III, Section 4 of the Constitution, says:
17 "upon impeachment for and conviction of," he "shall be removed
18 on impeachment for and conviction of."

19 That is all that section says. It provides for removal.
20 There is no way to get around removing.

21 Dr. Riddick. That is right.

22 Senator Byrd. But that section does not say, ipso facto,
23 he shall be disqualified from holding or enjoying any office
24 of honor, trust, or profit of the United States. That is
25 under another section.

8
1 Dr. Riddick. That is right.

2 Senator Byrd. The Senate may go ahead and make that
3 decision by a majority vote.

4 But this thing here says once the articles are sustained,
5 which to me means automatic removal, it is also going to auto-
6 matically disqualify him.

7 Senator Scott. I agree with you, it needs a separate
8 judgment.

9 Dr. Riddick. In the Hatter case, they voted on both, found
10 him guilty for removal, but they voted against disqualifying
11 him.

12 Senator Byrd. Look who is going to do it here -- clerk
13 of the court.

14 Dr. Riddick. Secretary.

15 Senator Byrd. Clerk of the Court shall forthwith prepare,
16 sign, and enter the maximum judgment.

17 Senator Scott. Oh, yes, I agree with you, that is con-
18 cern and it goes beyond. It may well prove to be the
19 intent of some -- at least it ought to be a provision made
20 for separate action if the Senate determines to take it.

21 How do you do it?

22 Senator Byrd. Under the present rules?

23 Senator Scott. Yes, we pronounce judgment.

24 Senator Cannon. Certified copy --

25 Senator Scott. Here the present rules are superior to

1 the proposed rules.

2 Senator Allen. Do you go on with the rest of the article?

3 Senator Byrd. Need not. You can or you need not.

4 Dr. Riddick. That is correct. In the case of Johnson,
5 they voted on three, they had not acquitted. They had how
6 many, nine? Eleven?

7 Senator Allen. If one is voted, the way they are talking
8 about doing it is having a division of those items so that
9 actually under that, then, under this, conviction would occur on
10 one of the divided items, just might be--

11 Dr. Riddick. That is under the precedents.

12 Senator Allen. That would be a question. It looks to
13 me like you would think you would just have a little silver of
14 the proceeding, have conviction on just one little specifica-
15 tion there, it would seem to me.

16 How many separate items are there?

17 Senator Scott. Fifteen; nine, five, and one.

18 I agree with you.

19 Senator Allen. It looks to me like this ought to be voted
20 up and down.

21 Senator Scott. I think so, too.

22 If the other arguments have any weight we heard here today,
23 namely, we could only carry out the judgment of the House, the
24 judgment of the House is that he shall be impeached upon one
25 or more offenses. But the Senate will have to try him and find,

1 one, whether he is guilty of one or more of those offenses, but
2 not by voting on any of them separately, but by making a deci-
3 sion on Article I. If, Senator so-and-so, believe he is guilty
4 on one or more. Same with Article II.

5 Senator Allen. I agree with that.

6 Senator Cannon. Except the division.

7 Senator Allen. If you impeach on the fifteenth of the
8 body of the accusations, it looks to me like that might not
9 stand the scrutiny of public opinion.

10 Senator Scott. That is what I am worried about.

11 If you here take what is legally the least of the charges
12 but pragmatically, depending on public opinion, one of the
13 most awful evidence of callousness or disregard or whatever
14 that does not amount normally to impeachment standing alone,
15 then public opinion is, like you say, well, they really should
16 let him have it for little or nothing. How do you know any
17 President will be even remotely protected in the future from
18 a charge he did not bring the milk bottles in from the rain,
19 whatever it is?

20 Senator Cannon. Gentlemen, that will be something for
21 us to give thought to and consider when we have the Senators
22 appear before us.

23 Incidentally, we will recess until ten o'clock Monday
24 morning and we will have some Senators to appear then, and
25 after we adjourn, then we can continue with our discussions.

31 1 We also will have a session on Tuesday, Wednesday, and
2 hopefully in those three days we will be able to have heard
3 all of the Senators who want to appear and will be prepared
4 to really get down to working on the substantive matters.

5 Yes.

6 Senator Byrd. Mr. Chairman, may we have order.

7 Senator Cannon. May we have order, please.

8 Senator Byrd. Of course, if it is necessary to have
9 three days of hearings, I say fine. But I hope we will not--
10 it seems to me we ought to have one day of hearings or two.

11 If you have to have three, fine. But the time is so
12 valuable, every one of us, I would hate to hold out the oppor-
13 tunity for three days of hearing.

14 Number two, the business of the articles, it may be,
15 this is just a food for thought, it may be that there is one,
16 to write into the impeachment in the case of a President --
17 that is the only office that offers that -- the real danger
18 from the standpoint of revolution, civil strife, unrest, and
19 so on -- in the case of impeachment of a President, that
20 notwithstanding other events, do not have to put in notwith-
21 standing, that no article would be too divisible, notwithstand-
22 ing the other rules, no article would be divisible.

23 And we ought to also be careful of one other thing; that
24 is, with regard, Howard, that once we start voting on articles
25 of impeachment, if we do, it ought to be all in one day, and

1 not have, as they did in the Johnson trial, it happens to be
2 all right in that case because they did not vote to convict,
3 but if we were to vote to convict on Article I and then went
4 over till the next day to vote on Article II, the man is already
5 convicted. And who is President?

