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SUMMARY

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The Impeachment Process in the Senate

After the House impeaches a federal officer, the Senate conducts a trial to determine if the individual should be removed from office. The Senate has a set of rules specific to the conduct of an impeachment trial, most of which originated in the early 19th century.

The impeachment rules lay out specific steps that the Senate takes to organize for a trial. House managers (Members of the House who present the case against the impeached officer in the Senate) read the articles of impeachment on the Senate floor. The Presiding Officer and Senators take an oath to do impartial justice, and the Senate issues a "summons" to the accused and requests that a written answer be filed. The House Managers are also invited to respond to the answer of the impeached officer.

Actions after these organizing steps, however, are not specified in the impeachment rules. The impeachment rules mention some actions that are common in judicial trials, such as opening and closing statements by the parties to the case and the examination of witnesses, but provide little specific guidance. Instead, the rules allow the Senate, when sitting for a trial, to set particular procedures through the approval of "orders." Some orders of the Senate are unanimous consent agreements, but others are proposals adopted by the Senate. If such a proposal is considered while the Senate is sitting for the trial, then debate is limited by the impeachment rules. As a result, the support of three-fifths of the Senate to invoke cloture is not necessary to reach a vote to approve a procedural proposal. In previous trials, such proposals have been subject to amendment. Senate published precedents do not provide guidance on what can or cannot be included in such an order.

Compared to when the Senate meets in legislative and executive session, the opportunity for individual participation by Senators in a Senate trial is limited. The rules require that any debate among Senators take place in closed session. Senators can make motions under the impeachment rules, but these rules are silent on what motions can be offered, and when. In modern trials, when Senators proposed motions, it was often pursuant to a previously-agreed-to order of the Senate. Senators can also submit written questions during the trial—to House Managers, counsel for the impeached officer, or witnesses—that the Presiding Officer presents on their behalf. Orders of the Senate, however, might structure the time and process for posing questions. During the open portion of an impeachment trial, Senators spend most of the time listening to arguments presented by House Managers and counsel for the impeached officer.

Impeachment Rule XI allows the Senate to create trial committees to hear and consider evidence and report it to the Senate. Such committees were not intended to be used for presidential impeachments, but four of the five impeachment trials completed since 1936 concerned federal judges, and in each of these cases the Senate established a trial committee.

When the Senate meets in closed session to deliberate, each Senator may speak only once on each question. Such remarks are limited to 15 minutes on the final question—whether the impeached officer is guilty or not guilty—and to 10 minutes on other questions. On the final question, Senators respond "guilty" or "not guilty" on each article of impeachment. The support of two-thirds of Senators present on an article is necessary to convict.

The Presiding Officer of a trial operates much like the Presiding Officer in regular Senate session, in that the Chair may issue an initial ruling, but any Senator could request that the full Senate vote instead. Because of the debate limitations in the impeachment rules, procedural decisions appealed or submitted by the Chair can be reached with majority support. In a presidential impeachment trial, the Chief Justice of the United States is the Presiding Officer.

Although the impeachment rules prescribe that the Senate convene at noon for a trial, six days a week, a Senate majority can alter this schedule. It is possible for the Senate to conduct legislative and executive business on the same calendar days that it meets for a trial, but it must meet in legislative or executive session to do so. When the Senate is sitting as a Court of Impeachment, legislative and executive business cannot occur.

The information presented in this report is drawn from published sources of congressional rules and precedents, as well as the public record of past impeachment trial proceedings. It provides an overview of the procedures, and some past actions, but should not be treated or cited as an authority on congressional proceedings. Authoritative guidance on the interpretation and possible application of rules and precedents can be obtained only through consultation with the Office of the Senate Parliamentarian.

Contents

Introduction 1
History of the Impeachment Rules of the Senate 2
Impeachment Trial Procedures and Practice 4
Brief Overview 4
Receipt and Presentation of Articles of Impeachment 5
Organizing for the Trial 6
Determining Trial Proceedings: Orders of the Senate 8
Consideration and Collection of Evidence 10
What the Impeachment Rules Provide 11
Creation of a Trial Committee 16
Closed Deliberations by Senators 17
Voting on Articles of Impeachment 19
Senate Interpretation of the Impeachment Rules and the Role of the Presiding Officer 20
Conducting Legislative and Executive Business 22

Contacts

Author Information 23

Introduction

Under the terms of the U.S. Constitution, it is the responsibility of the House to impeach (meaning, formally accuse) a federal officer of high crimes and misdemeanors, and the responsibility of the Senate to try and then possibly convict that officer. The Senate therefore does not initiate impeachment proceedings, but instead acts after the House has charged a federal officer with wrongdoing.

The Constitution grants the Senate the sole power to try all impeachments, and establishes four requirements for an impeachment trial in the Senate: (1) the support of two-thirds of Senators present is necessary to convict; (2) Senators must take an oath or an affirmation; (3) the punishments the Senate can issue cannot extend further than removal from office and disqualification from holding future office; and (4) in the case of a presidential impeachment trial, the Chief Justice, and not the Vice President or a Senator, is the presiding officer.

All other trial procedures are left to the Senate to determine itself. Indeed, in 1993, the Supreme Court ruled—in response to a claim by an impeached federal judge that his trial was unconstitutional because the Senate relied, in part, on a committee to collect evidence—that the judicial branch did not have a role to play in assessing the validity of Senate impeachment procedures.[1] According to the Supreme Court, the Constitution placed a few specific requirements on the trial, and "their nature suggests that the Framers did not intend to impose additional limitations on the form of the Senate proceedings."[2]

In each of the 15 impeachment trials the Senate has completed since 1789, the Senate has therefore determined its method of proceeding.[3] Although attention was certainly paid to past precedent, the Senate established unique procedures for each trial to some extent, and sometimes the decisions reached regarding process were consensual or even unanimous. Notably, of the 5 full trials conducted in the last 80 years, 4 were of federal judges. In these four cases the Senate appointed a trial committee, composed of an equal number of Senators from each party, to hear and consider evidence and report it to the Senate. This history did not provide the Senate with a robust set of precedents to look to for guidance on how to conduct a modern trial, particularly if a committee will not be used. Trial committees were not intended to be used for presidential impeachments, and the only trial since 1936 conducted without a committee was that of President William Jefferson Clinton. That trial illustrates the many procedural decisions reached that were tailored for that particular set of circumstances.[4]

This report summarizes the existing rules and some past practices of the Senate related to an impeachment trial of a federal official. It does not discuss possible grounds for impeachment or other Constitutional or legal issues which are addressed in CRS Report R46013, *Impeachment and the Constitution*, by Legislative Attorneys Jared P. Cole and Todd Garvey. The information

[1] *Nixon v. United States,* 506 U.S. 224, 225 (1993).

[2] *Nixon v. United States,* 506 U.S. 224, 230 (1993).

[3] Of the 15 completed impeachment trials, all but three—President Clinton, President Andrew Johnson, and Secretary of War William W. Belknap—were regarding federal judges. For more information on judicial impeachment procedures, see archived CRS Report R41172, *The Role of the Senate in Judicial Impeachment Proceedings: Procedure, Practice, and Data*, by Betsy Palmer.

[4] The Senate produced a comprehensive four-volume set containing a complete record of its proceedings on the impeachment trial of President Clinton. See U.S. Congress, Senate, *Proceedings of the United State Senate in the Impeachment Trial of President William Jefferson Clinton*, 106th Cong., 1st sess., February 12, 1999, S.Doc. 106-4 (Washington: GPO, 2000). In addition, miscellaneous Senate publications related to the impeachment trial of President Clinton have been compiled by GPO at this website: https://www.govinfo.gov/content/pkg/GPO-MISCSPUB/html/GPO-MISCSPUB.html.

presented in this report is drawn from published sources of congressional rules and precedents, as well as the public record of past impeachment trial proceedings. It provides an overview of the procedures and should not be treated or cited as an authority on congressional proceedings. Consultation with the Office of the Senate Parliamentarian is always advised regarding the possible application of rules and precedents.

History of the Impeachment Rules of the Senate

The Senate adopted a set of impeachment rules in 1868, recommended by a select committee appointed for that purpose, in anticipation of the trial of President Andrew Johnson. These were not the first rules regarding impeachment ever agreed to in the Senate. The Senate had agreed to rules for its two earliest impeachment trials (Senator William Blount, 1798-1799, and District Judge John Pickering, 1803-1804), but it seems to have considered the rules to apply only to the trial of that particular individual.[5] For the third impeachment trial, that of Supreme Court Justice Samuel Chase (1804-1805), the Senate approved 19 impeachment rules, and these rules appear to have been used in the next two trials (District Judge James H. Peck, 1831-1832, and District Judge West H. Humphreys, 1862).[6] The 1868 select committee in the Johnson impeachment was explicit in its intent to recommend permanent rules, deeming it "proper, to report general rules for the trial of all impeachments."[7] The select committee recommended 25 rules, many of which were the same as those adopted for the Chase trial, and some of which codified practices from previous trials.[8]

The rules reported by the 1868 select committee in the Johnson impeachment chiefly concerned the mode and manner of preparing for a trial. Some Senators argued that impeachment rules should not be too prescriptive regarding the actual trial proceedings, believing such decisions to be best made after the Senate had convened for the trial. They recognized that the outcome of a trial could depend "upon the rulings and mode of proceeding during the trial."[9] But the lack of detail in the rules also reflected the nature of Senate proceedings in the middle of the 19th century. Without designated party floor leaders and with very few staff, Senators were accustomed to discussing procedures on the floor, effectively working out a method of proceeding on legislation as they went along.[10]

The Senate adopted the rules reported by the select committee, and they have operated as the rules for impeachment trials since 1868, with very few changes. During the Johnson trial, when disputes arose about the interpretation of the rules, the Senate agreed to three changes to clarify their intent.[11] Despite calls to revise the rules for the impeachment trials conducted early in the

[5] Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States*, (Washington: GPO, 1907), (hereinafter *Hinds*), vol. 3, §2303 and §2331.

[6] *Hinds*, vol. 3, §2348; §2372 and §2393.

