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PETER GRUBER RULE OF LAW CLINIC

Presidential Impeachment Trial: *What a Senator Should Know*

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MEMORANDUM

TO: Members of the U.S. Senate
FROM: Russ Feingold (D-WI 1993-2011) and Chuck Hagel (R-NE 1997-2009)
DATE: December 5, 2019
RE: Presidential Impeachment Trial: What a Senator Should Know

Dear Senators:

Barring unforeseen events, you will soon participate in an historic Senate trial to decide the solemn question of whether the President of the United States should be removed from office. This will be only the third Senate presidential impeachment trial in U.S. history, and the first in twenty years; it will also be the first that raises the question of national security misconduct. From both sides of the aisle, we participated in two prior impeachment proceedings—one of a sitting President—and became familiar with the arcane constitutional law of this area.¹ With hopes that our experience will be useful to you, we have prepared the attached memorandum summarizing the Senate’s rules regarding the roles and obligations of U.S. senators in a presidential impeachment trial.² We offer this memorandum to you and your staff with respect and appreciation for your serious and important work ahead. We hope that this information will give helpful and unbiased guidance as the trial unfolds.

As you know, Article I of the Constitution provides that “[t]he Senate shall have the sole Power to try all Impeachments.”³ Upon “[i]mpeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors,” the President shall be removed from office.⁴ Only two Senate presidential impeachment trials—of Andrew Johnson and Bill Clinton—have occurred in U.S. history, and neither achieved the necessary two-thirds vote for removal.⁵ The specific discussions of presidential impeachments in Articles I and II establish the broad contours of a senator’s constitutional duty to hear impeachments concerning the President.⁶ But the Constitution is virtually silent on the procedures to be followed in Senate impeachment trials.⁷ Instead, it allows such

¹ As U.S. Senators, we both participated in the impeachment trial of President Bill Clinton in 1999, and Judge Thomas Porteous in 2010. In 1974, one of us (Hagel) also served as chief of staff to John Y. McCollister (R-NE) and from that vantage point, closely observed the impeachment proceedings of Richard Nixon. Appendix 6 includes press articles about each of our experiences with presidential impeachment trials.

² This memorandum has been prepared with the assistance of the students at the Yale Law School Peter Gruber Rule of Law Clinic. We are grateful to Professors Joel Goldstein and Harold Hongju Koh for their close review of this document.

³ U.S. CONST. art. I, § 3. All constitutional text pertaining to impeachment is reproduced in Appendix 4.

⁴ U.S. CONST. art. II, § 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”).

⁵ President Johnson was tried for violation of the Tenure of Office Act, and the Senate vote failed to reach 2/3 by one vote. Senate votes on two Articles to remove President Clinton from office fell well short of two-thirds: 45–55 on the charge of obstruction of justice and 50–50 on the charge of perjury.

⁶ U.S. CONST. art. I, § 3, cl. 6 (“When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside); U.S. CONST. art. II, § 2 (“The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”).

⁷ See U.S. CONST. art. I, § 3, cl. 6-7.

trials to be governed by the roadmap established by the “Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials” (Rules of Procedure) last amended in 1986.⁸

This memorandum is divided into four sections and six appendices.⁹ Section I describes the issues likely to arise, and the specific procedures that will guide, during the Senate’s impeachment trial. Section II presents a timeline—based on the U.S. Constitution and past Senate resolutions and precedents—as to how a Senate trial is likely to proceed. Section III explores the ways in which an impeachment trial could be avoided or shortened, concluding that it would be inconsistent with both precedent and senators’ constitutional duties to avoid holding a full impeachment trial. Finally, Section IV gives our best answers to specific questions that might arise for senators during the impeachment trial. The appendices provide documents cited throughout this memorandum as well as our recent commentary.

I. RULES AND PROCEDURES GOVERNING SENATE IMPEACHMENT TRIALS

A. Initial Events in a Senate Impeachment Trial

The Rules of Procedure outline the five initial actions the Senate must take on **Day One** of the impeachment trial. First, upon receiving notice that the House of Representatives have appointed managers to conduct an impeachment trial, the Senate must “immediately inform the House of Representatives” that it is ready to receive the managers.¹⁰ Second, the House managers must arrive and be introduced.¹¹ Third, the Sergeant at Arms must issue a proclamation requiring senators to remain silent while the House of Representatives is making its case.¹² Fourth, the House managers must exhibit the Articles to the Senate.¹³ Fifth, the Chief Justice must arrive and be sworn in as the Presiding Officer.¹⁴

On **Day Two**, the Rules of Procedure state that the Senate must “proceed to the consideration” of the articles of impeachment.¹⁵ The trial should proceed “day to day (Sundays excepted) . . . until final judgment shall be rendered.”¹⁶

⁸ *Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials*, S. Res. 479, 99th Cong. (as revised by Senate, Aug. 16, 1986) [hereinafter *Rules of Procedure*] (included in Appendix 1).

⁹ The appendices are organized as follows: (1) Appendix 1 provides the text of the Rules of Procedure; (2) Appendix 2 provides the text of Senate Resolution 16—the “writ of summons” that also set a detailed agenda for President Clinton’s impeachment trial; (3) Appendix 3 provides a timeline of votes from President Clinton’s impeachment trial; (4) Appendix 4 reprints the constitutional provisions on impeachment; (5) Appendix 5 provides specific voting data from President Clinton’s 1999 impeachment trial with respect to all U.S. Senators currently still sitting and (6) Appendix 6 includes two recent press articles in which the authors of this memorandum (Feingold and Hagel) reflect on their experience with presidential impeachment.

¹⁰ Rules of Procedure, § I.

¹¹ Rules of Procedure, § II; 145 CONG. REC. 272 (1999).

¹² *Id.*

¹³ Rules of Procedure, § II; 145 CONG. REC. 272-73 (1999).

¹⁴ U.S. CONST. art. I, § 3, cl. 6 (“When the President of the United States is tried, the Chief Justice shall preside . . .”); Rules of Procedure, § IV; 145 CONG. REC. 274 (1999).

¹⁵ Rules of Procedure, § III.

¹⁶ *Id.*

1. Senate Resolution 16

As an additional important threshold step, Rule of Procedure VIII provides that the Senate will issue “a writ of summons . . . to the person impeached.”¹⁷ By this summons, the Senate is required to “recit[e] [the] articles, and notify[] [the person impeached] to appear before the Senate upon a day and at a place to be fixed by the Senate and named in such writ, and file his [or her] answer to said articles of impeachment, and to stand to and abide the orders and judgments of the Senate thereon.”¹⁸ During President Clinton’s impeachment trial, Rule VIII’s summons requirement proved particularly important because the Senate satisfied the requirement to issue a “writ of summons” by passing Senate Resolution 16, which then outlined the detailed timeline of the trial.¹⁹ Among other things, Senate Resolution 16 documented the dates and timing requirements for various events throughout the trial, including the initial presentation, the debate over a motion to dismiss, and the subpoenaing of witnesses.²⁰ In particular, Senate Resolution 16 provided (1) for equally timed arguments by both parties throughout the Trial; (2) that “the time for depositions shall be agreed by both leaders,” and (3) that “[n]o testimony shall be admissible in the Senate unless the parties have had an opportunity to depose such witnesses.”²¹

On January 8, 1999, the Senate introduced Resolution 16 and immediately adopted it by unanimous consent.²² **We recommend that today’s Senators pass a similar, bipartisan resolution.** The Senate’s unanimous adoption of the trial timeline and procedures outlined in Senate Resolution 16 highlights three core ideas that senators should consider when developing the writ-of-summons resolution, pursuant to Rule of Procedure VIII: (1) it is the uncontroversial duty of all senators to hear presidential impeachment trials; (2) the timetable outlined in a writ-of-summons resolution is reasonable to both parties of the trial; and (3) the writ-of-summons resolution is designed to govern the presidential impeachment trial in a fair, bipartisan manner, without favoring either political party.

B. Oaths

In the context of impeachment, as Chief Justice William Rehnquist ruled in the Clinton trial, “[t]he Senate is not simply a jury. It is a court in this case.”²³ Accordingly, all senators swear to uphold two, interconnected oaths to the Constitution and impartial justice.²⁴ The first, senatorial oath has already been administered: when each senator is first sworn into office, he or she takes a specific oath (senatorial oath) that is grounded in the Constitution:

¹⁷ Rules of Procedure, § VIII.

¹⁸ *Id.*

¹⁹ S. Res. 16, 106th Cong. (1999) (reprinted in Appendix 2).

²⁰ *Id.*

²¹ S. Res. 16, 106th Cong. (1999).

²² 145 CONG. REC. 353-54 (1999).

²³ 145 CONG. REC. 580 (1999).

²⁴ U.S. CONST. art. I, § 3, cl. 6 (“When sitting for that Purpose [of trying impeachment, the Senators] shall be on Oath or Affirmation.”).

I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter: So help me God.²⁵

Crucially, this first oath is to support the Constitution—not party or constituents—and senators pledge to defend the Constitution against foreign “*and domestic*” enemies. Because a presidential impeachment lies at the heart of a senator’s constitutional responsibility, senators considering or conducting a presidential impeachment trial are bound above all by their duty to the Constitution.

But second and significantly, a senator’s oath of office alone is deemed constitutionally insufficient to execute his or her duties during an impeachment trial. Pursuant to the Constitution²⁶ and Rules of Procedure,²⁷ senators must take a *second* oath of impartiality (impeachment oath) immediately before, and particularly with respect to, an impeachment trial:

I solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of _____, now pending, I will do impartial justice according to the Constitution and laws: So help me God.²⁸

This oath makes explicit that **in the context of trying a particular President, senators must be bound by a sense of impartial duty to the country and the Constitution, and put aside any political motivations in order to fulfill their constitutional duties.**

C. The Chief Justice’s Role

For any presidential impeachment trial, the Chief Justice of the U.S. Supreme Court sits as the Presiding Officer. The Rules of Procedure grant the Chief Justice the authority to make or issue “orders, writs, mandates and precepts”²⁹ authorized by the Senate’s Rules of Procedure and task him or her with “ruling on all questions of evidence.”³⁰

Precedent indicates that the Chief Justice may break ties in votes on procedural matters. During the Senate impeachment trial of President Andrew Johnson, for example, Chief Justice

²⁵ United States Senate, *Oath of Office*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm. This oath is consistent with the Constitution’s requirement that senators “shall be bound by Oath or Affirmation, to support this Constitution.” U.S. CONST. art. VI.

²⁶ U.S. CONST. art. I, § 3, cl. 6 (“When sitting for that Purpose, they shall be on Oath or Affirmation.”)

²⁷ Rules of Procedure, § XXV (Form of oath to be administered to the Members of the Senate and the Presiding Officer sitting in the trial of impeachments).

²⁸ *Id.* See also 145 CONG. REC. 274 (1999) (recording oath administered to senators by Chief Justice Rehnquist prior to the Clinton impeachment trial).

²⁹ Rules of Procedure, § V.

³⁰ Rules of Procedure, § VII. See also *infra* Section I.E.