6 He says he shall be removed upon conviction. Well, he
7 is theoretically removed right then; the Vice President
8 has not been sworn in. This country is without a leader. You
9 will have two claimants for the office. And I think whatever
10 we do, when we get down to voting, whether it is unanimous
11 consent or by the rule, in the case of impeachment of the
12 President, once you start on voting on these articles, you
13 ought to complete them that day.

14 Go as far as you are going to vote on them. If you are
15 not going to vote on all eleven, only vote on three, vote on
16 those three and that is all.

17 Senator Scott. I can see the merit of that issue if
18 you can control it. Because of the time limitations, people
19 have only so much time.

20 Actually removal is judgment lodged with the Secretary.
21 But you have got a good point, we ought not drag these things
22 over a night or passage of a night if we can avoid it.

23 Senator Byrd. Hugh, do you have precedence for that,
24 in case of impeachment of a President?

25 I know you have not. But do you have precedence of that

33 1 impeachment of any civil officer, he is not removed; at the
2 end he is convicted?

3 Senator Cannon. Do not say upon conviction and delivery
4 of the President to the Secretary, which might be ten days
5 later.

6 Mr. Wicken. I believe in the debate in the Senate on
7 the rules of the President Johnson situation, it was under-
8 stood that removal would occur upon conviction.

9 Senator Byrd. That is right. That is what the Consti-
10 tution says.

11 Mr. Celada. There is an expression by one of the Senators,
12 two-thirds vote operated automatically to cast him from office.

13 Now you have provision of section 1 of Amendment XXV of
14 the Constitution that, upon death, resignation, or removal
15 from office, the Vice President becomes President.

16 Senator Scott. But only after taking the oath.

17 Mr. Celada. Sir, this is chicken-and-egg argument once
18 again, but the Constitution says "the President takes the oath."
19 He is already President when he takes the oath.

20 Senator Scott. I think that is true.

21 Senator Byrd. Wait a minute, I am talking about the
22 Vice President.

23 Senator Scott. I think when Harding died, Calvin Coolidge
24 was President before his father swore him in in that little
25 Vermont schoolhouse.

1 Senator Byrd. He would never be required-- he could
2 wait ten days to take that oath? Anyhow that is --

3 Senator Cannon. Those are side issues.

4 One thing here before I get -- the Library has made
5 available for us copies of two of the most recent trials of
6 impeachment, one of Harold Lawler and one of Ritter.
7 You have those so you may have a copy available to review.

8 Mr. Thornton. This material being handed out is just
9 the preliminary proceeding that led up to the actual conduct
10 of the trial, so you can see how --

11 Mr. Ticken. Orders and motions were carried.

12 Dr. Middlek. Senator, that point you raised about his
13 automatic -- there not only have been expressions to that
14 extent, but even in adopting the resolution where they had
15 both parts, they said there was no need to vote again on re-
16 moving him from office because he was already out. That was
17 the resolution they adopted after they had voted to convict
18 you see.

19 Senator Cannon. To get back to your question on three
20 days of hearing witnesses, we have Senators who said they
21 would be ready Monday to present their views; the group before
22 we talked of said they would not be prepared and could they
23 appear Tuesday afternoon. So that was the reason for my
24 saying we will try to hold the meetings three days, not
25 necessarily hearings three days.

35

1 Senator Scott. Is Senator Taft going to be heard on
2 Tuesday rather than Monday? He mentioned to me at luncheon.

3 Senator Cannon. No, he has not.

4 Senator Byrd. One quick question. What will we be doing
5 in the next working session? Not the hearing; next working
6 session.

7 Senator Cannon. Well, I would envision that as soon
8 as we have heard from the witnesses we are going to hear, the
9 Senators, then our working session would consist of deciding
10 are we going to go accept the old rules as we may modify them
11 and work with them, or are we going to start with a fresh new
12 batch of rules?

13 When that decision is made, then to start one by one and
14 going through the rules, try to solve them and settle them,
15 finally,

16 So that we do not have them hanging fire.

17 Senator Byrd. Would it not be well to know now?

18 Senator Scott. Preparatories are little -- judges follow
19 the election returns. I am following the election returns.
20 I think we ought to decide right now you are going to start
21 on the basic present rules and consider the amendment thereto.

22 Dr. Haddock. Mr. Chairman, may I support Senator Byrd's
23 point. The Constitution specifically reads: Before he
24 enter on the execution of his office, he shall take the follow-
25 ing oath or affirmation.

1 So technically he has no authority. That is why they
2 have on some Sundays before Inauguration administered an
3 oath to the President, in case a riot happened in the meantime.

4 Senator Byrd. I move in the next working session
5 the committee proceed on the basis of using the standing
6 impeachment rules as a working text, to be amended, modified,
7 revised, or approved as the committee sees fit.

8 Senator Cannon. Second? that motion?

9 (The motion was duly seconded from the floor.)

10 Senator Scott. I am sure.

11 Senator Cannon. All in favor say "aye."

12 (Chorus of "ayes.")

13 Senator Cannon. Opposed "no."

14 (No response.)

15 Senator Cannon. Unanimously approved.

16 Senator Scott. Does this motion contemplate finishing
17 the rules and the amendments thereto, then we are free to
18 consider new rules in addition thereto that may come up?

19 Senator Byrd. Even as we are considering the old rules.

20 Senator Scott. Even as we are considering the old rules.

21 Senator Cannon. The committee will stand in recess until
22 ten o'clock Monday morning.

23 (Whereupon, at 5:20 o'clock, p.m., the committee recessed
24 to reconvene at 10:00 o'clock, a.m., Monday, August 5, 1974.)