[7] *Congressional Globe*, February 29, 1822, p. 1522.

[8] Most of the rules were the same or very similar to rules agreed to in 1804 for the trial of Justice Samuel Chase. For details, see CRS memorandum, "Evolution of the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials," by Robert L. Thornton, September 3, 1974, published in U.S. Congress, Senate Committee on Rules and Administration, *Amending the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*, (Pursuant to S.Res. 370), 93rd Cong., 2nd sess., August 22, 1974, 93-1125 (Washington: GPO, 1974), pp. 54-77.

[9] *Congressional Globe*, February 29, 1822, p. 1520.

[10] Gerald Gamm and Steven S. Smith, "Emergence of Senate Party Leadership," in *U.S. Senate Exceptionalism*, ed. Bruce I. Oppenheimer (Columbia: Ohio State University Press, 2002), pp. 224-226.

[11] The Senate, at the start of the Johnson trial, agreed to correct "a clerical error in the rules" to allow the Senate to take a division or voice vote on a question submitted by the Presiding Officer, instead of mandating that the vote be by the

20th century,[12] the impeachment rules were not changed again until 1935. At that time, the Senate, in response to reported low attendance by Senators during the 1933 trial of district judge Harold Louderback, agreed to the current Rule XI, which allows for the establishment of a committee to receive evidence and hear testimony from witnesses (see discussion of trial committees below).[13]

The Senate next reviewed its impeachment rules in 1974, when the House was expected to impeach President Richard Nixon. (The House had not impeached a federal officer since 1936.) At that time, the Senate directed the Committee on Rules and Administration to examine Senate impeachment rules and precedents with a view toward recommending necessary revisions for the conduct of a trial.[14] The Committee met twice to discuss the rules and to pose questions to the Senate Parliamentarian and his assistant, and over two additional days it also heard testimony from Senators regarding the rules.[15] The Majority Leader wrote a letter to the Rules Committee proposing significant changes to the impeachment rules, and the Committee discussed these proposed changes as well.[16]

The Rules Committee reported an original resolution (S.Res. 390, 93rd Congress) proposing adjustments to 13 of the 26 rules. Of the suggested changes, nearly all were meant to clarify the meaning of the rule or to codify what had been the practice in past trials. The Committee did not recommend any major changes to the rules or report any new rules. As the accompanying committee report explained, "there appeared to be a consensus among the Members that for the most part the existing rules should be retained and that amendments thereto should be proposed only with the most valid justification."[17]

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yeas and nays. See *Congressional Globe,* "Supplement Containing the Proceedings of Senate Sitting for the Trial of Andrew Johnson, President of the United States," (hereinafter "Johnson Supplement") March 13, 1868, p. 7. The Senate also amended Rule VII to settle that the Presiding Officer could issue an initial ruling on a question, which would then be submitted to the full Senate at the request of any Senator. Some Senators thought the original rule prohibited the Presiding Officer from ruling at all, and instead required all questions to be submitted to the Senate. (See *Congressional Globe,* "Johnson Supplement," March 31, 1868, pp. 59-63.) The third change was to add to then-Rule XXIII (now Rule XXIV) the sentence clarifying that the 15-minute limit on debate on the final question is 15 minutes in total, not 15 minutes on each article. (See *Congressional Globe,* "Johnson Supplement," May 7, 1868, p. 409.)

[12] George H. Haynes, *The Senate of the United States*, Reissue of 1938 edition, vol. II (New York: Russell & Russell, 1960), p. 845. In 1912, during the trial of Judge Archbald, a Senator submitted a resolution in legislative session regarding amendments to the impeachment rules that would allow the Judiciary Committee to hear testimony and report findings of facts in future impeachment trials of lower-level officers (*Congressional Record*, vol. 49 (December, 16, 1912), pp. 698-699). The Senate did not act on the resolution.

[13] Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis*, 2nd ed. (Chicago: University of Chicago Press, 200), p. 34; *Congressional Record*, May 28, 1935, pp. 8309-8310.

[14] S.Res. 370, 93rd Congress. The Senate also referred to the Rules Committee a resolution (S.Res. 371, 93rd Congress) to permit television and radio coverage of the impeachment trial, something that would not otherwise have been permitted in 1974. Senate floor procedures were not televised until 1986.

[15] For transcripts of the meetings with the Senate Parliamentarian, see U.S. Congress, Senate Committee on Rules and Administration, Subcommittee on the Standing Rules, *Directing the Senate Committee on Rules and Administration To Study the Senate Rules and Precedents Applicable to Impeachment Trials*, Unpublished Transcript, 93rd Cong., 2nd sess., July 31, 1974; and *Comparison of Proposed Rules of the Senate of the U.S. When Sitting as a Court of Impeachment and Present Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials* (hereinafter *Comparison of Proposed Rules*), Unpublished Transcript, 93rd Cong., 2nd sess., August 1, 1974.

[16] For a description of the proposed changes, see Rich Spencer, "Mansfield Offers New Rules for Senate Impeachment Trial," *Boston Globe*, July 31, 1974, p. 11. Among the proposals that the Rules Committee did not report were one requiring that the Senate adopt a "clear and convincing" evidence standard and one to allow amendments to articles of impeachment in the Senate if they were authorized by the House.

[17] U.S. Congress, Senate Committee on Rules and Administration, *Amending the Rules and Procedure and Practice in the Senate When Sitting on Impeachment Trials*, report to accompany S.Res. 390, 93rd Cong., 2nd sess., August 22,

The Senate, however, never took up the resolution reported by the Rules Committee in 1974 because President Nixon resigned before being impeached by the House. Twelve years later, when the House next impeached an officer, the Senate again directed the Rules and Administration Committee to review the rules. The Rules Committee in 1986 recommended the changes that had been approved by the committee in 1974, and the Senate agreed to them.[18]

No further changes have been made to the impeachment rules. The rules, formally titled the "Rules of Procedure and Practice in the Senate When Sitting on the Trial of Impeachments" are printed in the *Senate Manual* as well as in a 1986 Senate document that also describes precedents and practices at an impeachment trial, *Procedure and Guidelines for Impeachment Trials in the United States Senate.*[19]

Impeachment Trial Procedures and Practice

Brief Overview

When the Senate conducts an impeachment trial, it does so in a procedural mode that is distinct both from legislative session (where bills and resolutions are considered) and from executive session (where nominations and treaties are considered). The differences are significant, but precedent does dictate that if the impeachment rules are silent, the regular Standing Rules of the Senate, where applicable, may guide proceedings.[20]

The impeachment rules prescribe a series of steps for the start of the trial, which are described below. The Senate follows these steps to organize itself for the trial and then requests written statements from the impeached officer and from the House regarding the charges. The next stage is the receipt and presentation of evidence, and the impeachment rules provide little guidance regarding this process. Actions taken at this stage have varied from trial to trial. Arguments are made on the Senate floor by House managers (Members of the House selected to prosecute the case in the Senate) and counsel for the impeached officer (an attorney or attorneys who were chosen by the accused). The Senate could decide to request documents and hear testimony from witnesses, who could receive questions from the House managers, counsel for the impeached officer, and Senators.

Senators are expected to attend the trial, but their individual participation in open session is limited. They can submit questions in writing—for a witness, House manager, or counsel for the impeached officer—but the Presiding Officer of the trial, not the Senator, reads the question, announcing which Senator posed it. Debate among Senators is not allowed during the trial unless the Senate, by majority vote, goes into closed session, where the length of time each Senator can speak is limited. The Senate impeachment rules refer to opportunities for both Senators and the parties to the case to place proposals before the Senate for a vote; in modern practice, however,

1974, S.Rpt. 93-1125 (Washington: GPO, 1974), p. 20.

[18] U.S. Congress, Senate Committee on Rules and Administration, *Amending the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*, 99th Cong., 2nd sess., August 13, 1986, S.Rpt. 99-401 (Washington: GPO, 1986); S.Res. 479, 99th Congress, agreed to by voice vote August 16, 1986.

[19] U.S. Congress, Senate, *Senate Manual*, Containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate, prepared by Matthew McGowan, 113th Cong., 1st sess., S.Doc. 113-1 (Washington: GPO, 2014), pp. 223-231; and U.S. Congress, Senate, *Procedure and Guidelines for Impeachment Trials in the United States Senate*, prepared pursuant to Senate Resolution 439, 99th Congress, 2nd sess., prepared by Floyd M. Riddick and Robert B. Dove, 99th Cong., 2nd sess., August 15, 1986, S.Doc. 99-33 (Washington: GPO, 1986) (hereinafter *Procedure and Guidelines for Impeachment Trials*).

[20] *Procedure and Guidelines for Impeachment Trials*, p. 8.

the Senate has structured the order of considering proposals, either by unanimous consent or by agreeing to a resolution by majority vote.

Votes can occur in open or closed session on procedural questions, such as those that might set the schedule for the trial, structure time for arguments and questions, and arrange for witnesses. In previous trials, the vote on the final question of whether or not to convict has always occurred in open session. Conviction requires a vote of two-thirds of Senators present on any article of impeachment.

Receipt and Presentation of Articles of Impeachment

The impeachment rules establish a timeline for the Senate to take several actions after it receives formal notice from the House regarding an impeachment. Specifically, under Impeachment Rule I, Senate action is triggered by the receipt of notice from the House "that managers are appointed" and "are directed to carry articles of impeachment to the Senate."[21] The House, in modern practice, first agrees to articles of impeachment in the form of a simple resolution (H.Res.), and then agrees to another privileged resolution (or sometimes multiple resolutions) that serves to instigate action in the Senate as prescribed by the rule. In this second resolution (or series of resolutions), the House selects Representatives who serve as "impeachment managers." These Members of the House will argue the case for impeachment before the Senate. The resolution also grants authority to the House managers to take actions to prepare and conduct the trial in the Senate.[22] Finally, the resolution directs that a message be sent to the Senate to inform them that managers have been appointed.