Salmon Chase voted to break the tie on a procedural issue. Senators introduced a motion to strip him of this authority, but it failed to receive a majority vote.³¹

During the Senate impeachment trial of President Clinton, Chief Justice Rehnquist saw his role as primarily ministerial;³² he conducted Court business in the mornings and supervised all impeachment hearings in the afternoons. Chief Justice Rehnquist relied heavily on the Senate Parliamentarian, and his actions as Presiding Officer were even-handed and uncontroversial. His major ruling over the course of the proceedings affirmed an objection to the House managers' use of the word "jurors" to describe members of the Senate.³³

D. Committee Procedure

Significantly, Rule XI discusses the use of a committee as a substitute for an open Senate trial. **While committees have been used in four of the sixty non-presidential impeachments to date,³⁴ they have never been used in a presidential impeachment.³⁵** While operating under the same Rules of Procedure, the 1999 Senate never even considered delegating the trial to a committee. This precedent reaffirms that hearing presidential impeachment trials is a distinctly important, constitutional responsibility that must be carried forward by the Senate as a whole.³⁶

³¹ See DAVID O. STEWART, *IMPEACHED: THE TRIAL OF PRESIDENT ANDREW JOHNSON AND THE FIGHT FOR LINCOLN'S LEGACY* 197 (2009); John Fay Philbin, Master's Thesis, *The Supreme Court and the Struggle for Judicial Independence, 1860-1873*, LOYOLA ECOMMONS 59-60 (1949) https://ecommons.luc.edu/luc_theses/798; Linda Greenhouse, *Impeachment Issues IV*, N.Y. TIMES (Jan. 29, 1999), <http://movies2.nytimes.com/library/politics/sco-tus/articles/012999greenhouse-column.html>.

³² Joan Biskupic, *The Rehnquist Files: How the Last Chief Justice Handled an Impeachment Trial*, CNN (Sept. 29, 2019), <https://www.cnn.com/2019/09/29/politics/william-rehnquist-impeachment-trial-senate/index.html>.

³³ *Id.*

³⁴ Committees were used in the impeachments of Judges Thomas Porteous (2010), Walter Nixon (1989), Alcee Hastings (1988-89), and Harry Claiborne (1986). SUSAN NAVARRO SMELCER, CONG. RESEARCH SERV., R4117, *THE ROLE OF THE SENATE IN JUDICIAL IMPEACHMENT PROCEEDINGS: PROCEDURE, PRACTICE, AND DATA* (2010), <https://fas.org/sgp/crs/misc/R41172.pdf>. Salmon Chase, who is the only Supreme Court Justice to have been impeached, was impeached in 1804, but acquitted by the Senate. Of the fourteen federal judges who have been impeached, eight have been convicted by the Senate and removed.

³⁵ According to Rules of Procedure, § XI, if a committee is so used, the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine. Thereafter, the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

- Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed.
- [N]othing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.
- The Senate has "the right . . . to determine competency, relevancy, and materiality of testimony."
- The committee shall "report to the Senate in writing a certified copy of the transcript of the proceedings."

³⁶ U.S. CONST. art. II, § 4 ("The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

E. Technical Trial Rules

The Rules of Procedure also detail a number of important technical rules that govern the Senate’s Impeachment Trial. Of these rules, the following are most relevant to senators:

First, Rule VII establishes that **the Chief Justice shall decide all questions of evidence**, subject to the Senate’s ability to override the decision by vote:

The Presiding Officer on the trial may rule on all questions of evidence including, but not limited to, questions of relevancy, materiality, and redundancy of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision without debate; or he may at his option, in the first instance, submit any such question to a vote of the Members of the Senate. Upon all such questions the vote shall be taken in accordance with the Standing Rules of the Senate.³⁷

Second, Rule XVI establishes that **“all motions, objections, requests, or applications” made by parties or their counsel—whether procedural or relating to the trial—should be made to the Chief Justice.** It is also required that any such motion, objection, request, or application “be committed to writing, and read at the Secretary’s table.”³⁸ Rule XIX further establishes that if a senator (1) seeks to question a “witness . . . manager . . . or [] counsel of the person impeached,” or (2) “offer a motion or order,” they must submit it **in writing** to the Chief Justice.³⁹ The parties or their counsel “may interpose objections to witnesses answering questions propounded at the request of any Senator,” which may be argued by the parties or counsel.⁴⁰

Third, Rule XVII establishes the **right of cross-examination**: Any witness put forth by one party will “then be cross-examined by one person on the other side.”⁴¹

II. **LIKELY TIMELINE FOR A SENATE IMPEACHMENT TRIAL**

The following timeline refers to the Rules of Procedure, Senate Resolution 16, and the trial history of the Clinton impeachment (Appendices 3 & 5). **Together they present a roadmap for how the forthcoming impeachment trial will likely unfold** based on these authorities (with actions that are mandated by the Constitution noted by a caret symbol (^), actions mandated by the Rules of Procedure noted with an asterisk (*), and actions outlined in Senate Resolution 16 noted with a hashtag (#)).

Senate Trial Day 1.

³⁷ Rules of Procedure, § VII.

³⁸ Rules of Procedure, § XVI.

³⁹ Rules of Procedure, § XIX.

⁴⁰ *Id.*

⁴¹ Rules of Procedure, § XVII.

1. The Senate is to “immediately inform the House of Representatives” that it is ready to receive the House managers;⁴² (*)
2. The House managers should arrive and be introduced;⁴³ (*)
3. The Sergeant at Arms should issue a proclamation requiring senators to remain silent while the House of Representatives is making its case;⁴⁴ (*)
4. The House managers should exhibit the Articles to the Senate;⁴⁵ (*)
5. The Chief Justice should arrive and be sworn in as the Presiding Officer;⁴⁶ (^, *)
6. The Chief Justice administers the impeachment oath of impartial justice to the senators. (^, *)

Day 2: The Senate Should “Proceed to the Consideration” of the Articles of Impeachment.⁴⁷

7. The Senate is to issue “a writ of summons . . . to the person impeached.”⁴⁸ As described above, during the Clinton impeachment trial, the Senate accomplished this step through unanimous adoption of Senate Resolution 16, which also outlined the timeline for the trial.⁴⁹ (*)

Subsequent Few Days.

8. Pursuant to the timeline developed by the Senate,
 - a. the House will likely file a trial brief on impeachment, which would articulate articles of impeachment and include relevant evidence;
 - b. the White House will likely also file a trial brief, which would establish a background of events and discuss the appropriate constitutional standard as well as reasons for acquittal;
 - c. the House will likely file a rebuttal to the White House’s response.⁵⁰ (*, #)

Preliminary Trial Following Submission of Briefs.

9. The preliminary trial will begin and continue for roughly one week (including Saturday), though the Senate could provide for a different length. The trial will entail the following steps:
 - a. House managers make Opening Statements;
 - b. Counsel for the White House make Opening Statements;
 - c. House managers present Evidence;⁵¹ (#)
 - d. Counsel for the White House present Evidence;
 - e. After both sides have made their presentations, the senators will have the opportunity to question the House managers and the Counsel for the White House. (#)

⁴² Rules of Procedure, § I.

⁴³ Rules of Procedure, § II; 145 CONG. REC. 272 (1999).

⁴⁴ Rules of Procedure, § II; 145 CONG. REC. 274 (1999).

⁴⁵ *Id.*

⁴⁶ Rules of Procedure, § IV; 145 CONG. REC. 274 (1999).

⁴⁷ Rules of Procedure, § III.

⁴⁸ Rules of Procedure, § VIII.

⁴⁹ S. Res. 16, 106th Cong. (1999).

⁵⁰ *Id.*

⁵¹ *Id.*

After a Few Days of Preliminary Trial.

10. Debate on a motion to dismiss⁵² (#)
11. Vote on motion to dismiss⁵³ (#)

If the Vote on the Motion to Dismiss Fails.

12. For a few weeks the trial continues with witness testimony, depositions, and presentations of evidence.⁵⁴ **The Clinton Trial was originally estimated to take two weeks—it lasted five weeks.**
13. Closing arguments by both sides⁵⁵

Following Closing Arguments.

14. Motions on additional matters⁵⁶
15. Motion on closed or open session⁵⁷
16. Senate deliberations⁵⁸
17. Senate written statements⁵⁹

Senate Vote on Articles of Impeachment.⁶⁰ (^, *)

18. The Constitution itself requires that “no Person shall be convicted without the Concurrence of **two thirds** of the Members present.”⁶¹
19. The Rules of Procedure describe how votes are to be taken and counted.
 - a. **Voting on each article—as a whole article—must be done consecutively.** Under Rule XXIII, “[a]n article of impeachment shall not be divisible for the purpose of voting thereon at any time during the trial.”
 - b. “Once voting has commenced on an article of impeachment, **voting shall be continued until voting has been completed on all articles** of impeachment” barring certain types of adjournment.⁶²
20. Rule XXIII notes that **all impeachment votes are final**: “A motion to reconsider the vote by which any article of impeachment is sustained or rejected shall not be in order.”⁶³

⁵² 145 CONG. REC. 1339, 1342-47 (1999).

⁵³ 145 CONG. REC. 1397 (1999). **The vote on a motion to dismiss in the Clinton Impeachment Trial was a majority vote.** See *infra* notes 77-82 and accompanying text.

⁵⁴ See 145 CONG. REC. 272-2571 (1999).

⁵⁵ 145 CONG. REC. 2026 (1999).

⁵⁶ For example, in the Clinton impeachment trial, Senator Specter brought a motion to investigate potential perjury by witnesses. See 145 CONG. REC. 2053 (1999).

⁵⁷ 145 CONG. REC. 2053-54 (1999); Rules of Procedure, § XX.

⁵⁸ 145 CONG. REC. 2162-63, 2318 (1999).

⁵⁹ See 145 CONG. REC. 2375-2571 (1999).

⁶⁰ 145 CONG. REC. 2376-77 (1999).

⁶¹ U.S. CONST. art. I, § 3, cl. 6

⁶² Rules of Procedure, § XXIII.

⁶³ *Id.*

III. PROPOSALS TO AVOID OR LIMIT THE TRIAL

Senators have several mechanisms at their disposal that they might use to limit an impeachment trial. While avoiding a trial entirely would represent an abandonment of constitutional duty, senators could attempt to end a trial early by passing a motion to adjourn or a motion to dismiss.

A. Must the Senate Hold the Trial?

In our view, the Senate’s failure to hold a trial would contravene senators’ constitutional oaths to “support and defend the Constitution of the United States [and to] well and faithfully discharge the duties of the [senatorial] office.”⁶⁴ Although constitutional scholars continue to debate whether the Senate must hold an impeachment trial on the House’s articles of impeachment,⁶⁵ the standing Senate rules do not affirmatively envision the possibility of blocking an impeachment trial. Instead, the rules mandate that once the Senate receives notice from the House of Representatives that House managers have been appointed, “the Secretary of the Senate *shall* immediately inform the House . . . that *the Senate is ready*” to proceed with the trial.⁶⁶ Professor Laurence Tribe has argued that “the Senate’s clear duty to conduct a trial after the House impeaches flows from the structure, history, function, and logic of the Impeachment Power—not from any mandating language.”⁶⁷ Bob Bauer, former Counsel to President Obama, has further argued that “senators would violate their oath in altogether ignoring the House’s constitutional

⁶⁴ See *supra* Section I.B.

