CREW | citizens for responsibility and ethics in washington

January 17, 2020

The Honorable John G. Roberts Jr.
Chief Justice
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C., 20543

The Honorable Mitch McConnell
Majority Leader
United States Senate
Washington, D.C., 20510

The Honorable Charles E. Schumer
Minority Leader
United States Senate
Washington, D.C., 20510

Chief Justice Roberts and Honorable Members of the U.S. Senate,

The Constitution gives you the solemn responsibility of conducting an impeachment trial of President Donald J. Trump. The United States Senate has the "sole Power to try all Impeachments." Article I, Sec. 3. The Constitution provides that the Chief Justice shall preside over the impeachment trial of a President. *Id.* You have taken an oath in which you swore or affirmed that you will "do impartial justice according to the constitution and laws."[1] On behalf of Citizens for Responsibility and Ethics in Washington, I write to respectfully request that you enforce the evidentiary standards regarding relevance, materiality and redundancy in the Federal Rules of Evidence in order to help ensure a fair and credible impeachment trial in the Senate.

In addition to ensuring that it has access to the documentary evidence and witness testimony it needs to make a just determination,[2] the Senate also has a responsibility to ensure that the evidence it hears is relevant. This responsibility is shared by the Chief Justice, who may make initial evidentiary rulings,[3] and members of the Senate, who may let the Chief Justice's ruling stand, overrule him, or make an independent determination in the event that the Chief Justice decides to submit a question directly to the Senate.

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[1] Rule of Procedure and Practice in the Senate When Sitting on Impeachment Trials, Rule XXV, *available at* https://www.govinfo.gov/content/pkg/SMAN-113/pdf/SMAN-113-pg223.pdf.

[2] *See* Letter to Chief Justice Roberts and Honorable Members of the Senate, *Protect Democracy and Citizens for Responsibility and Ethics in Washington*, Jan. 9, 2020, *available at* https://www.citizensforethics.org/press-release/impeachment-witness-testimony-2/; Senate Impeachment Trial Procedure, *Citizens for Responsibility and Ethics in Washington and Public Citizen*, Nov. 2019, *available at* https://www.citizensforethics.org/senate-impeachment-trial-procedure-2/.

[3] *See, e.g.,* Hinds' Precedents, Vol. 3, ch. 69 at 577, 580-83, 587-88, 592 (1907), *available at* https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/pdf/GPO-HPREC-HINDS-V3-18.pdf.

Although the Senate does not have its own rules of evidence, the Senate Impeachment Rules explicitly anticipate that issues of relevance, materiality, and redundancy will arise at an impeachment trial.[4] Adopting rules of evidence in impeachment trials was the practice of the English House of Lords and was explicitly adopted by the Senate in the 1831 trial of Judge Peck.[5] As the House managers explained in an evidentiary motion in the 1986 trial of Judge Claiborne,

> The Rules of Procedures & Practice In the Senate When Sitting on Impeachment Trials contain no specific standard for when evidence is admissible in an impeachment trial. The Rules only imply that the general standard used in courts across the country that evidence be relevant and material applies.[6]

The Senate has faced and ruled upon evidentiary objections at every impeachment trial it has completed: Judge Pickering (1803);[7] Justice Chase (1805);[8] Judge Peck (1831);[9] Judge Humphreys (1862);[10] President Johnson (1868);[11] Secretary of War Belknap (1876);[12] Judge Swayne (1905);[13] Judge Archbald (1913);[14] Judge Louderback (1933);[15] Judge Ritter (1936);[16]

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[4] Rule of Procedure and Practice in the Senate When Sitting on Impeachment Trials, Rule VII.

[5] *See* Hinds' Precedents, Vol. 3, ch. 69 at 537-40 (1907). Representative James Buchanan, chairman of the House managers, argued that impeachment in the House of Lords followed this practice, that both the accused and the House of Representatives had a right to a trial where those rules were enforced, and that rules of evidence were essentially the law of the land. *Id.*

[6] *See, e.g.,* Mem. in Support of Motion to Accept Prior Admissions of Judge Claiborne, S. Hrg. 99-812 Pt. 1, at 394-96 (1986), available at https://hdl.handle.net/2027/uc1.b5158533?urlappend=%3Bseq=416.

[7] *See, e.g.,* Hinds' Precedents, Vol. 3, ch. 69 at 562-65. The dates cited refer to the year of the verdict, not the year of the evidentiary objection.

[8] *See, e.g., id.* at 576; *id.* at 580.

[9] *See, e.g., id.* at 537-39.

[10] *See, e.g.,* Hinds' Precedents, Vol. 3, ch. 74 at 817 (1907) ("Twice objection was made by Senators to questions put by the managers, as eliciting testimony inadmissible as evidence, but either the question or the objection was withdrawn without a decision by the court.").

[11] *See, e.g.,* Hinds' Precedents, Vol. 3, ch. 69 at 540-49; *id.* at 557-62; *id.* at 575-76.

[12] *See, e.g., id.* at 552-56; *id*. at 590-91; *id.* at 593.

[13] *See, e.g., id.* at 551-52; *id.* at 556-57; *id.* at 591-92.

[14] *See, e.g.,* Cannon's Precedents, Vol. 6, ch. 199, at 679-83 (1936), *available at* https://www.govinfo.gov/content/pkg/GPO-HPREC-CANNONS-V6/pdf/GPO-HPREC-CANNONS-V6-52.pdf.