In practice, after receipt of the message from the House, the following actions take place in the Senate:

The Senate, by unanimous consent, establishes a time for the House Managers to present the articles of impeachment to the Senate. Impeachment Rule I provides that the "Secretary of the Senate shall immediately inform the House of Representatives that the Senate is ready to receive the managers." Instead of following the letter of the rule, however, the Senate reaches a unanimous consent agreement that sets a specific time for the Secretary to invite the House managers to appear. The time agreed upon in modern trials has been within a day or two of receipt of the House message. Scheduling a time is more convenient for all Senators, and these unanimous consent agreements have been reached within the context of a rule that appears to require immediate action.[23]

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[21] The language of the rule reflects the 19th century House practice of voting to impeach an officer—and notifying the Senate of this fact—prior to drafting articles of impeachment. Since the 1912 impeachment of Robert W. Archbald (U.S. Circuit Judge, designated as a member of the Commerce Court) the House has included articles of impeachment in the resolution impeaching the officer. On the Archbald impeachment, see Clarence Cannon, *Cannon's Precedents of the House of Representatives of the United States,* (Washington: GPO, 1935), Volume VI, §499.

[22] The resolutions, for example, typically allow the House managers to hire clerical and legal assistants, to issue subpoenas, and to file with the Secretary of the Senate requested formal statements, referred to as "pleadings," which in this context could include a written response to the impeached officer's answer to the articles and trial briefs.

[23] When the Rules and Administration Committee reviewed the impeachment rules in 1974, a question was raised whether the Secretary of the Senate should be charged with the function of immediately informing the House that the Senate was ready to receive the managers. The Senate Parliamentarian informed the committee that in all prior cases, the Secretary of the Senate had informed the House only after the Senate adopted an order directing him to do so. Some Senators, including the Chair, commented that these precedents would be sufficient and a rules change would not be necessary, and the Committee did not recommend a change to the language of the rule. See *Comparison of Proposed Rules*, Unpublished Transcript, 93rd Cong., 2nd sess., August 1, 1974, pp. 29-32.

A House manager reads the articles of impeachment aloud on the Senate floor, sometimes after a live quorum call to bring Senators into the chamber. The impeachment rules require that the articles of impeachment be "exhibited," which means read before the Senate. At a time arranged by unanimous consent, and sometimes after a live quorum call to ascertain the presence of Senators, the House Managers arrive on the floor of the Senate, are announced by the Secretary to the Majority or the Sergeant at Arms, and are escorted by the Sergeant at Arms to seats assigned to them in front of the Senate rostrum. The Presiding Officer[24] then directs the Sergeant at Arms to make a proclamation required by Impeachment Rule II:

> "All persons are commanded to keep silence, on pain of imprisonment, while the House of Representatives is exhibiting to the Senate of United States articles of impeachment against _____."

A House Manager, typically the Chair of the House Judiciary Committee, then reads the articles in full before the Senate. The House Manager also makes a statement that the House reserves the right to amend the articles of impeachment.[25] The Presiding Officer then announces, again using language from Impeachment Rule II, that the Senate will "take proper order on the subject of impeachment" and notify the House. The House Managers then exit the Senate chamber.

Organizing for the Trial

Impeachment Rule III provides that after the articles are presented by the House managers, the Senate will proceed to consider the articles at 1 o'clock the next day (unless the next day is a Sunday), or sooner if ordered by the Senate. In modern trials, the Senate has most often taken the steps necessary to organize for an impeachment trial on the same day that the articles of impeachment were read on the floor. After the presentation of the articles, the Senate takes the following steps to organize for a trial:

The Presiding Officer of the trial takes the oath of office. The Constitution requires that Senators be "on Oath or Affirmation" when sitting for the purpose of trying an impeachment.[26] The Senate developed the practice of first swearing in the presiding officer of the trial, who then administers the oath to all Senators.

In the case of a presidential impeachment, the Chief Justice acts as presiding officer. Impeachment Rule IV requires that notice be given to the Chief Justice of the time and place of the trial. It further provides that the Chief Justice is to be administered the oath by the "Presiding Officer of the Senate."[27] The Chief Justice takes the same oath as the Senators (see below for text). Although the Vice President of the United States, as President of the Senate, could act as Presiding Officer of the Senate and administer the oath to the Chief Justice, in the Clinton impeachment trial, the President Pro Tempore of the Senate administered the oath to the Chief

[24] At this point, even if the articles of impeachment are against a President of the United States, the presiding officer is the regular presiding officer of the Senate—either the Vice President, the President pro tempore, or an Acting President pro tempore.

[25] U.S. Congress, House, *Deschler's Precedents of the United States House of Representatives*, prepared by Lewis Deschler, 94th Cong., 2nd sess., H.Doc. 94-661 (Washington: GPO, 1977), (hereinafter *Deschler*), chapter 14 §10.1; for recent examples see also *Congressional Record*, vol. 137 (August 9, 1988), p. 21170, and vol. 156 (March 17, 2010), p. 3622.

[26] Article I, Section 3, Clause 6.

[27] This provision of the impeachment rules was added in response to the Chief Justice, in 1868, bringing an associate justice to administer the oath to him. U.S. Congress, Senate Committee on Rules and Administration, *Amending the Rules and Procedure and Practice in the Senate When Sitting on Impeachment Trials*, 93rd Cong., 2nd sess., August 22, 1974, 93-1125 (Washington: GPO, 1974), pp. 28-29; and *Amending the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*, 99th Cong., 2nd sess., August 13, 1986, 99-401 (Washington: GPO, 1986), pp. 3-4.

Justice. In the Clinton trial the Senate also agreed by unanimous consent that a bipartisan group of six Senators escort the Chief Justice to the dais.

Senators are administered the oath of office. The Presiding Officer of the Trial administers the following oath to Senators, as provided in Impeachment Rule XXV:

> [Do you] solemnly swear (or affirm, as the case may be) that in all things appertaining to the trial of the impeachment of____, now pending, [you] will do impartial justice according to the Constitution and laws: So help [you] God.

In modern practice, the Chief Justice asks all Senators, who are standing at their desks, to raise their right hands as he reads the oath, and Senators respond, all together, "I do." Senators also sign an official oath book, which serves as the permanent record of the administration of the oath. Senators are required to take the oath before participating in the trial, and Senators who might be absent at the time the oath is administered *en masse* inform the presiding officer as soon as possible so that they can take the oath separately.

At this point, any Senator wishing to be excused from participating in the trial could ask to be excused from this service. In the past, the Senate has excused Senators from service in an impeachment trial only at their request.[28]

The Senate issues a "summons" and requests an "answer" from the impeached official and a "replication" (or response) from the House Managers. It is a necessary early step of an impeachment trial that the impeached officer be informed of the charges through an official process. Impeachment Rule VIII states that after the articles have been presented and the Senate has organized for a trial, "…a writ of summons shall issue to the person impeached…" The Senate accomplishes this by agreeing to an "order," sometimes in the form of a resolution, directing that a summons be issued. Impeachment Rule XXV provides the language of the summons, which, in accordance with Rule VIII, includes the articles of impeachment.[29]

The Senate, when it adopts an order for a summons, also directs the accused official to file a written answer to the articles of impeachment. The Senate determines the date by which this answer must be filed. Under long-standing practice, the Senate also sets a date by which the House Managers can file a formal written response to the impeached officer's answer—which is called a "replication"—with the Senate. The length of time the Senate provides for the impeached officer to file an answer and for the House managers to file a replication has varied in modern practice, from a few days to several weeks.[30]

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[28] *Procedure and Guidelines for Impeachment Trials,* pp. 76-77. For example, the Senate has granted requests of Senators to be excused for reasons of having a personal connection with the impeached officer (*Congressional Record,* March 12, 1936, p. 3646) and for having been in the House the previous Congress when the House voted to impeach (*Congressional Record,* March 15, 1989, p. 4220, and December 7, 2010, p. 19012).

[29] Impeachment Rule VIII, which is reflected in the form of the summons in Impeachment Rule XXV, states that the person impeached shall be notified to appear before the Senate at a set day and time. It is not necessary that the impeached officer personally appear, however. Impeachment Rule X states that the person impeached shall be called to appear to answer the articles, and that, "if he appears, or any person for him, the appearance shall be recorded, stating particularly if by himself, or by agent or attorney"—provisions permitting the accused to be represented by another person. While impeached judges have attended their trials on the Senate floor, including in the 1980s, neither President Johnson nor President Clinton attended their impeachment trials.

[30] For example, on January 8, 1999, in the impeachment trial of President Clinton, the Senate agreed to a resolution (S.Res. 16) requiring that an answer to the summons be filed by noon on January 11 and the replication of the House managers be filed by noon on January 13. On August 14, 1986, in the impeachment trial of Judge Harry Claiborne, the Senate agreed to a resolution (S.Res. 480) requiring that an answer be filed no later than September 8 and the replication no later than September 15.

An order or resolution regarding the summons and replication is not subject to debate, pursuant to Impeachment Rule XXIV, but is subject to amendment. The order or resolution can be approved by a majority of Senators voting, a quorum being present.

On the day that the Senate majority has established for the return of the summons, Impeachment Rule IX provides that the Senate convene the trial at 12:30 p.m. The officer who served the summons (typically the Sergeant at Arms under Impeachment Rule VI) swears an oath, administered by the Secretary of the Senate, that the service was performed.

Other administrative and organizational decisions. Impeachment Rule VII states that "The Presiding Officer of the Senate shall direct all necessary preparations in the Senate Chamber." Note that this is the regular presiding officer of the Senate, as these arrangements could be made in advance of the trial.

In practice, the Senate, through a unanimous consent agreement or a resolution, makes decisions regarding such matters as staff access to the floor and the placement of furniture and equipment in the well to be used for trial presentations. The Senate might take such actions in legislative session before the trial, or the actions could be taken shortly after the Senate convenes for the trial.