⁶⁵ Much of the disagreement over the Senate’s obligation to conduct a trial boils down to differing readings of Article 1, section 3, which states that the Senate “shall have the sole Power to try all impeachments.” U.S. CONST. art. I, § 3, cl. 6. As Professor Michael Gerhardt notes, some legal scholars read article 1, section 3 to be a mandate that “requir[es] the Senate to conduct a trial.” Philip Bump, *If the House Impeaches Trump, Mitch McConnell’s Senate Can Simply Ignore It*, WASH. POST (Sept. 30, 2019, 12:02 PM EDT), <https://www.washingtonpost.com/politics/2019/09/27/if-house-impeaches-trump-mitch-mcconnells-senate-can-simply-ignore-it.html>. Others argue that just as the House can elect not to hold an impeachment inquiry, so too can the Senate elect not to hold a trial: i.e., the Senate shall try all impeachments that proceed to trials, but that does not mean that all impeachments must be tried. As one impeachment scholar notes, the current Senate rules of procedure “include ‘a lot of shall language’—just like sections 2 and 3 of article 1 of the Constitution—and thus provide the “Republican majority a lot of flexibility.” *Id.* Gerhardt himself concludes that “as a practical matter . . . the Majority Leader will have substantial discretion on the process.” *Id.*

⁶⁶ Rules of Procedure, § I (emphasis added); Rule III is more ambiguous, stating that the Senate shall “proceed to the consideration of such articles and shall continue in session . . . after the trial shall continue in session from day to day . . . after the trial shall commence (unless otherwise ordered by the Senate) until final judgment shall be rendered.” Rules of Procedure, § III. It remains unclear if the phrase “unless otherwise ordered by the Senate” refers to the schedule of the trial or to a possible ability to block the trial altogether. Professor Michael Gerhardt, however, notes that “[i]n practice, the Senate has always felt obliged to do something when it formally received impeachment articles from the House.” Philip Bump, *If the House Impeaches Trump, Mitch McConnell’s Senate Can Simply Ignore It*, WASH. POST (Sept. 30, 2019, 12:02 PM EDT), <https://www.washingtonpost.com/politics/2019/09/27/if-house-impeaches-trump-mitch-mcconnells-senate-can-simply-ignore-it.html>.

⁶⁷ Laurence Tribe (@tribelaw), TWITTER (Jan. 18, 2019, 8:40 PM), <https://twitter.com/tribelaw/status/1086438253081841664>.

judgment that the president, having committed impeachable offenses, is unfit to retain the office.”⁶⁸ Such disregard for the House’s decision to impeach would also demonstrate lack of reverence for the House’s duty to bring charges against an official believed to have committed impeachable offenses. As historian Ron Chernow has documented, Alexander Hamilton was “adamant that the Senate should hold a trial, with the chief justice presiding” over any impeachment and saw trial as a key component of a two-step process.⁶⁹ In *Federalist* No. 65, Hamilton argued that the Senate was the appropriate body to conduct a trial:

Where else than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel CONFIDENCE ENOUGH IN ITS OWN SITUATION, to preserve, unawed and uninfluenced, the necessary impartiality between an INDIVIDUAL accused, and the REPRESENTATIVES OF THE PEOPLE, HIS ACCUSERS?⁷⁰

Consequently, **if senators were to abandon their constitutional duty by declining to hold a trial on articles of impeachment they would be ceding a core constitutional function of the Senate**, as holding an impeachment trial is one of just four actions Article I, Section 3 specifically empowers the Senate to take.⁷¹

If articles of impeachment are presented, refusal to hold a trial would be inconsistent with prior practice. If the majority party in the Senate were to vote to block a trial, it would be difficult to bring a dispute over the impeachment process to the courts due to the political question doctrine.⁷² Nevertheless, a refusal to hold a trial would contravene established precedent of prior presidential impeachments: the Senate upheld its duty for the impeachments of Presidents Johnson and Clinton, and made preparations for a trial in anticipation of President Nixon’s impeachment.⁷³ **The sixteen currently serving senators who previously voted in President Clinton’s Senate trial would find it particularly difficult to explain a contrary decision to forego their constitutional duty to conduct an impeachment trial this time.**⁷⁴ Finally, a decision not to hold a trial would also contradict prior statements by Senate Majority Leader Mitch McConnell that the Senate will “take the matter up” and that the Senate intends to “do our constitutional responsibility.”⁷⁵

⁶⁸ Bob Bauer, *Can the Senate Decline to Try an Impeachment Case?*, LAWFARE BLOG (Jan. 21, 2019, 11:10 AM), <https://www.lawfareblog.com/can-senate-decline-try-impeachment-case>.

⁶⁹ Ron Chernow, *Hamilton Pushed for Impeachment Powers. Trump is What He Had in Mind*, WASH. POST (Oct. 18, 2019), <https://www.washingtonpost.com/outlook/2019/10/18/hamilton-pushed-impeachment-powers-trump-is-what-he-had-mind.html>.

⁷⁰ THE FEDERALIST NO. 65 (Alexander Hamilton).

⁷¹ Steven G. Calabresi & Michael J. Gerhardt, *Common Interpretation: Article I, Section 3*, NAT’L CONST. CTR. INTERACTIVE CONST., <https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/765>.

⁷² See *Nixon v. United States*, 506 U.S. 224, 228-38 (1993) (holding that Judge Nixon’s claim that the Senate’s decision to use an impeachment committee was a non-justiciable political question).

⁷³ Francis Valeo on President Richard Nixon’s Impeachment Trial, U.S. SENATE (Dec. 4, 2019), https://www.senate.gov/artandhistory/history/common/investigations/audio/Valeo_audio_clip.htm.

⁷⁴ See Appendix 5.

⁷⁵ Ed Kilgore, *What We Know—and Don’t Know—About Trump’s Potential Impeachment Trial*, N.Y. TIMES (Nov. 13, 2019), <http://nymag.com/intelligencer/2019/11/trumps-potential-senate-impeachment-trial-what-we-know.html>.

B. Could the Senate Truncate the Trial Through Adjournment or a Motion to Dismiss?

While a Senate majority could invoke the procedural tactics of adjournment or a motion to dismiss to cut short trial proceedings, it would be inconsistent with both Senate precedent and constitutional duty for senators to cut an impeachment trial short.

1. Adjournment

In theory, a motion to adjourn—which would require a majority vote and is not subject to debate—could be introduced as early as the beginning of the proceedings. There is historical precedent for adjournment: during the trial of President Johnson, the Senate adjourned “after the president was acquitted on three articles of impeachment; no votes were held on the remaining eight articles” after it became clear that a two-thirds vote could not be politically achieved.⁷⁶ But during the Clinton trial, the Senate did not adjourn and instead decided on both articles of impeachment. That historical precedent would make it politically difficult, for the reasons discussed above, to adjourn proceedings before a vote this time around.

2. Dismissal

The more likely path for the Senate to truncate the trial would be through a motion to dismiss, which White House lawyers may decide to bring forward.⁷⁷ **Under the Senate’s standing procedures, a motion to dismiss would require a majority vote.** During President Clinton’s impeachment trial, the motion to debate dismissal in open session failed on a vote of 56-44, and not along strict party lines.⁷⁸

At the time, the Republican Managers repeatedly argued that the motion to dismiss was inappropriate. House Manager Charles Canady, for example, explained that “adoption of the motion would be inconsistent with constitutional standards and harmful to the institutions of our Government.” Likewise, House Manager Asa Hutchinson asserted that “to dismiss the case would be unprecedented from a historical standpoint, because it has never been done before; it would be damaging to the Constitution, because the Senate would fail to try the case; it would be harmful to the body politic”⁷⁹ Lead House Manager Henry Hyde, then Chair of the House Judiciary Committee, further argued, “this motion elevates convenience over constitutional process” and pushed for a bipartisan approach that would allow the country to move forward.⁸⁰

In the end, the Senate accepted the House managers’ arguments and rejected the motion to dismiss in a bipartisan vote. It has been reported that in the current proceeding, Senate Republicans

⁷⁶ Bauer, *supra* note 68.

⁷⁷ Kilgore, *supra* note 75.

⁷⁸ **During the Clinton Trial, we both (Feingold and Hagel) voted against the motion to dismiss.** See Appendix 5.

⁷⁹ 145 CONG. REC. 973 (1999).

⁸⁰ See *id.* (advocating for the rejection of the motion to dismiss to avoid a situation where “there is no resolution of the issues of the case”; “in a bipartisan way, I would hope some Democrats would support the rejection of this motion, as difficult as it is, because I don’t think this whole sad, sad, drama will end. We will never get it behind us until you vote up or down on the articles.”).

have already told the President’s defense team to “prepare for a full Senate trial, stating that any motion for an early dismissal of impeachment charges likely won’t have the votes to pass.”⁸¹

IV. SPECIFIC QUESTIONS AND ANSWERS

A. Is An Impeachment Vote Based Purely On Politics?

No. At the Constitutional Convention, James Madison objected to a particular proposal because it would render the presidency “a tenure during the pleasure of the Senate.” Based in part on this exchange, Charles Black and Philip Bobbitt argue that **impeachment was intended to be conducted in a realm that is legal**, and subject to legal standards set forward in the Constitution, not merely subject to the personal political whims of Senate members.⁸²

B. Who Can Be a House Manager?

Whoever is appointed by House resolution. After agreeing to articles of impeachment, the House can appoint members to serve as managers in the Senate trial “by agreeing to a House resolution.”⁸³ Traditionally, as during the Clinton trial, members of the House Judiciary Committee majority have served as House Managers. **Nothing in the Constitution, however, would prevent the current Speaker (Nancy Pelosi) from picking as a manager knowledgeable members of other committees involved in the impeachment inquiry**, for example, House Intelligence Committee Chairman Adam Schiff.

C. Is a Senate Impeachment Trial Like a Criminal Trial?

Notwithstanding certain similarities between impeachment and a criminal trial, the two differ in important ways. During President Clinton’s Senate trial, Members of Congress with prosecutorial backgrounds often discussed or were asked⁸⁴ whether there existed sufficient evidence against President Clinton to convict him in a criminal trial in an Article III court. Furthermore, Counsel for the White House and the House managers frequently argued over whether the House’s charges would pass muster in a criminal court. For example, counsel for the President Greg Craig emphasized that “no reasonable, no responsible prosecutor would bring this kind of [perjury] case based on” the evidence at issue in the Clinton impeachment hearings;⁸⁵ meanwhile,

⁸¹ Alexander Bolton, *Senate GOP Waves Trump Off Early Motion to Dismiss Impeachment Charges*, THE HILL (Nov. 13, 2019), <https://thehill.com/homenews/senate/470401-senate-gop-waves-trump-off-early-motion-to-dismiss-impeachment-charges.html>.

⁸² See CHARLES L. BLACK, JR. & PHILIP BOBBITT, *IMPEACHMENT: A HANDBOOK* 99-103 (1974) (labeling as a fallacy the notion that that impeachment is a purely political question, and not a legal one).

⁸³ ELIZABETH RYBICKI & MICHAEL GREENE, CONG. RESEARCH SERV., R45769, *THE IMPEACHMENT PROCESS IN THE HOUSE OF REPRESENTATIVES* 13 (2019).

⁸⁴ 145 CONG. REC. 951 (1999) (“Would each of the managers who have been prosecutors prior to being elected to the House of Representatives please state briefly whether he believes he would have sought an indictment and obtained a conviction of an individual who had engaged in the conduct of which the President is accused?”).

⁸⁵ 145 CONG. REC. 936 (1999).

at least four House managers with prosecutorial experience spoke on the record confirming they would prosecute this case in a court of law if given the chance.⁸⁶

There are similarities, to be sure, between senators in a presidential impeachment trial and jurors in a criminal trial. Under the Senate procedural rules for Impeachment, senators must take an oath that they “will do impartial justice according to the Constitution” regarding all “appertaining to the trial of the impeachment”⁸⁷ and must base their decisions on legal principles, particularly whether “treason, bribery, or a high crime or misdemeanor” has been committed.

But despite these similarities, **the Senate’s role and position in an impeachment differs from a conventional trial jury.** Article III, Section 2 of the Constitution explicitly states, “[t]he Trial of all Crimes, *except in cases of Impeachment*, shall be by Jury”⁸⁸ As previously noted, Chief Justice Rehnquist requested during the Clinton impeachment trial that “counsel . . . refrain from referring to the Senators as jurors,”⁸⁹ because “the Senate is not simply a jury; it is a court in this case.”⁹⁰ In *Federalist* No. 65, Hamilton distinguished the Senate’s role in the impeachment trial from that of a jury, arguing that there must be “a numerous court” not “tied down by . . . strict rules . . . as in common cases serve to limit the discretion of courts in favor of personal security. There will be no jury to stand between the judges who are to pronounce the sentence of the law, and the party who is to receive or suffer it.”⁹¹ Unlike in a jury trial, no unanimous vote is needed to decide a Senate impeachment trial; only a two-thirds vote is needed.⁹² Unlike jurors who can be screened for bias in the jury selection process, Senators are elected to their roles and cannot be “struck” from the decisionmaking pool by peremptory challenge or for cause. Some of the Senate’s powers during impeachment trials exceed that of both juries and judges. As noted above, senators in an impeachment trial can assume roles that are ordinarily reserved to those serving as counsel. For example, senators may, by written submission to the Presiding Officer, ask questions and make and argue objections.⁹³ And while Senators, like jurors, are required to keep silent during the impeachment trial itself, no explicit gag rule requires Senators to refrain from public comment about the proceeding as it unfolds.

⁸⁶ 145 CONG. REC. 951 (1999) (House Managers Bryant, McCollum, Hutchinson, and Bob Barr).

⁸⁷ Rules of Procedure, § XXV; *see* THE FEDERALIST NO. 65 (Alexander Hamilton) (emphasizing that the Senate is “the most fit depository” of the power to impeach because it is uniquely “independent” and capable of making its decisions “unawed and uninfluenced”). Still, it is dubious whether the Senate can be entirely impartial, because unlike juries who can be screened for bias through *voir dire*, Senators are elected to their roles as representatives of communities. *See* Mark Sherman, *AP Explains: What a Trump Impeachment Trial Might Look Like*, AP NEWS (Oct. 31, 2019), <https://apnews.com/9d972aa191e94199afaef9c387c1f7fa>.

⁸⁸ U.S. CONST. art. III, § 2 (emphasis added).

⁸⁹ 145 CONG. REC. 279 (1999). After a presentation by the House managers in which they referred to the Senators as “jurors” several times, Senator Tom Harkin objected to the use of the term. In response, the Chief Justice noted that the “objection . . . is well taken” and then cautioned against the term’s use. *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Rules of Procedure, § XXIII.

⁹³ Rules of Procedure, § XIX. *See* Kilgore, *supra* note 75; *What an Impeachment Trial of Donald Trump Might Look Like*, ECONOMIST (Oct. 24, 2019), <https://www.economist.com/united-states/2019/10/24/what-an-impeachment-trial-of-donald-trump-might-look-like>.

D. Must Senate Impeachment Trial Proceedings Be Open?

Generally yes, but they can be closed pursuant to a motion. Rule XX of the Rules of Procedure state that “the doors of the Senate shall be kept open” when “the Senate is sitting upon the trial of an impeachment,” unless “the Senate . . . direct[s] the doors to be closed while deliberating upon its decisions.” Such a direction is achieved by a motion to close the doors, without objection; or, if the “objection is heard,” after a recorded vote on the motion without debate.⁹⁴ However, Chief Justice Rehnquist relied on guidance from the parliamentarian and on past precedent to close the doors for proceedings.

On February 9, 1999, Senate Majority Leader Trent Lott had introduced a motion to publish the impeachment records in the Congressional Record at the conclusion of the trial. Weighing in on the discussion, Senator Kay Bailey Hutchison raised Rule XX to argue that the doors ought to be presumed to be open. However, Chief Justice Rehnquist disagreed, observing that “[o]n initial read . . . it would not appear to mandate that the deliberations and debate occur in closed session, but only to permit it. But it is clear from the review of the history of the rules that the committee . . . to create the rules specifically intended to require closed sessions for debate and deliberation.” Chief Justice Rehnquist explained that in Andrew Johnson’s trial, the presiding Chief Justice said, “There can be no deliberation unless the doors are closed.” Chief Justice Rehnquist further emphasized that **closed deliberations have “been the consistent practice of the Senate for the last 130 years in impeachment trials,” but did not foreclose open deliberations entirely. Instead, he said that open deliberations would require suspending the rules or the granting of consent.**⁹⁵

E. May a Senate Vote to Remove by Impeachment be Taken by Secret Ballot?⁹⁶

In theory yes, but it would be poor constitutional practice. The Rules of Procedure currently stipulate that each senator announce his or her vote on each Article of Impeachment.⁹⁷ Two-thirds of the Senate (67 senators) would need to approve an amendment or suspension to this rule.⁹⁸ Thus, in theory the Senate could specify that the impeachment vote be conducted by secret ballot. As an historical matter, Congress twice broke Electoral College gridlock by the House picking the president by secret ballot, electing Thomas Jefferson in 1800 and John Quincy Adams in 1824. Article 1, Section 5, of the Constitution states that one-fifth of the senators present can oppose a secret ballot on “any questions,” defined as “[a]ny matter on which the Senate

⁹⁴ Rules of Procedure, § XX.

⁹⁵ 145 CONG. REC. 2055 (1999).

⁹⁶ For a recent article making this proposal, see Juleanna Glover, *There’s a Surprisingly Plausible Path to Removing Trump From Office*, POLITICO (Nov. 12, 2019), <https://www.politico.com/magazine/story/2019/11/12/path-to-removing-donald-trump-from-office-229911>.

⁹⁷ Rules of Procedure, § XXIII.

⁹⁸ During the Senate impeachment trial of President Clinton, senators moved to suspend portions of the Rules of Procedure relating to opening Senate doors during deliberation, but were unable to muster the requisite two-thirds majority. See S. DOC. 106-4 (1999), reprinted in 2 GOV’T PRINTING OFFICE, PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF PRESIDENT WILLIAM JEFFERSON CLINTON: FLOOR TRIAL PROCEEDINGS 1497 (2000), <https://www.govinfo.gov/content/pkg/CDOC-106sdoc4/pdf/CDOC-106sdoc4-vol2.pdf>.

is to vote, such as passage of a bill, adoption of an amendment, agreement to a motion, or an appeal,” but makes no mention of impeachment proceedings. But just before this requirement is the language: “Each House shall keep a Journal of its Proceedings, and from time to time publish the same, *excepting such Parts as may in their Judgment require Secrecy*,” which might be construed to permit secret balloting.⁹⁹ Insofar as the Senate has relatively untrammelled power to make its own rules governing each impeachment proceeding, in theory those rules could include a secret ballot.

Nevertheless, we think it against the spirit of our constitutional democracy to allow senators to cast impeachment votes in secret. This was not done in either of the two Senate presidential impeachment trials. More fundamentally, it is anti-democratic to deny voters the right to know which senators have cast what votes. Precisely because impeachment and removal by conviction involves overturning the normal constitutional procedures by which individuals achieve high office, it requires a supermajority vote and is reserved for those deemed to have committed serious abuses of office. On a constitutional decision as momentous as deciding whether or not the President shall stay in office, the Senate would do best to act in the light of day, to avoid any claim that it has not afforded the President due process of law.

F. What Standard of Proof is Required at Impeachment Trials?

The Senate has declined to apply a uniform standard of proof by rule, so in practice, each senator has applied his or her own standard. The Constitution does not specify the standard of proof to be used in impeachment trials.¹⁰⁰ Scholars have advocated various standards of proof on the basis of textual, functional, and precedential arguments.¹⁰¹ In previous trials, however, the Senate has chosen not to impose a standard of proof and instead has allowed each individual senator to determine the standard they apply.¹⁰² And, despite disagreeing on which standard of proof is the appropriate standard, senators from both parties have accepted Charles Black’s charge to “**find [one’s] own standard [of proof] in [one’s] own conscience, as advised by reflection.**”¹⁰³

⁹⁹ U.S. CONST. art. 1, § 5 (emphasis added).

¹⁰⁰ See U.S. CONST. art. I, § 3, cl. 6.

¹⁰¹ E.g., CHARLES L. BLACK JR., *IMPEACHMENT: A HANDBOOK*, 17 (1974) (advocating an “overwhelming preponderance of the evidence” standard in presidential impeachments); 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 169 (3rd ed. 1999) (arguing that the text of the Constitution requires the same standard of proof to impeach judges and presidents); John O. McGinnis, *Impeachment: The Structural Understanding*, 67 GEO. WASH. L. REV. 650, 660 (1999) (“[T]he legal standard for impeaching a President should be higher than the legal standard for impeaching a judge because a President has been elected by the people whereas a judge has been appointed.”).

¹⁰² See THOMAS B. RIPPY, CONG. RESEARCH SERV., 98-990, *Standard of Proof in Senate Impeachment Proceedings* 6 (Jan. 7, 1999). During the Clinton impeachment, for example, Senator Arlen Specter of Pennsylvania chose to vote “Not Proven,” citing Scottish law, and adding, “therefore not guilty.” Sheryl Gay Stolberg, *Arlen Specter, Pennsylvania Senator, Is Dead at 82*, N.Y. TIMES (Oct. 14, 2012), <https://www.nytimes.com/2012/10/15/us/politics/arlen-specter-senator-dies-at-82.html>.

¹⁰³ BLACK JR., *supra* note 101, at 17-18; see, e.g., 145 CONG. REC. 2397 (1999) (statement of Sen. Biden) (“[W]e have left it to the good judgment of each Senator to decide whether or not they are convinced by the evidence presented to us. For this Senator, fundamental fairness as well as the nature of the House’s case dictate that I ought to be convinced beyond a reasonable doubt”); *id.* at 2375 (1999) (statement of Sen. Jeffords) (“I believe the fact that the Framers gave this body the duty to try an impeachment, but no guidance as to what standard of proof to use

The Senate has considered three possible standards of proof to apply in impeachment trials: (1) the preponderance of the evidence standard found in civil cases, (2) the clear and convincing evidence standard found in certain quasi-criminal administrative proceedings, (3) and the “beyond a reasonable doubt standard” required in criminal proceedings.¹⁰⁴ House managers have tended to argue that the lowest standard—preponderance of the evidence—should apply to the Senate trial, whereas the defendants’ counsel has argued for application of the highest standard—beyond a reasonable doubt.¹⁰⁵ House managers have also tended to argue that the standard of proof is a question for each individual senator, whereas defense counsel has argued for a uniform standard across senators.¹⁰⁶

Both House managers and defense counsel have made textual and functional arguments in support of their preferred standards of proof. The textual arguments derive from the Constitution’s silence on the subject of standards of proof and the uniform application of its impeachment provisions. House managers have interpreted the Constitution’s silence to support an individualized, conscience-based determination of the standard of proof,¹⁰⁷ and they have interpreted the uniformity of constitutionally demarcated impeachment procedures to imply a uniform standard of proof for both judges and the president.¹⁰⁸ By contrast, President Clinton’s defense counsel argued that the constitutional provisions governing impeachment trial procedure “strongly suggest[] that an impeachment trial is akin to a criminal proceeding and that the beyond-a-reasonable-doubt standard of criminal proceedings should be used,”¹⁰⁹ especially with respect to counts that may be based on claimed federal criminal violations.