For example, in the Clinton impeachment trial, the Senate agreed to guidelines specifying which Senate staff with official impeachment duties would have access to the floor. It did so by unanimous consent in legislative session before the start of the trial. Additional unanimous consent agreements granted privileges of the floor to the counsel and assistants to counsel for the President, as well as to assistants to the Chief Justice and to the House Managers. The Senate also, by unanimous consent, established a method for allocating tickets to the Senate gallery.[31]

Determining Trial Proceedings: Orders of the Senate

While the previously identified steps have occurred, with minor variations, in every Senate impeachment trial, actions subsequent to organization have varied considerably. To establish impeachment trial procedures, the Senate could reach unanimous consent agreements or vote on propositions offered by Senators, House Managers, or counsel for the impeached officer. When adopted, these procedural agreements are referred to as "orders" of the Senate. Impeachment Rule XXIV contains the provision that, when the Senate is convened to conduct a trial, "orders and decisions" of the Senate shall be voted on "without debate." This prohibition on debate applies when the Senate trial is meeting in open session; if a majority of Senators wished to discuss a proposed order, they could agree to do so in closed session, and in that forum each Senator would be limited to speaking only once, and for a maximum of 10 minutes. (See "Closed Deliberations by Senators" section below.) Furthermore, Impeachment Rule XXI provides further that "all preliminary or interlocutory questions, and all motions, shall be argued for not exceeding one hour (unless the Senate otherwise orders) on each side," which means that, in some cases, the Senate could hear arguments from House Managers and counsel for the impeached on procedural proposals for up to two hours.

In contrast, under the regular rules of the Senate, most matters are not subject to any debate restrictions. As a result, a cloture process—requiring the support of three-fifths of the Senate on legislation and most other items—is sometimes necessary to end debate and reach a vote.[32] It is

[31] *Congressional Record*, daily edition, vol. 145 (January 6, 1999), pp. S7-S8.

[32] A majority of Senators voting, a quorum being present, can invoke cloture on a nomination, and two-thirds of Senators voting, a quorum being present, is necessary to invoke cloture on a proposal amending Senate rules. For more

for this reason that the support of three-fifths of the Senate (or 60 Senators, assuming no more than one vacancy) is usually considered to be necessary for the Senate to reach a decision that cannot be reached by consensus.

The limits on debate when the Senate is sitting for an impeachment trial, however, allow the Senate to reach decisions without the threat of a filibuster. Without the need for cloture, most questions voted on during a Senate impeachment trial can be approved with the support of a majority of Senators voting. The major exception to this, of course, is that conviction requires the support of two-thirds of Senators present.[33]

Because cloture is not required, a Senate majority can agree to orders that affect the proceedings in a trial. It is not clear, however, how quickly a majority could do so in the absence of broad agreement among Senators and the parties to the case. Orders proposed by Senators are subject to amendment offered by other Senators.[34] For example, in the trial of Secretary of War William W. Belknap, Senators offered multiple amendments to a series of orders that the Senate considered.[35] In a more recent example, during the Clinton impeachment trial, the Minority Leader offered two amendments to a resolution (S.Res. 30) to establish trial procedures offered by the Majority Leader. (Both amendments, which attempted to shorten the trial, failed.)[36] Senators cannot, in open session, debate amendments to orders proposed by Senators.[37]

Furthermore, in past trials Senators have demanded the division of an "order," and the division of amendments to an order, that contained substantive, separate directions for a trial. Under regular Senate procedures, both amendments and resolutions containing separate provisions are susceptible to division.[38] If any single Senator demanded a division, each provision would be considered separately for amendment and voted upon.

Finally, there is little guidance in Senate published precedents as to what constitutes a proper "order" that would be eligible to be called up expeditiously and decided by majority vote during an impeachment trial. The impeachment rules mention several rules that could be altered by an "order": the time the Senate meets for the first day of the trial (Rule XII), and other days of meeting thereafter (Rule XIII); the length of time for the House Managers and counsel for the impeached officer to argue propositions before the Senate (Rule XXI); the number of people who may make opening and closing arguments (Rule XXII); and who may serve a summons (Rule XXV). Impeachment Rule XXVI permits the Senate to adopt a non-debatable order to fix the date and time for considering articles, even if it had missed a previously scheduled meeting. Impeachment Rule XI, which, as noted above, the Senate approved in 1935 to allow the use of committees to receive evidence, also states such committees can be created by order.

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information on cloture, see CRS Report RL30360, *Filibusters and Cloture in the Senate*, by Valerie Heitshusen and Richard S. Beth.

[33] Some other motions that might be made during an impeachment trial, such as a motion to suspend the Standing Rules of the Senate, require a two-thirds vote.

[34] *Procedure and Guidelines for Impeachment Trials*, p. 35.

[35] See, for example, *Hinds*, vol. 3, §2457-2458; and *Proceedings of the Senate Sitting for the Trial of William W. Belknap, Late Secretary of War*, 44th Cong. 1st sess. (Washington: GPO, 1876), pp. 48-49.

[36] *Congressional Record*, daily edition, vol. 145 (January 28, 1999), pp. S1069-S1072.

[37] In modern practice, amendments offered by Senators have also not been argued by the House Managers and counsel for the impeached officer. In the Belknap trial in 1876, however, the Presiding Officer asked the parties if they wanted to discuss the amendments offered by Senators (but stated that debate by Senators was out of order).

[38] *Riddick's Senate Procedure,* pp. 807-808.

The Senate, however, while sitting for an impeachment trial, has agreed to many other orders that are not directly mentioned in the impeachment rules. During the Clinton trial in the 106th Congress, for example, the Senate agreed to S.Res. 16 and S.Res. 30, which structured most aspects of proceedings by establishing deadlines for filings, allotting time for arguments, and making certain motions in order at specific points in the trial.[39] If these resolutions constituted "orders" under Impeachment Rule XXIV, they were among the most comprehensive orders agreed to for a trial. Thus, based on Senate practice, it appears that "orders" of the Senate during impeachment trials can affect many more procedures than those specifically delineated in the impeachment rules. Senate precedents, however, might limit what can be included in such an order.[40]

In the absence of broad agreement regarding how to proceed with a trial, Senators might contest the inclusion of particular provisions of an order—for example, those that appear to be in direct conflict with the impeachment rules or past practice, or those that Senators argue are unconstitutional. While Senators can be expected to consult the precedents for guidance, ultimately a Senate majority will decide these questions, using the process for interpreting procedures discussed below.

If all Senators are voting, the majority necessary to approve an order of the Senate is 51 Senators; tie votes fail in the Senate.[41] If all Senators are not voting, however, this number changes. The vote necessary for approval is a majority of those voting, assuming a quorum is present. The quorum required for an impeachment trial is 51 Senators—the same as in regular Senate proceedings.[42] During impeachment trials, however, the party leaders often implore Senators to attend all sessions, and committee meetings are unlikely to be scheduled during times the Senate is expected to be sitting for the trial. This is due to past criticisms of the Senate for light attendance at trials when evidence was presented, including from counsel of impeached officers who feel Senators must be present to listen to arguments before they vote.

Consideration and Collection of Evidence

The actions taken by the Senate to consider and collect evidence in each trial have varied considerably. The impeachment rules provide guidance only on a few particulars, necessitating that the Senate determine, each time it organizes for a trial, the manner of proceeding from that point forward.

It is therefore not possible to describe, in the same manner as above, the parliamentary steps the Senate is expected to take to consider evidence in a trial. This section instead reviews the impeachment rules related to this stage of the trial, how these rules have been interpreted, and

[39] In the case of S.Res. 16, the Chief Justice referenced Impeachment Rule XXIV—which determines the handling of orders and decisions during a trial—when stating that the vote would be by the yeas and nays (*Congressional Record,* daily edition, vol. 145 (January 8, 1999), p. S50).

[40] It is possible that some past precedents of the Senate could inform what can be included in an order or resolution affecting trial procedures. For example, in a ruling during the 1999 trial of President Clinton, the Chief Justice stated that there "can be no deliberation on any question before the Senate in open session unless the Senate suspends its rules, or consent is granted" (*Congressional Record,* daily edition, vol. 145 (February 9, 1999), p. S1387). If taken literally, this ruling could mean that the Senate could not, by "order of the Senate," open deliberations, but instead would need unanimous consent or a two-thirds vote to suspend the rules.

[41] In impeachment trials other than for a President, when the Vice President is presiding, he can vote to break ties. See section below, "Senate Interpretation of the Impeachment Rules and the Role of the Presiding Officer."

[42] *Procedure and Guidelines for Impeachment Trials,* p. 69. The quorum requirement is also enforced using the same procedures used in legislative or executive session (*Riddick's Senate Procedure,* p. 873).

how their terms have been modified in past practice. Because in most modern trials the Senate has relied on a trial committee to consider and collect evidence, it then describes how these committees are established and some of their practices.

What the Impeachment Rules Provide

Opening and Closing Arguments by the House Managers and Counsel for the Impeached Officer

During an impeachment trial in the Senate, Senators spend most of the time listening to arguments presented by the House Managers and the counsel for the impeached officer. Impeachment Rule XV states that counsel for the parties "shall be admitted to appear and be heard upon an impeachment."

The impeachment rules further reference both opening and closing arguments that would be made by the parties to the case. Specifically, Impeachment Rule XXII states that the House of Representatives will provide opening remarks first, followed by the counsel for the impeached. It also provides that the case shall be opened "by one person" on each side, but in practice opening remarks have been divided among multiple managers and multiple counsel for the impeached.

With regard to closing arguments, Rule XXII provides that the House Managers will speak last, and permits two House Managers and two people for the impeached officer to make closing arguments. The number of individuals allowed to participate in closing arguments has been modified in past trials by order of the Senate.

The impeachment rules do not place a time limit on opening and closing statements, although in past trials the Senate has agreed to place such limits on the parties.[43] The Senate has also allowed the side speaking first to reserve time for rebuttal.

Arguments by the House Managers and Counsel for the Impeached Officer on Questions and Motions

Impeachment Rule XXI limits the time for arguments that can be made during the trial on any "questions" or "motions" that might arise to one hour on each side, unless otherwise ordered by the Senate.

The impeachment rules provide no guidance regarding what particular questions or motions can be raised by the parties to the case. Rule XVI simply requires that all such motions (and "objections, requests, or applications") should be addressed to the Presiding Officer and put in writing if demanded by any Senator or the Presiding Officer.[44] Examples of questions that have been argued pursuant to this rule include, from the 1868 trial of President Johnson, a motion by the defense that the trial be postponed for 40 days to allow for preparation of the answer to the articles of impeachment and, from the 1936 trial of Judge Ritter, a motion by the counsel for the

[43] For a review of orders the Senate agreed to affecting final arguments between 1868 and 1986, see *Procedure and Guidelines for Impeachment Trials*, p. 37.