During the Clinton Impeachment, Counsel for the White House also made a functional argument for a higher standard of proof. Whereas the “clear and convincing” standard was appropriate for judges, for whom “the Senate must balance its concern for the independence of the judiciary against the recognition that . . . impeachment is the only available means to protect the public against [judges] who are corrupt,” Counsel claimed that a “beyond a reasonable doubt standard” was more appropriate for the president because an impeachment conviction, “in effect, [] overturn[s] the results of an election . . . in which the American people selected the head of one of the three coordinate branches of government.”¹¹⁰ The House managers responded that the criminal standard was inappropriate “because impeachment is, by its nature, a proceeding where the public interest weighs more heavily than the interest of the individual defendant.”¹¹¹

in the trial, gives each senator the discretion to select the standard he or she deems appropriate. . . . I would suggest that the clear and convincing standard, which lies somewhere in between [the preponderance of the evidence and beyond a reasonable doubt standards], would be more appropriate . . .”).

¹⁰⁴ RPY, *supra* note 102, at 2.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*; *see also* 145 CONG. REC. 518 (1999) (House Rebuttal to White House Brief); *id.* at 496 (White House Trial Memorandum).

¹⁰⁷ House Rebuttal to White House Brief, *supra* note 105.

¹⁰⁸ *Id.* at 518-19; *see also* TRIBE, *supra* note 101, at 169.

¹⁰⁹ White House Trial Memorandum, *supra* note 103, at 496.

¹¹⁰ *Id.*; *see* McGinnis, *supra* note 101, at 660.

¹¹¹ House Rebuttal to White House Brief, *supra* note 105, at 518.

In the end, the Senate ultimately declined to adopt a uniform standard of proof for presidential impeachment trials during the Clinton impeachment trial. Instead, **Senators relied on the aforementioned textual and functional arguments regarding different standards of proof when making their individualized determinations about the appropriate standard to apply.** Most, if not all,¹¹² senators who explained which standard of proof they applied chose to apply a standard at least as stringent as the “clear and convincing evidence”¹¹³ standard, and most of these senators said they applied the “beyond a reasonable doubt” standard.¹¹⁴

Several senators advocated varying the standard of proof to account for the nature of *specific* articles of impeachment.¹¹⁵ Then-Senator Biden expressed the view that, “[i]n any impeachment, a Senator must simply be convinced to his or her satisfaction that the defendant committed the acts alleged. That standard never changes.”¹¹⁶ Instead, what changes between impeachments are the facts and their harmful consequences.¹¹⁷ Senators Biden, Leahy, and Thompson all expressed the view that, although the “beyond a reasonable doubt” standard might be appropriate where the impeachment articles allege only per se violations of law or “harms that are not imminently serious to the national well-being,”¹¹⁸ the standard of proof should be lower when the harmful consequences derive from the “most serious” offenses,¹¹⁹ such as “treason or serious public

¹¹² Not all Senators agreed to release statements explaining their impeachment vote. See 145 CONG. REC. 2375-2602 (1999) (Senators’ Final Statements).

¹¹³ E.g., 145 CONG. REC. 2558 (1999) (supplemental statement of Sen. DeWine) (“I have used the standard of proof of ‘clear and convincing evidence.’ . . . I have rejected the standard of proof ‘beyond a reasonable doubt’ . . . [as] not applicable to a case in which the defendant is threatened not with loss of liberty but with loss of office. I have also rejected the standard of ‘preponderance of the evidence’ . . . [which], would not treat removal from office with the seriousness and gravity it deserves.”); *id.* at 2438 (statement of Sen. Fitzgerald) (“The ‘clear and convincing’ evidence standard strikes a prudent balance, providing sufficient protection for the authority of the Presidency and the expression of popular will represented by the President’s election, while avoiding the risk of a President remaining in office despite clear and convincing evidence of impeachable offenses.”); Statement of Senator Jeffords, *supra* note 103.

¹¹⁴ E.g., 145 CONG. REC. 2543 (1999) (statement of Sen. Bryan) (“The House alleges that specific crimes have been committed . . . Under these circumstances, I believe the appropriate standard is the criminal standard—proof beyond a reasonable doubt.”); *id.* at 2447 (statement of Sen. Frist) (“I believed that I should apply a ‘beyond a reasonable doubt’ burden of proof . . . I wanted to give the President the benefit of the same high standard of proof applied in criminal trials.”); *id.* at 2425 (statement of Sen. Kerrey) (“Because the premium on Constitutional stability is so high, I decided to judge the case against the strictest possible standard: proof beyond a reasonable doubt.”); *id.* at 2418 (statement of Sen. Mikulski) (“I have used the highest legal standard of proof—‘beyond a reasonable doubt’ . . . I believe that removing a president is so serious, and such an undeniably tumultuous precedent to set in our nation’s history, that we should act only when the evidence meets that highest standard.”); *id.* at 2566 (statement of Sen. Rockefeller) (“I believe that the evidence must be the universally accepted standard of proof that is applied to other criminal cases. It must be proven beyond a reasonable doubt.”); *id.* at 2423 (statement of Sen. Sarbanes) (“Since [the House managers] relied on the Federal Criminal Code . . . in making their case, it is appropriate that they be held to the burden of proof of beyond a reasonable doubt.”); *id.* at 2462 (statement of Sen. Snowe) (“[T]he heavy burden of proof beyond a reasonable doubt . . . is the only appropriate statement where the underlying charges are the crimes of perjury and obstruction of justice.”).

¹¹⁵ See 145 CONG. REC. 1343 (1999) (statement of Ms. Seligman) (“[I]f the question is . . . whether the President has committed a crime, that standard should be proof beyond a reasonable doubt”); *id.* (explaining that the standard indicates “proof to the level of certainty necessary to make the most significant decisions you face in life”).

¹¹⁶ 145 CONG. REC. 2403 (1999) (statement of Sen. Biden).

¹¹⁷ *Id.*

¹¹⁸ 145 CONG. REC. 2484 (1999) (statement of Sen. Thompson).

¹¹⁹ *Id.*

corruption.”¹²⁰ Senator Thompson justified this lower standard of proof for more serious offenses on the basis of the more consequential harms that would flow from “leaving a likely traitor in office simply because his guilt has not been established beyond a reasonable doubt.”¹²¹ **Other Senators applied a “beyond a reasonable doubt” standard to charges that were based on federal crimes, but did not apply that high standard to “high Crimes and Misdemeanors” having to do with violations of the public trust, which could include conduct that suggests bribery or treason.**¹²²

G. Must the President commit a criminal act to be impeached and removed from office?

No. It is well-settled that the President does not need to commit a criminal act as a predicate to removal by impeachment. Just as a criminal act by the President is not automatic cause for impeachment, an act need not be criminal to be an impeachable offense. Alexander Hamilton wrote in *Federalist* No. 65 that impeachable offenses include those “which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust.”¹²³ The Framers created a Constitution that could remedy “injuries done immediately to society itself,” whether explicitly illegal or as a result of malfeasance.¹²⁴

Impeachment is meant to remedy constitutional offenses that go to the heart of the U.S. system of government. The Framers therefore limited impeachment to certain constitutional violations: treason, bribery, and high crimes and misdemeanors.¹²⁵ The perpetration of these offenses “would so stain a [P]resident as to make his continuance in office dangerous to public order.”¹²⁶ **Concern that the President would engage in such behavior more than once is grounds for impeaching and removing him or her before the public is able to remove the President through election.**¹²⁷ The Founders themselves recognized the necessity of a mechanism for removal that could be initiated before the end of a President’s term. In arguing for an impeachment provision in the Constitution, James Madison noted it was “indispensable that some provision should be made for defending the Community [against] the incapacity, negligence or perfidy of the chief Magistrate,” and that “the limitation of the period of his service [] was not a sufficient security.”¹²⁸

“[V]irtually all successful judicial impeachments have involved criminal behavior,” but this does not necessarily translate to *presidential* impeachments,¹²⁹ because the President’s constitutional role is distinct from that of Article III judges. First, Article III judges’ service is conditioned on good behavior. Second, the President is elected by the American people, and therefore,

¹²⁰ 145 CONG. REC. 2516 (1999) (statement of Sen. Leahy).

¹²¹ Statement of Senator Thompson, *supra* note 118, at 2484.

¹²² This group included one of us (Feingold).

¹²³ The *Federalist* No. 65 (Alexander Hamilton).

¹²⁴ *Id.*

¹²⁵ U.S. CONST. art. II, § 4.

¹²⁶ BLACK & BOBBITT, *supra* note 82, at 35-36.

¹²⁷ *Id.*

¹²⁸ Madison Debates: July 20, AVALON PROJECT, https://avalon.law.yale.edu/18th_century/debates_720.asp.

¹²⁹ BLACK & BOBBITT, *supra* note 82, at 107.

his or her removal is a “far graver step in a democracy than the removal of a single member of the judiciary.”¹³⁰ Throughout President Clinton’s Senate trial, House Manager Lindsey Graham acknowledged that “great minds can differ on” whether the perjury and obstruction of justice require removal from office.¹³¹ Counsel for the White House Seligman agreed, stating that impeachment should not be a partisan exercise and that “[o]nly the most serious public misconduct, aggravated abuse of Executive power, is meant to be addressed through exercise of the Presidential impeachment power.”¹³²

While a criminal act is not required for presidential impeachment, members of Congress in the past have relied on statutory violations to buttress their case due to the grave political consequences of presidential impeachment and removal. In some cases, reference to common crime can be a “useful [] check on hyperpartisanship in the impeachment process.”¹³³ This explains why all three House charges adopted against President Richard Nixon—abuse of power, contempt of Congress, and obstruction of justice—were also common crimes; why Democrats in the House felt obligated to prove President Ronald Reagan had been aware of the transfer of funds in the Iran-Contra Affair (a common crime of misappropriation) before pursuing impeachment; and why House managers in President Clinton’s impeachment emphasized the criminal aspect of perjury over abuse of power.¹³⁴ However, as Charles Black and Philip Bobbitt emphasize in their handbook on impeachment, **there are countless other actions a President might take that while not common criminal offenses, would constitute grave constitutional offenses.** They cite as an example:

Suppose a candidate for the presidency conspired with foreign intelligence agencies to provide him with sophisticated data analytics in order that they could more effectively assist his campaign. This may or may not be a crime, depending on whether information from a foreign government amounts to the “giving of something of value” to the campaign, but it can scarcely be doubted that it is a high crime in the circumstance of a presidential election.¹³⁵

H. What constitutes Impeachable “Bribery”?

If it is proven that a President offers or withholds something of value to a foreign power in order to advance his or her own personal interests at the expense of the national interest, he or she has committed impeachable “bribery.” While Article II, Section 4 of the Constitution says the President “shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors,” it does not define “bribery” there or elsewhere in the constitutional text. In the 1912 impeachment proceedings against Judge Robert

¹³⁰ *Id.*

¹³¹ 145 CONG. REC. 936 (1999).

¹³² 145 CONG. REC. 967 (1999) (statement of Counsel for the White House Nicole Seligman).

¹³³ BLACK & BOBBITT, *supra* note 82, at 108.

¹³⁴ *Id.* at 107-08.

¹³⁵ *Id.* at 109; see also John D. Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 FORDHAM L. REV. 1, 48-51 (1970) (discussing the Founders’ broad understanding of impeachable constitutional offenses).

Wodrow Archbald, the House noted that “[t]he offense of bribery had a fixed status in the parliamentary law as well as the criminal law of England when our Constitution was adopted, and there is little difficulty in determining its nature and extent in the application of the law of impeachments in this country.”¹³⁶ **Bribery has traditionally meant abuse of power by the holder of an office by giving or soliciting something of value to serve the officeholder’s private interest.** Bribery and extortion often overlap, because at the Founding, the two terms were often used to describe the same conduct.¹³⁷ **To establish bribery, the House managers would thus need to show that the President acted on the basis of self-interest and not because he or she thought the foreign policy should be changed on its merits.**

When the Constitution was drafted, the Founders understood bribery to refer to the corrupt use of an official’s public power to achieve private ends.¹³⁸ At common law, “bribery in a large sense is sometimes taken for the receiving or offering of any undue reward, by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to incline him to do a thing against the known rules of honesty and integrity; for the law abhors any the least tendency to corruption in those who are any way concerned in its administration, and will not endure their taking a reward for the doing a thing which deserves the severest of punishments.”¹³⁹ Thus, it would not matter if the reward were accepted; the offering alone would suffice to complete the offense of bribery.

Extorting a public act in exchange for a financial inducement would also qualify as bribery. As one legal historian has noted, to the Founders, “Bribery and extortion were . . . considered per se corrupt, but such crimes were rarely punished criminally, so invocations of bribery were rarely in reference to criminal law standards and were more often in reference to the use of a gift, political office, or flattery to persuade someone to change a course of action.”¹⁴⁰ In early American history, “[a] 1797 Delaware list of ‘indictable crimes’ described bribery broadly, as ‘an offense against public justice,’ constituted by undue reward for one in the administration of

¹³⁶ H.R. REP. NO. 62-946 (1912), *reprinted in* 3 GOV’T PRINTING OFFICE, PROCEEDINGS OF THE UNITED STATES SENATE AND THE HOUSE OF REPRESENTATIVES IN THE TRIAL OF IMPEACHMENT OF ROBERT W. ARCHBALD: PROCEEDINGS IN THE HOUSE 1695 (1913), <https://babel.hathitrust.org/cgi/pt?id=umn.31951002168977f&view=1up&seq=25>. The First Congress did pass two statutes that criminalized bribery, but those statutes were tailored to specific categories of public servants—namely, customs officers and judges. Act of April 30, 1790, ch. 9, sec. 21, 1 Stat. 112, 117; Act of July 31, 1789, ch. 5, sec. 35, 1 Stat. 29, 46-47.

¹³⁷ See James Lindgren, *The Elusive Difference Between Bribery and Extortion: From the Common Law to the Hobbs Act*, 35 UCLA L. REV. 815 (1988).

¹³⁸ The two bribery statutes that the First Congress passed criminalized giving *and* receiving bribes. § 21, 1 Stat. at 117; § 35, 1 Stat. at 46-47.

¹³⁹ See WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 73 (London, G.G. & J. Robinson, Paternoster-Row & J. Butterworth, Fleet-Street 1795) (1716) (emphasis added); *see also* 1 WILLIAM OLDNALL RUSSELL, A TREATISE ON CRIMES & MISDEMEANORS 154 (Philadelphia, T. & J.W. Johnson, Law Booksellers 1850) (1819) (describing bribery as “the receiving or offering [of] any undue reward by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behaviour in office, and incline him to act contrary to the known rules of honesty and integrity.”).

¹⁴⁰ ZEPHYR TEACHOUT, CORRUPTION IN AMERICA 50 (2014).

public justice, in an attempt ‘to influence him against the known rules of law, honesty, or integrity, or [constituted by] giving or taking a reward for offices of a public nature. *He who accepts and he who offers the bribe are both liable to punishment.*’”¹⁴¹

Finally, the Founders singled out bribery as a constitutional offense, in good measure because of their pervasive concern that a President might be corrupted by a foreign power. As James Madison stated during the Constitutional Convention, “[The President] may be bribed by a greater interest to betray his trust; and no one would say that we ought to expose ourselves to the danger of seeing the first Magistrate in foreign pay without being able to guard [against] it by displacing him.”¹⁴² George Washington in his Farewell Address urged Americans “to be constantly awake, since history and experience prove that foreign influence is one of the most baneful foes of republican government.”¹⁴³ **In sum, the Founders enumerated bribery as an impeachable offense in part because of their concern that a foreign power might influence the President to misuse his public office for private gain, or vice versa.** As Hamilton warned in *Federalist* No. 75, “[a]n ambitious man might make his own aggrandizement, by the aid of a foreign power, the price of his treachery to his constituents”¹⁴⁴

V. CONCLUSION

In sum, the text of the Constitution, the Senate’s Rules of Procedure for impeachment, and various Senate precedents establish the constitutional obligation of senators to hold an impartial impeachment trial when articles of impeachment are referred to the Senate by the House of Representatives. The same texts specify the procedures to be followed during the course of a Senate impeachment trial and answer most of the questions that arise during such a proceeding.

A vote on presidential impeachment is perhaps the most momentous decision a senator can make. In the weeks ahead, we urge you to take your constitutional responsibilities with the greatest seriousness. Simply put, that means respecting the constitutional process, keeping an open mind, hearing all the evidence before making a decision, and not prejudging the effort based on policy or political preferences. When we cast our own votes in past proceedings, we did so humbly aware that history would judge our actions by whether we had done so consistently with our solemn oaths: “to support and defend the Constitution,” and in the impeachment process, to “do impartial justice according to the Constitution and laws.” We wish you all the best in discharging your historic constitutional function.

Respectfully yours,

Russ Feingold, (D-WI 1993-2011)

Chuck Hagel (R-NE 1997-2009)

¹⁴¹ *Id.* at 111 (2014) (emphasis added).

¹⁴² CHARLES DOYLE, CONG. RESEARCH SERV., 98-894, IMPEACHMENT GROUNDS: PART 2: SELECTED CONSTITUTIONAL CONVENTION MATERIALS (1998) (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed. 1911)).

¹⁴³ George Washington, *Farewell Address* (1796), https://avalon.law.yale.edu/18th_century/washing.asp.

¹⁴⁴ THE FEDERALIST NO. 75 (Alexander Hamilton).

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APPENDIX 1 Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials

[Revised pursuant to S. Res. 479, 99-2, Aug. 16, 1986]

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

II. When the managers of an impeachment shall be introduced at the bar of the Senate and shall signify that they are ready to exhibit against any person, the Presiding Officer of the Senate shall direct the Sergeant at Arms to make proclamation, who shall, after making proclamation, repeat the following words, viz: All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of the United States articles of impeachment against ----- "; after which the articles shall be exhibited, and then the Presiding Officer of the Senate shall inform the managers that the Senate will take proper order on the subject of the impeachment, of which due notice shall be given to the House of Representatives.

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

IV. When the President of the United States or the Vice President of the United States, upon whom the powers and duties of the Office of President shall have devolved, shall be

impeached, the Chief Justice of the United States shall preside; and in a case requiring the said Chief Justice to preside notice shall be given to him by the Presiding Officer of the Senate of the time and place fixed for the consideration of the articles of impeachment, as aforesaid, with a request to attend; and the said Chief Justice shall be administered the oath by the Presiding Officer of the Senate and shall preside over the Senate during the consideration of said articles and upon the trial of the person impeached therein.

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

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

VII. The Presiding Officer of the Senate shall direct all necessary preparations in the Senate Chamber, and the Presiding Officer on the trial shall direct all the forms of proceedings while the Senate is sitting for the purpose of trying an impeachment, and all forms during the trial not otherwise specially provided for. And the Presiding Officer on the trial may rule on all questions of evidence including, but not limited to, questions of relevancy, materiality, and redundancy of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision without debate; or he may at his option, in the first instance, submit any such question to a vote of the Members of the Senate. Upon all such questions the vote shall be taken in accordance with the Standing Rules of the Senate.

VIII. Upon the presentation of articles of impeachment and

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

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

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

attorney, the same shall be recorded.

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

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

XII. At 12:30 o'clock afternoon, or at such other hour as the Senate may order, of the day appointed for the trial of an impeachment, the legislative and executive business of the Senate shall be suspended, and the Secretary shall give notice to the House of Representatives that the Senate is ready to proceed upon the impeachment of -----, in the Senate Chamber.

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

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

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

XVI. All motions, objections, requests, or applications whether relating to the procedure of the Senate or relating immediately to the trial (including questions with respect to admission of evidence or other questions arising during the trial) made by the parties or their counsel shall be addressed to the Presiding Officer only, and if he, or any Senator, shall require it, they shall be committed to writing, and read at the Secretary's table.

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

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

XIX. If a Senator wishes a question to be put to a witness, or to a manager, or to counsel of the person impeached, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing, and put by the Presiding Officer. The parties or their counsel may interpose objections to witnesses answering questions propounded at the request of any Senator and the merits of any such objection may be argued by the parties or their counsel. Ruling on any such objection shall be made as provided in Rule VII. It shall not be in order for any Senator to engage in colloquy.

XX. At all times while the Senate is sitting upon the trial of an impeachment the doors of the Senate shall be kept open, unless the Senate shall direct the doors to be closed while deliberating upon its decisions. A motion to close the doors may be acted upon without objection, or, if objection is heard, the motion shall be voted on without debate by the yeas and nays, which shall be entered on the record.

XXI. All preliminary or interlocutory questions, and all motions, shall be argued for not exceeding one hour (unless the Senate otherwise orders) on each side.

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

XXIII. An article of impeachment shall not be divisible for the purpose of voting thereon at any time during the trial. Once voting has commenced on an article of impeachment, voting shall be continued until voting has been completed on all articles of impeachment unless the Senate adjourns for a period not to exceed one day or adjourns sine die. On the final question whether the impeachment is sustained, the yeas and nays shall be taken on each article of impeachment separately; and if the impeachment shall not, upon any of the articles presented, be sustained by the votes of two-thirds of the Members present, a judgment of acquittal shall be entered; but if the person impeached shall be convicted upon any such article by the votes of two-thirds of the Members present, the Senate may proceed to the consideration of such other matters as may be determined to be appropriate prior to pronouncing judgment. Upon pronouncing judgment, a certified copy of such judgment shall be deposited in the office of the Secretary of State. A motion to reconsider the vote by which any article of impeachment is sustained or rejected shall not be in order.

Form of putting the question on each article of impeachment

The Presiding Officer shall first state the question; thereafter each Senator, as his name is called, shall rise in his place and answer: guilty or not guilty.

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

question, and not on the final question on each article of impeachment.

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

Form of a subpoena to be issued on the application of the managers of
 the impeachment, or of the party impeached, or of his counsel

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

Fail not.

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

-----,
 Presiding Officer of the Senate.

Form of direction for the service of said subpoena

The Senate of the United States to -----, greeting:
 You are hereby commanded to serve and return the within
 subpoena according to law.
 Dated at Washington, this ----- day of -----, in the year
 of our Lord -----, and of the Independence of the United
 States the -----.

-----,
 Secretary of the Senate.

Form of oath to be administered to the Members of the Senate and the
 Presiding Officer sitting in the trial of impeachments

I solemnly swear (or affirm, as the case may be) that in
 all things appertaining to the trial of the impeachment of ----
 -- -----, now pending, I will do impartial justice according

to the Constitution and laws: So help me God.

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

The United States of America, ss:

The Senate of the United States to -----, greeting:

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

[Here insert the articles]

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

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

Hereof you are not to fail.

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

-----,
Presiding Officer of the Senate.

Form of precept to be indorsed on said writ of summons

The United States of America, ss:

The Senate of the United States to -----, greeting:

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

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

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

-----,
Presiding Officer of the Senate.

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

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

APPENDIX 2 Text of Senate Resolution 16

[Passed Unanimously by the Senate on January 8, 1999]

Resolved, That the summons be issued in the usual form provided that the President may have until 12 noon on Monday, January 11th, to file his answer with the Secretary of the Senate, and the House have until 12 noon on January 13th to file its replication with the Secretary of the Senate, together with the record which will consist of those publicly available materials that have been submitted to or produced by the House Judiciary Committee, including transcripts of public hearings or mark-ups and any materials printed by the House of Representatives or House Judiciary Committee pursuant to House Resolutions 525 and 581. Such record will be admitted into evidence, printed, and made available to Senators. If the House wishes to file a trial brief it shall be filed by 5 p.m. on January 11th.