[44] The impeachment rules also do not make clear whether Senators, rather than the parties to the case, could make such motions that would then be argued by each side for one hour. In the Clinton trial, a Senator offered a motion in relation to a motion that had been offered by the House Managers, and the Chief Justice stated, "The Parliamentarian advises me that there are 2 hours of argument on this motion." By unanimous consent, the time was yielded back. (See *Congressional Record*, daily edition, vol. 145 (February 4, 1999), p. S1209.)

impeached to strike an article deemed repetitive.[45] In general, in past trials, the Senate has controlled, through the adoption of orders, what propositions can be placed before the body and voted on while it is sitting for an impeachment trial.

The impeachment rules do not address which side speaks first on questions and motions, but it is by practice the side proposing the motion. The Senate has altered the time available for such arguments by unanimous consent or other order of the Senate. The side speaking first has asked to reserve time for rebuttal.

It is important to note that there appears to be a distinction between motions filed and argued by the parties to the case in an impeachment trial, and motions offered by Senators. When House managers or counsel for an impeached officer propose a "motion," they are requesting that the Senate reach a judgement (perhaps by agreeing to an order on the subject). They are not necessarily forcing Senate action on their proposal as written. During an impeachment trial, the Senate, at least in modern practice, has generally controlled when and what motions are proposed before the full Senate by the parties to the case, and it also determines the method of responding to such motions (which might not be a direct vote on the question).

For example, in the 2010 trial of Judge Porteous, counsel for the impeached filed three motions that were argued by the parties to the case: a motion to dismiss Article 1, a motion to dismiss Article 2, and a motion to dismiss all articles because they aggregated multiple charges.[46] The Senate heard arguments from each side (pursuant to a unanimous consent agreement that limited arguments on all motions to two hours, equally divided) and deliberated in closed session. When the Senate reconvened in open session, rather than act directly on the propositions as presented, the Majority Leader moved to hold preliminary votes on individual allegations within the articles.[47] This motion was defeated 94-0. Effectively, it served as a response to the three motions filed by the defense and argued by the parties to the case.[48]

In another modern example, the Senate heard arguments by the parties, under the terms of a unanimous consent agreement, regarding a motion by the impeached officer that Impeachment Rule XI, allowing the creation of a trial committee, was unconstitutional and that there be a full and free trial before the Senate and witnesses be subpoenaed for that purpose. After deliberating in closed session, the Senate returned to open session and the Majority Leader moved that the Senate not hear additional witnesses in the case.[49] The motion was agreed to 61-32 (7 Senators not voting), and served as a response to the arguments by counsel for the impeached officer that the full Senate, not the trial committee, should receive evidence.[50]

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[45] *Supplement to the Congressional Globe Containing the Proceedings of the Senate Sitting for the Trial of Andrew Johnson*, 40th Cong. 2nd sess. (Washington: F&J Rives & George A. Bailey, 1868), March 13, 1868, p. 6; and *Congressional Record*, vol. 80 (March 31, 1936), p. 4656.

[46] Counsel to Judge Porteous argued that the aggregation of multiple charges in one article of impeachment prevented the Senate from stand-alone judgment on individual charges and made it easier to secure votes towards conviction (*Congressional Record* daily edition, vol. 156 (December 7, 2010) pp. S8564-S8565).

[47] Such votes would necessarily be "preliminary," because an article of impeachment is not divisible. See the section below, "Voting on Articles of Impeachment."

[48] *Congressional Record*, vol. 156 (December 8, 2010), p. 19012-3 (for description of motions filed by the defense) and (December 9, 2010), p. 19133-4 (for motion to hold preliminary votes).

[49] *Riddick's Senate Procedure*, p. 877, describes the motion of the Majority Leader as a "preferential motion made by a Senator when a motion by one of the parties was pending."

[50] *Congressional Record*, vol. 132 (October 8, 1986), pp. 29412-29413.

Motions or Orders Offered by Senators Are Not Debatable in Open Session and Are Acted upon Without Objection or by the Yeas and the Nays

Impeachment Rule XXIV refers to "orders and decisions" of the Senate, which in practice have been proposed by Senators, not by the parties to the case. As discussed above, such "orders" are sometimes offered in the form of resolutions. In impeachment trials, however, it appears that such resolutions were proposed as if they were motions and were not subject to layover requirements, or taken up by a motion to proceed, which is the usual way that the Senate would process a resolution. Impeachment Rule XIX requires any motion or order proposed by a Senator (except a motion to adjourn) be in writing and put by the Presiding Officer.

Impeachment Rule XXIV prohibits debate on orders of the Senate in open session, but the Senate could vote to go into closed session, in which case each Senator could speak for up to 10 minutes on the motion or order. Impeachment Rule XXIV also provides that orders of the Senate can be agreed to by unanimous consent but, short of unanimous consent, the vote on an order must be by the yeas and the nays (a roll call vote).[51] An exception is made for the motion to adjourn, which could be voted on by voice vote or division (or if the yeas and nays are ordered, by roll call vote, as under regular Senate procedures).

Otherwise, the impeachment rules do not reference proposals offered by Senators. In the 19th and early 20th century trials, it appears that a variety of propositions regarding procedure were proposed by Senators. In the modern trials, some motions were permitted pursuant to a previously-agreed-to resolution, or under the terms of a unanimous consent agreement. For example, in the 1999 trial of President Clinton, a Senator offered a motion to dismiss the articles that was permitted under the terms of S.Res. 16. Similarly, later in the same trial, the Minority Leader offered a motion that the Senate proceed to closing arguments, and this motion appears to have been permitted under the terms of S.Res. 30.[52]

In other modern instances, however, Senators appear to have offered motions that were not explicitly allowed under a previous order and presumably were permitted by the standing impeachment rules and precedents. For example, during the trial of President Clinton, a Senator moved that Senators be permitted to insert statements they made in the closed session into the *Congressional Record*. In another example, during the 1986 trial of Judge Harry Claiborne, a Senator moved to postpone the decision on motions filed by the defendant.[53] It is also possible that such motions were effectively offered by a kind of tacit unanimous consent, and if any Senator had objected, they could not have been considered. Unanimous consent cannot always be required for a Senator to propose a motion or order, however, as that would allow a single Senator to block procedural decisions. Neither the impeachment rules nor the published precedents provide explicit guidance on what propositions can be offered by Senators while sitting on an impeachment trial. There is also no guidance regarding precedence among the various motions,

[51] Under regular Senate procedures, the vote on most questions will be by roll call if a request for the yeas and the nays is supported by a second of 1/5th of those present (and a quorum of 51 Senators is assumed to be present). The support of a second is not necessary on proposed orders in an impeachment trial. For more information on securing a roll call vote in legislative or executive session, see CRS Report 96-452, *Voting and Quorum Procedures in the Senate*, coordinated by Elizabeth Rybicki.

[52] Section 102 of S.Res. 30 provided that after depositions were completed and the Senate had resolved any objections made during the depositions, "Motions may also then be made for orders governing the presentation of evidence and/or the testifying of witnesses before the Senate." The full motion was that the Senate proceed to closing arguments, that the time for closing arguments be limited to two hours each side, and that the Senate then proceed to a vote on the articles.

[53] *Congressional Record*, vol. 132 (October 7, 1986), p. 29136.

although the Senate precedents establishing that the Majority Leader is entitled to priority in recognition, followed by the Minority Leader, presumably continue to apply in an impeachment trial.

Still other motions have been offered pursuant to the regular standing rules of the Senate. In 1999, for example, several Senators moved to suspend certain impeachment rules (to allow for unlimited debate on questions in open session). To suspend the rules, Senators must provide one calendar day's notice in writing of their intent to offer a motion to suspend.[54] Adoption of such a motion requires a two-thirds affirmative vote. During the Clinton trial, the Senate considered motions to suspend under the terms of a unanimous consent agreement or a resolution, and it is not entirely clear from the proceedings or published precedents when such motions would otherwise be in order.[55]

Witnesses

The impeachment rules contain little guidance in relation to the calling and questioning of witnesses. Impeachment Rule XVII states that witnesses shall be examined first by the side who requested them, and then cross-examined by the other side. It also specifies that only one person from each side shall conduct the examination and cross-examination.[56] Witnesses are also required to be sworn by the Secretary of the Senate or other authorized person, in a form provided by Senate Rule XXV:

> "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."

Impeachment Rule VI is intended to grant the Senate the ability to compel the attendance of witnesses (and, more generally, to enforce any "orders, mandates, writs, precepts, and judgments" deemed "essential or conducive to the ends of justice"). In modern practice, the Senate has relied on the other branches of government to enforce its subpoenas, as discussed in detail in other CRS reports.[57] For example, in the 1989 trial of Judge Alcee Hastings, when a key witness refused to testify, the Senate in legislative session took up and approved by unanimous consent a resolution directing the Senate Legal Counsel to bring a civil action to enforce the subpoena.[58] Senate Legal Counsel obtained an order from the U.S. District Court for the District of Columbia directing the witness to testify, and when the witness continued to refuse to do so, he was incarcerated until the end of the trial.[59]

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[54] Senate Standing Rule V, paragraph 1.

[55] Motions to suspend the rules were made four times during the Clinton impeachment trial on January 25, January 26, February 9, and February 12, 1999. In each case, prior notices of intent to make such a motion were filed at least 1 day earlier, pursuant to Senate Rule V. Motions to suspend made on January 25, January 26, and February 12 were each made in order pursuant to unanimous consent agreements (see, for example, *Congressional Record*, daily edition, vol. 145 (January 25, 1999), p. S962). The motion to suspend made on February 9 was made in order pursuant to language in S.Res. 30.

[56] Another impeachment rule exclusively concerning witnesses, Rule XVIII, was first agreed to by the Senate in the trial of Justice Chase in 1805. It provides that if Senators are witnesses, they shall be sworn as witnesses and can provide their testimony from their own desks on the floor.

[57] CRS Report R45653, *Congressional Subpoenas: Enforcing Executive Branch Compliance*, by Todd Garvey.

[58] *Congressional Record*, vol. 135 (August 3, 1989), pp. 18474-18475.

[59] U.S. Congress, Senate, *Proceedings of the United States Senate in the Impeachment Trial of Alcee L. Hastings, A Judge of the United States District Court for the Southern District of Florida*, 101st Cong., 1st sess., S.Doc. 101-18 (Washington: GPO, 1989), pp. 1591-1608.

The Senate impeachment rules do not address the selection of witnesses. In practice, the Senate determines which witnesses will be heard, if any. (If a trial committee is used, the trial committee selects and subpoenas the witnesses.) The parties to the case do not have the right under the rules to call whom they choose. To be clear, it is the House Managers and counsel for the impeached who know the charges and know what evidence they would like to present, and, in practice, the Senate weighs their requests heavily. In some recent trials, the Senate has requested pretrial statements or trial memoranda from both parties, which discuss possible evidence to be presented, including desired witnesses.[60] On the basis of such requests, the Senate (or the trial committee) decides which witnesses to hear and possibly subpoena.

In the modern judicial trials, witnesses were examined in the trial committees, and not on the floor before the full Senate. In the Clinton trial in 1999, the Senate agreed to an order that depositions from three witnesses be taken, but did not agree to hear testimony from any witness on the floor. The last time witnesses were examined and cross-examined on the Senate floor was during the impeachment trial of Judge Ritter in 1936.

Questions by Senators

During the presentation of evidence by the House Managers and counsel for the impeached officer, Senators are generally expected to attend, but not speak. Impeachment Rule XIX, however, does allow a Senator to question a witness, manager, or counsel of the person impeached. The Senator must put the question in writing and submit it to the Presiding Officer, who then reads the question out loud. In practice, the Presiding Officer identifies the Senator posing the question before reading it.

As noted, witnesses have not testified before the full Senate since the 1936 trial of Judge Ritter, so there are no modern examples to look to concerning Senators questioning witnesses on the floor. In trial committees, Senators have submitted questions for witnesses. In addition, resolutions establishing trial committees have explicitly authorized the chair of the trial committee to "waive the requirement…that questions by a Senator to a witness, a manager, or counsel shall be reduced to writing and put by the presiding officer."[61]

In modern trials, Senators have posed questions to House managers and counsel for the impeached. In the 1999 trial of President Clinton, the Senate agreed to a resolution (S.Res. 16, 106th Congress) that established procedures in addition to the impeachment rules to structure a period of questioning by Senators. S.Res. 16 provided that after opening arguments by the House Managers and the President's counsel, "Senators may question the parties for a period of time not to exceed 16 hours." During the Clinton trial, Senators directed their questions to one side or the other, and the party leaders asked that questions be submitted to them first, so that they could identify duplications and structure the order of questions (which alternated between Republican and Democratic Senators' questions). The Chief Justice announced that he thought five minutes

[60] See, for example, the request by letter for pretrial statements from the Senate Impeachment Trial Committee with respect to articles of impeachment against district judge Harry E. Claiborne: "The statements should identify any witness whom the party proposes to call and should state what the party expects the testimony of the witness to be." (U.S. Congress, Senate, Senate Impeachment Trial Committee, *Hearings Before the Senate Impeachment Trial Committee*, Part 1 of 4, 99th Cong., 2nd sess., 1986, 99-812 (Washington: GPO, 1986), p. 33). Note, however, that in the trial of President Clinton, the trial brief submitted by the House Managers did not list witnesses, and instead stated that their "brief is intended solely to advise the Senate generally of the evidence that the managers intend to produce, if permitted…nor does it necessarily include each and every witness and document that Managers would produce…" (*Congressional Record*, daily edition, vol. 145 (January 14, 1999), p. S64).

[61] *Congressional Record*, vol. 135 (March 16, 1989), p. 4534.

would be a sufficient time to answer each question, and an effort was made to keep the time used by each side roughly equal. Over 100 questions were posed by Senators over the course of two days.

In other modern trials, Senators asked questions of the House Managers and counsel for the accused on the floor, apparently without a unanimous consent agreement or other order of the Senate structuring the questioning process. During the 2010 trial of Judge Porteous, for example, after the trial committee had issued its report, the Senate agreed by unanimous consent to limit the time for arguments on all motions filed by Judge Porteous to one hour for each side, and to limit the time for final arguments on all four articles of impeachment to one and a half hours for each side.[62] The agreement did not explicitly address time for questions. Senators, during the arguments, sent questions in writing to the Presiding Officer, who asked the clerk to read them at a time deemed appropriate, including after the expiration of the time limits set by unanimous consent.[63] In this trial, Senators' questions were sometimes directed to both sides.

Creation of a Trial Committee

Impeachment Rule XI allows for the appointment of a trial committee of Senators to receive evidence and take testimony on behalf of the Senate for an impeachment. Rule XI does not contain language explicitly limiting the application of trial committees; however, the 1974 Rules and Administration Committee report regarding amendments to the impeachment rules stated that, "nothing but action by the full Senate on all aspects of a presidential impeachment was conceivable" and that the legislative history to the proposed amendments should "clearly reflect" this understanding by members of the Committee.[64] The Senate has chosen to appoint trial committees for every modern impeachment of a judge since the 1980s.[65]

Trial committees serve to relieve the full Senate of the potentially lengthy process of these early trial tasks and instead devote time to its legislative workload. Transcripts of all proceedings conducted and evidence received by the trial committee are transmitted to the full Senate when the committee's work is completed. This material provides a potential opportunity to move quickly to closing arguments and deliberation on the final question of whether an impeached officer is guilty or not guilty.

Trial committees are typically created by a simple resolution that authorizes the majority and minority leaders to each recommend six Senators, including, more recently, a chair and vice chair, respectively. Impeachment Rule XI does not fix the membership or size of a trial committee, nor does it require party balance; in modern practice, however, the Senate has routinely agreed to a bipartisan 12-member committee.[66] Resolutions creating trial committees also typically include a

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[62] *Congressional Record,* vol. 156 (December 6, 2010), p. 19002.

[63] *Congressional Record,* vol. 156 (December 7, 2010), pp. 19047-19048.

[64] U.S. Congress, Senate Committee on Rules and Administration, *Amending the Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials*, 93rd Cong., 2nd sess., August 22, 1974, S.Rept. 93-1125 (Washington: GPO, 1974), p. 32.

[65] For recent examples of resolutions creating trial committees, see S.Res. 203 and S.Res. 458, both from the 111th Congress (2009-2010).

[66] Prior to the rule's amendment in 1986, Impeachment Rule XI required trial committees to consist of 12 Senators. In recommending the removal of this requirement, the Senate Rules Committee suggested that a trial committee's structure should remain undefined to allow flexibility in meeting the needs of future Senate impeachment trials. U.S. Congress, Senate Committee on Rules and Administration, *Amending the Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials*, 99th Cong., 2nd sess., August 13, 1986, S.Rept. 99-401 (Washington: GPO, 1986), p. 5.

funding provision, and may authorize a committee to waive certain impeachment rules, direct a committee on what it should report to the Senate, or establish a date at which the committee will terminate.

In addition to receiving evidence and testimony, trial committees can reach decisions concerning certain pre-trial requests and motions filed by the parties to the case, and they can question witnesses. Trial committees process motions filed by House Managers in a fashion similar to that which the Senate would use when sitting as a court of impeachment. The committee holds a hearing to receive oral arguments from the trial parties, allots time for questioning by committee members, deliberates in closed session, and ultimately votes to make a determination in relation to the request.[67] Modern trial committees have routinely declined to consider motions to dismiss an article or articles of impeachment, citing a lack of authority to do so.[68] Trial committees also have examined witnesses called by House managers and counsel to the accused. Typically, a witness is first examined by the trial parties, after which committee members have been able to ask their own questions. Under the impeachment rules, questions by Senators are to be submitted in writing, although the Senate has waived this rule to allow for direct questioning by Senators in trial committees.[69]

Once a trial committee has completed its work, as previously discussed, it will issue a report to the Senate compiling all evidence, exhibits, and witness testimony it received. That material is considered as having been received and taken before the full Senate for the purposes of delivering a final vote on articles of impeachment. The trial committee's work does not preclude the Senate itself from calling additional witnesses, hearing further testimony, or revisiting motions raised by House managers and counsel for the accused. The full Senate did not choose to hear witnesses or request any further evidence in any of the four completed trials in which a committee was used.

Closed Deliberations by Senators

Closed door deliberation by the Senate while sitting for an impeachment trial is established through Impeachment Rules XX and XXIV. Rule XX states that a Senate impeachment trial is to be conducted in open session, except for when the doors shall be closed for deliberation.[70] A

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[67] See, for example, U.S. Congress, Senate Impeachment Trial Committee, *Impeachment Trial Committee on the Articles against Judge G. Thomas Porteous, Jr.*, Volume 1 of 3, Part B, 111th Cong., 2nd sess., November 16, 2010, S.Hrg. 111-691 (Washington: GPO, 2010), pp. 1835-1965.

[68] Trial committees have regularly reported that they have a limited mandate to provide a neutral summary of evidence presented and witness testimony heard, and that such committees "have no authority to make recommendations regarding matters as to weight of the evidence or whether the Senate should vote to convict or acquit on the articles of impeachment." U.S. Congress, Senate Impeachment Trial Committee, *Report of the Impeachment Trial Committee on the Articles against G. Thomas Porteous, Jr.*, 111th Cong., 2nd sess., November 16, 2010, S.Rept. 111-347 (Washington: GPO, 2010), p. 2.

[69] S.Res. 458, Sec. 4, allowed the chair of the Judge Porteous trial committee to waive Impeachment Rule XIX during the committee's consideration of evidence. The trial committee chose to exercise that authority and Senators posed questions orally to witnesses. See, for example, U.S. Congress, Senate Impeachment Trial Committee, *Impeachment Trial Committee on the Articles against Judge G. Thomas Porteous, Jr.*, Volume 2 of 3, Part A, 111th Cong., 2nd sess., November 16, 2010, S.Hrg. 111-691 (Washington: GPO, 2010), pp. 242-245.