The President and the House shall have until 5 p.m. on January 11th to file any motions permitted under the rules of impeachment except for motions to subpoena witnesses or to present any evidence not in the record. Responses to any such motions shall be filed no later than 10 a.m. on January 13th. The President may file a trial brief at or before that time. The House may file a rebuttal brief no later than 10 a.m. January 14th.

Arguments on such motions shall begin at 1 p.m. on January 13th, and each side may determine the number of persons to make its presentation, following which the Senate shall deliberate and vote on any such motions. Following the disposition of these motions, or if no motions occur then at 1 p.m. on January 14th, the House shall make its presentation in support of the articles of impeachment for a period of time not to exceed 24 hours. Each side may determine the number of persons to make its presentation. The presentation shall be limited to argument from the record. Following the House presentation. The President shall make his presentation for a period not to exceed 24 hours as outlined in the paragraph above with reference to the House presentation.

Upon the conclusion of the President's presentation, Senators may question the parties for a period of time not to exceed 16 hours.

After the conclusion of questioning by the Senate, it shall be in order to consider and debate a motion to dismiss as outlined by the impeachment rules. Following debate it shall be in order to make a motion to subpoena witnesses and/or present any evidence not in the record, with debate time on that motion limited to 6 hours, to be equally divided between the two parties. Following debate and any deliberation as provided in the impeachment rules, the Senate will proceed to vote on the motion to dismiss, and if defeated, an immediate vote on the motion to subpoena witnesses and/or to present any evidence not in the record, all without any intervening action, motion, amendment or debate.

If the Senate agrees to allow either the House or the President to call witnesses, the witnesses shall first be deposed and the Senate shall decide after deposition which witnesses shall

testify, pursuant to the impeachment rules. Further, the time for depositions shall be agreed to by both leaders. No testimony shall be admissible in the Senate unless the parties have had an opportunity to depose such witnesses.

If the Senate fails to dismiss the case, the parties will proceed to present evidence. At the conclusion of the deliberations by the Senate, the Senate shall proceed to vote on each article of impeachment.

APPENDIX 3 Timeline of Votes from 1999 Impeachment Trial of Bill Clinton

1. The Presiding Officer administered the oath to William H. Rehnquist, Chief Justice of the United States.
2. Unanimously approved S. Res. 16 “to provide for issuance of a summons and for related procedures concerning the articles of impeachment against William Jefferson Clinton.”¹⁴⁵
3. Two Democratic Senators (Harkin and Wellstone) provided notice in writing of their intent to suspend specific provisions of the “Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials.”¹⁴⁶
4. Consent to floor privileges for a number of individuals (e.g., Counsel to the Majority leader; Assistant Minority Secretary)
 - Voted without objection
5. Authorization to print relevant documents
 - Voted without objection
6. Resolution to authorize proper equipment and furniture¹⁴⁷
 - Voted without objection
7. Authorization to print as Senate document all documents filed by parties and other materials
 - Voted without objection

¹⁴⁵ See Appendix 2 for complete text of S. Res. 16, 106th Cong. (1999).

¹⁴⁶ Text of Proposed Resolution:

I hereby give notice in writing that it is my intention to move to suspend the following portions of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials for the duration of the trial of President William Jefferson Clinton:

- (1) The phrase ‘without debate’ in Rule VII;
- (2) The following portion of Rule XX: ‘, unless the Senate directs shall direct the doors to be closed while deliberating upon its decisions. A motion to close the doors may be acted upon without objection, or, if objected is heard, the motion shall be voted on without debate by the yeas and nays, which shall be entered on the Record’; and
- (3) In Rule XXIV, the phrases ‘without debate’, ‘except when the doors shall be closed for deliberation, and in that case’ and ‘, to be had without debate’.

¹⁴⁷ Text of Proposed Resolution:

Resolved, That in recognition of the unique requirements raised by the impeachment trial of a President of the United States, the Sergeant at Arms shall install appropriate equipment and furniture in the Senate chamber for use by the managers from the House of Representatives and counsel to the President in their presentations to the Senate during all times that the Senate is sitting for trial with the Chief Justice of the United States presiding.

Sec. 2. The appropriate equipment and furniture referred to in the first section is as follows:

- (1) A lectern, a witness table and chair if required, and tables and chairs to accommodate an equal number of managers from the House of Representatives and counsel for the President which shall be placed in the well of the Senate.
- (2) Such equipment as may be required to permit the display of video, or audio evidence, including video monitors and microphones, which may be placed in the chamber for use by the managers from the House of Representatives or the counsel to the President.

Sec. 3. All equipment and furniture authorized by this resolution shall be placed in the chamber in a manner that provides the least practicable disruption to Senate proceedings.

8. Consent to allow Senate to proceed to Hall of House for State of the Union
 - Voted on without objection
9. Vote on Motion to Dismiss
 - Yeas: 44
 - Nays: 56 [incl. Feingold, Hagel]
 - Result: MTD rejected
10. Vote on motion to subpoena witness and admit evidence not in record
 - Yeas: 56 [incl. Feingold, Hagel]
 - Nays: 44
 - Result: Motion accepted
11. Votes on Senate Resolution 30,¹⁴⁸ minority leader amendment 1,¹⁴⁹ minority leader amendment 2,¹⁵⁰ and majority leader amendment¹⁵¹
 - Minority leader amendment 1:
 - Yeas: 44 (incl. Feingold)
 - Nays: 54 (incl. Hagel)
 - Result: Amendment rejected
 - Minority leader amendment 2:
 - Yeas: 43
 - Nays: 55 (incl. Feingold)
 - Result: Amendment rejected

¹⁴⁸ Text of Proposed Resolution:

Title 1 § 101: Deposition time TBD by majority/minority leaders; all senators to have opportunity to review deposition materials.

Title 1 § 102: the House managers and the President's counsel may move to resolve objections made during depositions. After that, they may motion to admit the depositions or portions thereof into evidence. It shall then be in order for the two leaders jointly only to make motions for additional discovery only for new relevant evidence during the deposition.

Title 1 § 103: If no motions are made, the WH will have 24hrs to make any notions dealing with testimony or evidence.

Title 1 § 104: If no motions are made, the Senate will proceed to final arguments as provided in the impeachment rules, "waiving the two person rule" XXII of the Senate Roles of Procedure.

Title 1 § 105: at the conclusion of final arguments, the parties will proceed in accordance with the rules of impeachment, except that: (1) no motion with respect to re-opening the record will be in order; and (2) it shall be in order for a senator to offer a motion to suspend the rules to allow for open final deliberations with no amendments or motions to that motion in order; and (3) the Senate shall proceed to vote on the motion to suspend the rules.

Title 1 § 106: If no motions have been agreed to under §§ 102-03, and no motions are agreed to following the arguments, the vote will occur no later than 12:00noon on February 12, 1999.

Title 2 § 201: Chief Justice shall issue subpoenas to Blumenthal, Lewinsky, Jordan for oral depositions.

Title 2 § 203-05: standards of conduct for depositions.

Title 2 § 206: regarding dissemination/distribution of deposition materials.

¹⁴⁹ Summary of Proposed Amendment 1:

The amendment would limit the deposition time for all witnesses.

The amendment provides for 4 hours of closing arguments, with the White House using 2 hours and the House Republican managers using 2 hours.

¹⁵⁰ Summary of Proposed Amendment 2:

The amendment would have precluded motions or debate, except for deliberations, after the closing arguments.

¹⁵¹ Summary of Proposed Amendment 3:

The amendment allowed a final vote "if all motions are disposed of and final deliberations are completed."

- Majority leader amendment:
 - Yeas: 54 (incl. Hagel)
 - Nays: 44 (incl. Feingold)
 - Result: Amendment approved
- 12. The House moves that the transcriptions and videotapes of the oral depositions taken pursuant to Senate resolution 30 from the point that each witness is sworn to testify under oath to the end of any direct response to the last question posed by a party be admitted into evidence.
 - Yeas: 100
 - Nays: 0
- 13. Motion to place depositions in the Congressional Record
 - Yeas: 100
 - Nays: 0
- 14. House motion to subpoena Monica Lewinsky to appear for up to eight hours¹⁵²
 - Yeas: 30
 - Nays: 70
- 15. House motion to allow presentation of videotapes of oral depositions of Lewinsky, Jordan, and Blumenthal¹⁵³
 - Yeas: 62
 - Nays: 38
- 16. Motion to proceed to closing arguments
 - Yeas: 44
 - Nays: 56
- 17. Senator Ruff motion to require written notice of any video excerpts planned to be used¹⁵⁴
 - Yeas: 46
 - Nays: 54
- 18. Unanimous consent to show Jordan testimony to Senate met with objection
 - Chief Justice heard objection and proceeded
- 19. Notice of Intent to Suspend the Rules of the Senate by Senators Lott, Daschle, Hutchison, Harkin, Collins, Specter, Wellstone, and Leahy. No votes taken.
- 20. Senate Majority Leader asked unanimous consent to admit into evidence two affidavits met with objection
 - Chief Justice heard objection and proceeded
- 21. Unanimous consent to allow additional discovery, including testimony on oral deposition of multiple witnesses re possible fraud on Senate through perjury met with perjury
 - Chief Justice heard objection and proceeded

¹⁵² Period not to exceed eight hours, and in connection with the examination of that witness, the House requests that either party be able to examine the witness as if the witness were declared adverse, that counsel for the President and counsel for the House managers be able to participate in the examination of that witness, and that the House be entitled to reserve a portion of its examination time to reexamine the witness following any examination by the President

¹⁵³ Period of time not to exceed a total of six hours, equally divided, all or portions of the parts of the videotapes of the oral depositions of Monica S. Lewinsky, Vernon E. Jordan, Jr., and Sidney Blumenthal admitted into evidence, and that the House be entitled to reserve a portion of its presentation time.

¹⁵⁴ Managers shall provide written notice to counsel for the President indicating the precise page and line designations of any video excerpts from the depositions of Monica Lewinsky, Vernon Jordan or Sidney Blumenthal that they plan to use during their three-hour presentation on Saturday, or during their closing argument.

22. Wellstone requested unanimous consent from C.J. for 40-min. debate, equally divided, on the motion met with objection
 - Chief Justice heard objection and proceeded
23. Senate Majority Leader to suspend the rules
 - Yeas: 59
 - Nays: 41
 - Result: “[t]wo-thirds of those Senators voting—a quorum being present—not having voted in the affirmative, the motion is not agreed to.”
24. Lott introduced motion that the record of the proceedings held in closed session re: senators inserting final deliberations on impeachment be published in the Congressional Record at conclusion of the trial.¹⁵⁵
 - Motion to close the doors for final deliberations:
 - Yeas: 53
 - Nays: 47
25. Feb. 12, 1999: Rollcall vote No. 17, on Article I, which focused on allegations that Clinton “willfully provided perjurious, false, and misleading testimony to the grand jury.”
 - Guilty: 45¹⁵⁶ (incl. Hagel)
 - Not Guilty: 55¹⁵⁷ (incl. Feingold)
 - Result: Clinton is not guilty as charged in the first article of impeachment
26. Feb. 12, 1999: Rollcall vote No. 18, on Article II, which focused on “scheme designed to delay, impede, cover up, and conceal the existence of evidence and testimony related to a Federal civil rights action.”
 - Guilty: 50¹⁵⁸ (incl. Hagel)
 - Not Guilty: 50¹⁵⁹ (incl. Feingold)
 - Result: Clinton is not guilty as charged in the second article of impeachment

¹⁵⁵ C.J. allowed Lott to elaborate. Some points of clarification were made, and questions were asked. Some discussion ensued. For a short time, the C.J. largely allowed questions and allowed senators to address Lott directly.