[70] The actual language of Senate Impeachment Rule XX states that "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 be closed while deliberating upon its decisions." Impeachment Rule XXIV is more direct, stating that "…the doors shall be closed for deliberation." A parliamentary inquiry was made during the impeachment trial of President William J. Clinton regarding whether it would be in order to proceed to public deliberation. The Chief Justice, as part of his ruling, explained the origins and history of Impeachment Rules XX and XXIV, concluding that despite "some ambiguity between the two rules … there can be no deliberation on any question before the Senate in open session unless the

motion to go into closed door session can be acted upon without objection, or if an objection is raised, by a roll call vote without debate.[71] Note that this method of entering closed session when the Senate is sitting for an impeachment trial—approving a motion by majority vote—is different from the method used during regular Senate session. Outside of an impeachment trial, a single Senator can move that the Senate go into closed session, and, if the motion is seconded by another Senator, the Senate will proceed to secret session.[72]

Rule XXIV specifies, in part, that during closed door deliberations, each Senator may speak only once on each question. Such remarks are limited to 10 minutes per Senator on "interlocutory" questions and to 15 minutes on "the final question," (i.e., whether the impeached officer is guilty or not guilty), regardless of the number of articles of impeachment. In other words, in the final debate, regardless of whether the Senate is considering one article of impeachment or many, each Senator has only one opportunity to speak for no more than 15 minutes.

When the Senate enters a closed session, the specific procedures followed are guided by the Senate's standing rules, rather than its impeachment rules. The Sergeant at Arms clears the chamber and galleries of everyone except for Senators and staff designated under Senate Rule XXIX, paragraph 2, who are sworn to secrecy.[73] The Senate rule further provides access for the Senate Secretary, the Assistant Secretary, the Principal Legislative Clerk, the Parliamentarian, the Executive Clerk, the Minute and Journal Clerk, the Sergeant at Arms, and the Secretaries to the Majority and Minority, as well as other individuals the Presiding Officer "shall think necessary." During impeachment trials, the Senate has, in practice, extended floor privileges in closed session to additional designated staff by unanimous consent agreement.[74]

A record of closed session deliberations is kept, as with all proceedings of impeachment trials, pursuant to Impeachment Rule XIV. Unlike open session records, which are made available to the public, closed session transcripts are kept under an injunction of secrecy unless lifted by the Senate by resolution or unanimous consent.[75] Accordingly, Senators and staff are expected to refrain from public discussion of closed door deliberations. Senate Standing Rule XXIX, paragraph 5, provides for possible expulsion from the Senate (if a Senator) or dismissal from service (if an officer or employee) as punishment for divulging closed door proceedings.[76] In

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Senate suspends its rules, or consent is granted." *Congressional Record*, (February 9, 1999), p. S1387.

[71] The precedents suggest that, in some cases, this motion may not be repeated. During the 1876 trial of Secretary of War William Belknap, the Presiding Officer ruled that, after a motion to enter closed session failed by voice vote, another such motion was not in order. The closed session would have been to deliberate whether to extend time for arguments on a procedural question from one hour for each side to two hours for each side (*Proceedings of the Senate Sitting for the Trial of William W. Belknap, Late Secretary of War*, 44th Cong. 1st sess. (Washington: GPO, 1876), (April 28, 1876), p. 36).

[72] For more information, see CRS Report R42106, *Secret Sessions of the House and Senate: Authority, Confidentiality, and Frequency*, by Christopher M. Davis. For a discussion of the difference between entering secret session under Senate Rule XXI and Impeachment Rule XX, see U.S. Congress, Senate Committee on Rules and Administration, *Amending the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials*, (Pursuant to S.Res. 370), 93rd Cong., 2nd sess., August 22, 1974, 93-1125 (Washington: GPO, 1974), p. 37.

[73] More specifically, the authority of Senate Rule XXIX—which pertains to executive sessions—is extended to all closed door sessions by Senate Rule XXI, which states that "when the Senate meets in closed session, any applicable provisions of rules XXIX and XXXI including the confidentiality of information shall apply to any information and to the conduct of any debate transacted."

[74] Clinton trial, *Congressional Record* daily edition, (January 14, 1999), pp. S59-S60; Porteous trial, *Congressional Record*, (December 7, 2010), p. S8595.

[75] Senate Standing Rule XXIX, paragraph 3.

[76] Expulsion of a Senator requires an affirmative two-thirds vote pursuant to the U.S. Constitution, Article 1, Section 5, Clause 2.

recent Senate impeachment trials, the Senate has allowed Senators to insert their closed session remarks into the *Congressional Record*.[77]

As mentioned above, in the 1999 trial of President Clinton, Senators attempted to allow for open deliberation and debate in an impeachment trial by moving to suspend the impeachment rules. No such proposals were agreed to by the Senate during the Clinton trial, and all deliberation throughout the trial occurred in closed sessions.

Voting on Articles of Impeachment

Conviction requires a guilty vote on at least one article of impeachment by two-thirds of Senators present. Assuming 100 Senators present, the support of 67 Senators is needed to convict on an article. If fewer Senators are present, the threshold to convict will accordingly be reduced as well (e.g., 97 Senators present would require 65 votes to convict). A response of "present" effectively supports acquittal, as it counts in the denominator against which the threshold to convict is calculated.[78]

Following closed door deliberations on the final question of whether to convict or acquit an impeached officer, the Senate reconvenes in open session to vote on the articles of impeachment. Articles are typically voted on in the order they were exhibited by House Managers.[79] It is not in order to further divide an article.[80]

Pursuant to Impeachment Rule XXIII, the Presiding Officer puts the question on each article separately, and each vote is required to be by roll call. The legislative clerk is directed to read the article of impeachment aloud and then the roll is called, to which Senators must rise from their seats and answer "guilty" or "not guilty" on the question of impeachment.[81] Voting on the articles of impeachment is to continue without interruption, pursuant to Rule XXII, unless the Senate adjourns the trial. After voting has commenced, adjournments of the trial can be for only one day, or *sine die,* that is, without a specific date to return, if ever.[82] Under the rule, a motion to reconsider a vote on an article of impeachment is not in order.

Under Senate Standing Rule XII, Senators are required to vote upon call of their name unless excused by the Senate or due to a conflict of interest. The question of excusing a Senator from voting is disposed of after the call of the roll is completed but before the result is announced.[83]

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[77] *Congressional Record,* daily edition, (February 9, 1999) pp. S1386-S1387.

[78] *Riddick's Senate Procedure,* p. 879.

[79] During the impeachment trial of President Andrew Johnson, the Senate agreed to a motion directing that the eleventh article of impeachment be read and voted on first.

[80] Rule XXIII was amended in 1986 to include its current language about articles not being divisible. Earlier, an article of impeachment had been divided into three parts by motion, each of which received a separate vote during the 1862 impeachment trial of Judge West Humphreys.

[81] During voting on the two articles of impeachment in the Senate trial of President William J. Clinton, Senator Arlen Specter responded "not proven, therefore, not guilty" reportedly in a reference to a third verdict of "not proved" provided for under Scottish law. Senator Specter explained his vote in remarks inserted into the *Congressional Record* that "I consulted with the Parliamentarian and examined the Senate precedents and found that if I voted simply 'not proven,' that I would be marked on the voting roles as 'present.' I also found that a response of 'present,' and inferentially the equivalent of 'present,' could be challenged and that I could be forced to cast a vote of 'yea' or 'nay.'" *Congressional Record* daily edition, vol. 145 (March 2, 1999), p. S2140.

[82] During the impeachment trial of President Andrew Johnson, the Senate only voted on three of eleven articles of impeachment before adjourning *sine die*. The eight remaining articles resulted in acquittals in the absence of a two-thirds affirmative vote to convict. *Hinds' Precedents,* vol. 3, ch. 76, §2443, pp. 900-901.

[83] U.S. Congress, Senate Committee on Rules and Administration, *Procedure and Guidelines for Impeachment Trials*

Senators have been excused from voting on articles of impeachment in past trials due to their absences from arguments or owing to their participation as a witness in the trial. (Senators have also been excused from participating in the trial at all; see above "Organizing for the Trial.")

If an officer is convicted by two-thirds of Senators present, "such a vote operates automatically and instantaneously to separate the person impeached from office."[84] The Senate may then choose to take the additional action to move to disqualify a convicted officer from holding further office, although this step is not required. The Senate has established that a vote to disqualify requires a simple majority voting affirmatively, and not two-thirds as with conviction.[85]

Senate Interpretation of the Impeachment Rules and the Role of the Presiding Officer

The Presiding Officer of an impeachment trial does not possess any more independent control over proceedings than the Presiding Officer does during the more common Senate deliberations on legislation or nominations. While the Presiding Officer, in either case, may rule on the proper interpretation of the rules and procedures of the Senate, that ruling can be challenged by any Senator. In legislative or executive sessions of the Senate, if any Senator appeals a ruling by the Presiding Officer, the full Senate considers the question, "Shall the decision of the Chair stand as the judgment of the Senate?"[86]

Impeachment Rule VII lays out the process of challenging a ruling as it applies during an impeachment trial. It states in part

> 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.

In other words, while the impeachment rules grant the Presiding Officer the authority to rule on questions, they also state that a single Senator could instead request that the full Senate vote on any such question. In that case, pursuant to this rule, the question is not debatable, and a majority of Senators voting would determine the outcome. (By precedent, House Managers or counsel for the impeached could not ask that a question be submitted to the Senate.[87]) The published precedents state that all decisions of the Chair are subject to appeal.[88]

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in the United States Senate, 99th Cong., 2nd sess., August 15, 1986, S.Doc. 99-33 (Washington: GPO, 1986), pp. 77-78.

[84] U.S. Congress, Senate Committee on Rules and Administration, *Amending the Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials*, 99th Cong., 2nd sess., August 13, 1986, S.Rept. 99-401 (Washington: GPO, 1986), pp. 9-10.

[85] *Procedure and Guidelines for Impeachment Trials*, pp. 81-82. The Senate has convicted 8 impeached officers, all federal judges, and disqualified three from holding future office: Judge West H. Humphreys, 1862; Judge Robert W. Archbald, 1913; and Judge G. Thomas Porteous, 2010. See Michael J. Gerhardt, *The Federal Impeachment Process: A Constitutional and Historical Analysis*, 2nd ed. (Chicago: University of Chicago Press, 200), p. 78; and *Congressional Record*, vol. 156 (December 8, 2010), p. 19136.

[86] The question is usually subject to debate, but it can be tabled, which sustains the ruling of the Chair. For more information, see CRS Report 98-306, *Points of Order, Rulings, and Appeals in the Senate*, by Valerie Heitshusen.

[87] *Procedure and Guidelines for Impeachment Trials*, p. 36.

[88] *Procedure and Guidelines for Impeachment Trials*, p. 35.

If a ruling concerning the admissibility of evidence is appealed (or if the Presiding Officer submits such a question), the question put to the Senate is: "Is the evidence admissible?"[89] In the case of other procedural issues the Senate would vote on, the phrasing of the question put to the Senate could vary with the question. For example, in 1986, during the trial of Judge Claiborne, the Presiding Officer ruled, in response to a motion by the defense counsel and at the request of the Majority Leader, "It is the Chair's determination that the question of standard of evidence is for each Senator to decide individually when voting on Articles of Impeachment."[90] A Senator requested that the Senate vote on the question instead, and the Presiding Officer put the question on whether the motion of the counsel for the impeached judge—that the Senate establish a "beyond a reasonable doubt" standard of proof in the trial—was "well taken." By a vote of 17 yeas and 75 nays (8 Senators not voting), the Senate voted that the motion was not well taken, effectively agreeing with the ruling of the Presiding Officer.[91]

The Senate, in short, is the final arbiter on any procedural questions. Impeachment Rule VII states that "the vote shall be taken in accordance with the Standing Rules of the Senate."[92] That means these questions could be settled by roll call vote, but only if that request for the yeas and nays is supported by 1/5 of a quorum (11 Senators), or, if the Senate recently voted, 1/5 of the Senators who voted.

The impeachment rules make several other references to the Presiding Officer of the trial.[93] Impeachment Rule IV restates the constitutional requirement that when the President of the United States has been impeached, the Chief Justice of the United States shall serve as the Presiding Officer. Impeachment Rule III tasks the Presiding Officer with administering the oath to Senators. Rule V grants him general power to execute decisions of the Senate where necessary (which would include, for example, signing a summons the Senate ordered to be issued to the person impeached, or signing a subpoena that the Senate had agreed to issue). Rule XIII directs the Presiding Officer to cause the proclamation to be declared at the start of each day commanding those present to keep silent. Rule XVI requires that the parties to the case—the House Managers and the impeached officer and his counsel—address the Presiding Officer when proposing motions, objecting to proceedings, or making any request related to the trial. As mentioned above, Rule XIX requires the Presiding Officer to read aloud any question submitted in writing by a Senator. The Presiding Officer also puts the question on the vote on the articles of impeachment, pursuant to Rule XXIII and as described above.

The Presiding Officer of the trial can vote when he or she is a Senator. If the Vice President is presiding over a trial, and if there is a tie vote, then the Vice President may vote. In presidential impeachment trials, however, the Vice President cannot preside and cannot vote.[94] The Chief

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[89] *Procedure and Guidelines for Impeachment Trials*, p. 52.

[90] *Congressional Record*, vol. 132 (October 7, 1986), p. 29152. For more information on the Senate's decision not to establish by rule or precedent a standard of proof for impeachment trials, see CRS Report R46013, *Impeachment and the Constitution*, by Jared P. Cole and Todd Garvey, pp. 48-51.

[91] *Congressional Record*, vol. 132 (October 7, 1986), pp. 29152-29153.

[92] For more information, see CRS Report 96-452, *Voting and Quorum Procedures in the Senate*, coordinated by Elizabeth Rybicki.

[93] In the opinion of one scholar of the U.S. Senate, "The rules make evident the intent that when the Senate is sitting for the trial of an impeachment, the presiding officer shall act as the agent or mouthpiece of the Senate and not as an independent authority" (George H. Haynes, *The Senate of the United States*, Reissue of 1938 edition ed., vol. II (New York: Russell & Russell, 1960), p. 847).

[94] It is the practice of the Senate that the Vice President can only vote to break a tie while presiding. The form used by the Vice President to vote is that, as Presiding Officer, he first announces the result of the vote, then states, "The Senate being equally divided, the Vice President votes in the ___ and the (proposition) is____." *Riddick's Senate Procedure,*

Justice, when presiding over an impeachment trial, would not be expected to vote, even in the case of a tie.[95] If a vote on a question results in a tie, the question is decided in the negative.

Conducting Legislative and Executive Business

When the Senate convenes as a Court of Impeachment, it is in a distinct procedural mode, different from legislation session, where it considers bills and resolutions, and executive session, where it considers treaties and nominations. In addition to having its own set of rules, the Court of Impeachment also keeps a separate Journal.[96] (The Journal is the Constitutionally-required record of parliamentary actions taken by the Senate.) Business in these distinct procedural modes is kept entirely separate. For example, bills and resolutions cannot be introduced when the Senate is in the mode of sitting for the trial, and committee reports cannot be filed. This might mean that the Senate chooses to spend some period of a day meeting in legislative or executive session and also spend a period meeting as Court of Impeachment, in order to provide an opportunity for other actions to occur.

For some legislative actions, unanimous consent may effectively be required. Notably, the Senate must have a period for "morning business" in legislative session for various actions to occur—including the introduction of legislation and the filing of committee reports. In modern practice, this is provided for in unanimous consent agreements for each day the Senate meets.[97] The Senate would need to reach a similar unanimous consent agreement for legislative sessions held on days during the trial in order for these actions to be allowed. Alternatively, the Senate could agree by unanimous consent to arrange other methods for these actions to occur, even though the Senate has not met that day in legislative session.[98]

The impeachment rules provide for the Senate to convene for an impeachment trial at noon (Rule XIII) every day except Sunday after a trial has begun (Rule III). While this might have been the expected schedule in the middle of the 19th century, the impeachment rules also provide for the Senate to modify this schedule by "order." In modern practice, the Senate has adjusted the meeting days and times. Most often, the Senate agreed by unanimous consent to the time of the next meeting. Alternatively, a motion to adjourn the Senate sitting in a trial of impeachment to a time certain is subject to amendment, but it is not debatable and could be agreed to by majority vote.[99] The Senate also could agree to an order altering the default time for the Senate to sit for

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p. 1394.

[95] During the trial of President Andrew Johnson, the Chief Justice voted on two occasions to break a tie. This was controversial at the time, and he did not vote in all instances of ties. For more information, see *Procedure and Guidelines for Impeachment Trials,* pp. 40-42.

[96] Senate Standing Rule IV, paragraph 1(d) states that "The legislative, executive, the confidential legislative proceedings, and the proceedings when sitting as a Court of Impeachment, shall each be recorded in a separate book."

[97] For each day that the Senate meets, it agrees by unanimous consent that the Journal of the previous day be considered agreed to, that the morning hour be deemed expired, and that there be a period for "morning business." In the absence of unanimous consent, these parliamentary actions would instead be required to occur each new legislative day, and they have the potential to be time consuming.

[98] The Senate reached multiple unanimous consent agreements during the Clinton trial concerning these matters. For example, the Senate, during the 1999 trial of President Clinton, agreed on January 15, 1999, by unanimous consent that there be a period of morning business when the Senate next convened on January 19 (*Congressional Record,* vol. 145, daily edition (January 15, 1999), p. S259). On January 23, 1999, the Senate agreed by unanimous consent that "in the *Record* following today's proceedings there appear a period of morning business to accommodate bills and statements that have been submitted during the day by Senators" (*Congressional Record,* vol. 145, daily edition (January 23, 1999), p. S956).

[99] Although there are a few instances of the Presiding Officer advising that a motion to adjourn to a time certain is not

the trial each day, and this order would not be subject to debate. In short, a numerical majority can determine the day and times of meeting for an impeachment trial.

Impeachment Rule XIII also provides that, when the trial adjourns, the Senate resumes consideration of legislative (or executive) business. The Rule states, "(t)he adjournment of the Senate sitting in said trial shall not operate as an adjournment of the Senate." As a result, it is possible for the Senate to convene to conduct business in legislative (or executive) session before noon, convene the trial at noon pursuant to the rules (or at some other time if decided by the Senate), adjourn the impeachment trial for the day and return to legislative (or executive) session to conduct more business. The Senate could also meet for other purposes on days the Senate is not meeting for the trial.

In the modern judicial trials and during the Clinton trial, the Senate did conduct other business on some of the days on which it also considered articles of impeachment. Limited legislative business was accomplished during the six weeks of the Clinton trial, but that trial occurred at the very start of the 106th Congress (1999-2000), while committees were still organizing and legislation may have still been developing. Other factors could certainly affect the ability of the Senate to approve legislation while a trial is being conducted. Bipartisan support is generally necessary to take up most legislation in the Senate, and forming such coalitions could be challenging if the impeachment proceedings are contentious. The attention of Senators and their staff might also be expected to be directed toward impeachment proceedings.

In addition, it is not clear how some procedures that apply to the consideration of legislation and nominations in the Senate are impacted when the Senate sits for an impeachment trial. For example, if cloture was filed on a matter in legislative session, and the Senate was sitting in trial when the cloture motion matured, it is not clear if the Senate would vote on the cloture motion at that time, or instead not until it adjourned the trial for the day. It is also not clear how legislation to be considered under expedited procedure statutes, such as the Congressional Review Act, the War Powers Resolution, or the Trade Act (each of which provide for specific Senate actions at times certain) could be impacted by a Senate trial.

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in order during an impeachment trial, the Senate's published precedents state that more recent decisions and practices "do not conform" to these rulings. See *Procedure and Guidelines for Impeachment Trials*, p. 34.

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