¹⁵⁶ One of us, Hagel, voted that President Clinton was guilty of the first article of impeachment.

¹⁵⁷ One of us, Feingold, voted that President Clinton was not guilty of the second article of impeachment.

¹⁵⁸ One of us, Hagel, voted that President Clinton was guilty of the second article of impeachment.

¹⁵⁹ One of us, Feingold, voted that President Clinton was not guilty of the second article of impeachment.

APPENDIX 4 Constitutional Provisions on Impeachment

The provisions of the United States Constitution which apply specifically to impeachment are as follows:

Article I, Section 2, Clause 5

The House of Representatives . . . shall have the sole Power of Impeachment.

Article I, Section 3, Clauses 6 and 7

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Article II, Section 2, Clause 1

The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

Article II, Section 4

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III, Section 2, Clause 3

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . .

APPENDIX 5 Clinton Impeachment Trial Voting Data for United States Senators Still Serving

Name	State	Party	Motion to Dismiss	1998 Vote: Perjury	1998 Vote: Obstruction
Durbin, Dick	Illinois	Democrat	Yea	Not Guilty	Not Guilty
Feinstein, Dianne	California	Democrat	Yea	Not Guilty	Not Guilty
Leahy, Patrick	Vermont	Democrat	Yea	Not Guilty	Not Guilty
Murray, Patty	Washington	Democrat	Yea	Not Guilty	Not Guilty
Reed, Jack	Rhode Island	Democrat	Yea	Not Guilty	Not Guilty
Schumer, Chuck	New York	Democrat	Yea	Not Guilty	Not Guilty
Wyden, Ron	Oregon	Democrat	Yea	Not Guilty	Not Guilty
Cochran, Thad	Mississippi	Republican	Nay	Guilty	Guilty
Collins, Susan	Maine	Republican	Yea	Not Guilty	Not Guilty
Crapo, Mike	Idaho	Republican	Nay	Guilty	Guilty
Enzi, Mike	Wyoming	Republican	Nay	Guilty	Guilty
Grassley, Chuck	Iowa	Republican	Nay	Guilty	Guilty
Inhofe, Jim	Oklahoma	Republican	Nay	Guilty	Guilty
McConnell, Mitch	Kentucky	Republican	Nay	Guilty	Guilty
Roberts, Pat	Kansas	Republican	Nay	Guilty	Guilty
Shelby, Richard	Alabama	Republican	Nay	Not Guilty	Guilty

Key Takeaway: There are sixteen (16) senators still serving (7 Democrats, 9 Republicans) who voted in the Clinton impeachment trial. With the exception of Senators Collins and Shelby, each of these sixteen senators voted along party lines.

APPENDIX 6 Authors' Recent Press Articles on Impeachment

- I. Don Walton, *Hagel Says House Has Evidence to Consider Trump Impeachment*, LINCOLN J. STAR (Nov. 24, 2019).

Former Republican Sen. Chuck Hagel says he believes the case has been made for the House to “get very serious” about considering drafting articles of impeachment against President Donald Trump now.

“There’s enough here to really move beyond the hearings into discussion (about) specific charges,” Hagel said during a telephone interview from New York City.

“I’ve seen and heard enough evidence (to) clearly believe it was the right thing to start this inquiry,” he said. “The House has no choice but to move forward.

“The best advice (for members of Congress) is that you've got only one responsibility now and that is to the Constitution.

“Your North Star is the Constitution.”

Hagel said he’s not prepared to say that he would vote to convict the president of impeachment charges and remove him from office if he was a member of the Senate today.

“I would want to sit there and listen to the evidence,” he said.

Hagel has done that before.

After the House impeached Democratic President Bill Clinton in 1998 on charges of perjury and obstruction of justice related to acts of sexual misconduct, the Senate acquitted him in early 1999.

Hagel ultimately voted to convict Clinton.

As today’s House impeachment proceedings move ahead, former Republican Rep. Doug Bereuter said it’s time to “set aside partisan considerations.”

In a written statement responding to a Journal Star inquiry, Bereuter said: “All members of the House Intelligence Committee, in their role in the impeachment inquiry, should set aside partisan considerations, examine the evidence and discharge their constitutional duty with integrity.”

Bereuter also participated in the Clinton proceedings, voting to impeach the president and send the issue to the Senate for its decision.

What Hagel learned from that process, and from earlier association with the potential impeachment of President Richard Nixon in 1974 when he was chief of staff for former Nebraska Rep. John McCollister, was that there probably are “some surprises ahead,” he said.

“Things will get worse,” he added.

“People will start pulling the threads and things will come undone. It’s already happening now. The longer this plays out, the worse it gets for the president.”

Hagel has been watching the impeachment hearings on television, sometimes at home in Virginia or when he's on the road, and he’s “reading everything” about them.

As former secretary of defense, Hagel said, he personally knows some of the career professionals from the Defense Department and State Department who have testified during the hearings.

“I have worked with them,” he said. “I know their professionalism and their honesty.”

Hagel is the only Nebraska senator to have voted for impeachment of a president since John Thayer and Thomas Tipton, both Republicans, voted to impeach Andrew Johnson in 1868, just one year after Nebraska became a state.

Like Clinton, Johnson was acquitted by the Senate.

But it was a close call for Johnson; the 35-19 vote to convict and remove him from office fell just one vote short of the necessary two-thirds majority.

In 1999, Democratic Sen. Bob Kerrey voted to acquit Clinton as two motions to convict and remove the president from office failed on 50-50 and 45-55 votes.

Nebraska’s three House members, Bereuter, Rep. Jon Christensen and Rep. Bill Barrett, all Republicans, had voted to impeach Clinton, sending the issue to the Senate.

Facing certain House impeachment and conviction in the Senate, Nixon resigned in 1974.

Former Nebraska Republican Gov. Charles Thone, a member of the House at the time, was prepared to support the Judiciary Committee’s approaching recommendation to impeach Nixon, but planned to visit with Vice President Gerald Ford before casting his vote, Thone said years later.

Republican Sen. Carl Curtis planned to stick with Nixon to the end and cast his vote to acquit Nixon even if he stood alone.

“If I didn’t defend him, he would have gone undefended,” Curtis later said.

As the current impeachment drama unfolds, Nebraska’s all-Republican congressional delegation appears prepared to support Trump.

Sen. Ben Sasse, an occasional critic of the president and a candidate for reelection next year, has been viewed sometimes nationally as a potential stray vote.

But statements from Sasse's office during the week made that appear unlikely.

Sasse, in a news release critical of House Speaker Nancy Pelosi's decision to continue to delay a House vote on approval of the new trade agreement among the United States, Mexico and Canada, said House Democrats are "wasting time on circuses instead of doing real work for the American people."

Earlier, in response to a request for Sasse's view of the impeachment proceedings, spokesman James Wegmann emailed: "As Senator Sasse has said for months, Adam Schiff is running a clown show in the House and everyone should stop playing the short-term game for cable TV and act like adults."

II. Russ Feingold, *As a Democrat, I Took Clinton Impeachment Seriously. Justice Tops Politics*, USA TODAY (Oct. 29, 2019).

Impeachment is dangerous and risky for our country, but the Founders gave us the process for a reason. More than ever, lawmakers must be impartial.

In late 1998, I was a Democratic senator from Wisconsin just reelected for a second term. Shortly after the election, the House Judiciary Committee approved articles of impeachment, seeking to remove from office a president from my own party whose abilities and accomplishments I held in high esteem.

Stark political battle lines were drawn and tensions were sky high. Public opinion quite clearly [did not favor impeachment](#), but the full House of Representatives approved the articles of impeachment and sent them to the Senate. The Senate prepared to conduct a trial and vote on whether to convict President Bill Clinton and end his presidency.

My party's leadership strongly supported the president and made it clear it would do everything it could to ensure that he would not become the first president in history to be convicted and removed from office. A strong majority of my constituents made plain in the letters and phone calls that flooded my office that while they did not like the president's behavior, they did not want to see his presidency end. And I recognized that conviction would upend the choice the voters had made in a free and fair election held just a few years earlier.

Senators' duty to 'impartial justice'

But something about this purely political approach to the impeachment trial bothered me. And as I looked at the Constitution and the historical precedents drawn from the only two [impeachment efforts](#) that had reached or nearly reached this point, of President Andrew Johnson in 1868 and President Richard Nixon in 1974, I realized I had a duty as a senator that went beyond politics and policy.

The Founders made it clear: [You don't have to break a law to be impeached. Trump's defenders need a better argument.](#)

The Constitution gives both House members and senators distinct responsibilities with respect to impeachment. House members alone decide whether the president has done something, or many things, that warrant impeachment. But they can't remove him from office. Senators can protest the president's policies or proclaim he has committed high crimes and misdemeanors all they want, but they can't impeach him if the House doesn't act. Once the House approves articles of impeachment, however, no poll is taken, no election is held. The 100 Senators have the sole power to decide whether to remove the president from office or allow him to finish the term to which he was elected.

As a senator, I had sworn an oath to uphold the Constitution. And as the trial began, I swore a separate oath to "[do impartial justice](#)" in the impeachment matter. Those oaths led me to two decisions early in the proceeding that were not popular with my party or my constituents.

First, rather than short-circuiting the trial by voting for a [motion to dismiss](#) offered by the senior member of my caucus, Sen. Robert Byrd, D-W.Va., under rules adopted by the Senate for the Clinton impeachment, I concluded that the trial should move forward to its eventual conclusion. And second, I felt bound to give the [House managers](#), who act as prosecutors in the impeachment case, an opportunity to make the case that the House had appointed them to present, and of course, to consider the defense of the president presented by his counsel.

And so, [alone in my caucus](#), I voted against the motion to dismiss and, separately, in favor of allowing the House managers to take the depositions of three key witnesses and offer them into evidence in the Senate trial.

Impeachment risks instability

I reached those conclusions out of respect for the role that the House of Representatives plays in the impeachment process set out in the Constitution. Senators have an extremely important role to play in this process, but it is to do impartial justice in the trial. Making a decision to acquit the president before impeachment articles are even voted on by House, or doing so before the House has presented its full case in the Senate trial, would be inconsistent with a senator's constitutional responsibilities.

Punish political frivolity at the polls: [Should Trump get a third term if he's impeached and acquitted? Hmmmmm . . .](#)

In the end, I voted to [acquit President Clinton](#), although I believed and stated at the time that it was [a close case](#). But I made my decision after hearing all the arguments and reviewing all the evidence that the body charged with presenting the case for impeachment wanted to put before the Senate.

When the Senate considered the impeachment of President Clinton, I was deeply troubled that for the second time in my life, impeachment of a duly elected president was contemplated. I wondered how we would feel about the stability of our political system if another presidential

impeachment occurred in the next 10 or 20 years. And I firmly believed that senators should err on the side of respecting the will of the people as expressed in the election for president every four years.

But I also knew that the Founders of our country had provided a process for removing a president for good reason, and I believed strongly that senators had to respect that constitutional process and faithfully carry out their role in it, rather than prejudging the effort based on their own policy or political preferences.

That is what I tried my best to do, and what I urge all senators to do now as an impeachment trial for President Donald Trump looms. They must keep an open mind. They must hear all the evidence before making a decision. And, having been entrusted by the Constitution with perhaps the most momentous decision a senator can make, they must do impartial justice.

Russ Feingold, a Democrat, represented Wisconsin in the U.S. Senate from 1993 to 2010.