[15] *See, e.g.,* Cannon's Precedents, Vol. 6, ch. 201, at 738 (1936), *available at* https://www.govinfo.gov/content/pkg/GPO-HPREC-CANNONS-V6/pdf/GPO-HPREC-CANNONS-V6-54.pdf.

[16] *See, e.g.,* H. Doc. 94-661, Deschler's Precedents, Vol. 3, ch. 14, § 12, at 2117 (1994), *available at* https://www.govinfo.gov/content/pkg/GPO-HPREC-DESCHLERS-V3/pdf/GPO-HPREC-DESCHLERS-V3-5-4-2.pdf.

Judge Claiborne (1986);[17] Judge Hastings (1989);[18] Judge Nixon (1989);[19] President Clinton (1999);[20] and Judge Porteous (2010).[21]

During the impeachment trial of President Johnson, the Senate ruled on numerous objections to evidence introduced by House managers on the grounds that the evidence was not in fact relevant to the specific allegations asserted in the articles of impeachment. The Senate rejected a relevance objection to the introduction of telegrams between President Johnson and Alabama's provisional governor. Although President's counsel objected on the grounds that the relevant articles referenced speeches, not telegrams, the House countered that the telegrams were evidence of the President's efforts to oppose reconstruction--a charge specifically referenced in the eleventh article of impeachment. The Senate ultimately sided with the House on a vote of 27 to 17.[22] Nonetheless, on a vote of 27 to 22, the Senate sustained an objection to testimony about the President's efforts to appoint his private secretary Assistant Secretary of the Treasury on the grounds that it was not relevant to the claim that the President had violated the civil service laws to appoint a Secretary for the Department of War when there was no vacancy.[23] The Senate also ruled inadmissible evidence that President Johnson had been advised that the tenure-of-office act (which he had been accused of violating) was unconstitutional because the question of why the President failed to execute the laws was immaterial to whether he had in fact done so.[24]

The floor trial proceedings in the impeachment trial of President Clinton represent compelling precedent as well, but it is critical to draw the right lesson from that episode. Although the record of that trial contains strikingly few evidentiary objections and votes to resolve them,[25] that does not mean that principles of relevance played no role. To the contrary, both the House managers and the counsel for the President presented arguments that squarely addressed the factual and legal merits of impeachment rather than testing the boundaries of what was relevant. The factual record for impeachment had already been well developed in a special counsel investigation, and

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[17] *See, e.g.*, Report of the Senate Trial Committee, S. Hrg. 99-812 Pt. 1, at 536-37, 544, 862, 912 (1986), *available at* https://hdl.handle.net/2027/uc1.b5158533?urlappend=%3Bseq=566.

[18] *See, e.g.,* Report of the Senate Impeachment Trial Committee on the Articles against Judge Alcee L. Hastings, S. Hrg. 101-194, Pt. 2A, at 176-78, 186-88 (1989), *available at* https://hdl.handle.net/2027/pur1.32754074481312.

[19] *See, e.g.,* Report of the Senate Impeachment Trial Committee on the Articles against Judge Walter L. Nixon, Jr., S. Hrg. 101-247, Pt. 2, at 2 (1989), *available at* https://babel.hathitrust.org/cgi/pt?id=mdp.39015064793501&view=1up&seq=10.

[20] *See, e.g.,* Proceedings of the United States Senate in the Impeachment Trial of President William Jefferson Clinton, S. Doc. 106–4, Vol II, at 1505 (1999), *available at* https://www.govinfo.gov/content/pkg/CDOC-106sdoc4/pdf/CDOC-106sdoc4-vol2.pdf; *Id*., Vol. III, at 2124.

[21] *See, e.g.,* Disposition of Pretrial Motions, Impeachment Trial Committee on the Articles against John G. Thomas Porteous, Jr., S. Rep. No. 111–347, Pt. 1C at 1967 (2010) *available at* https://hdl.handle.net/2027/pur1.32754081522306?urlappend=%3Bseq=1325.

[22] Hinds' Precedents, Vol. 3, ch. 69 at 541-42.

[23] *Id.* 542-44.

[24] *Id.* at 545-49

[25] *See* S. Doc. 106–4, Vol. II.

neither President Clinton nor the House managers attempted to introduce evidence that tested the boundaries of relevance or materiality.

The Federal Rules of Evidence, a codification of evidentiary rules that have been established over hundreds of years, provide a comprehensive framework for evidentiary decisions.[26] House managers and members of the Senate have routinely invoked rules of evidence from courts of law to give meaning to evidentiary terms.[27] The reason to do so is not to adopt those principles reflexively, but rather to equip the Senate with neutral, non-partisan principles for resolving evidentiary disputes.

As the Federal Rules of Evidence explain, evidentiary rules exist to ensure that a deliberative body can ascertain the truth and make a just determination. *See, e.g.*, Fed. R. Evid. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."). Evidence is only relevant if it "has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Fed. R. Evid. 401. In short, evidence is only relevant if it is both probative and material. In an impeachment context, a fact is material if it is of consequence to answering two questions: whether the President committed treason, bribery, or high crimes and misdemeanors and whether those impeachable acts require the removal of the President and an optional punishment—his disqualification from future office.

The Federal Rules of Evidence further provide that "When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist." Fed. R. Evid. 104. In essence, a party cannot simply invent facts out of whole cloth to make evidence relevant; there must be some basis to think that the fact exists.

The Federal Rules of Evidence also permit the exclusion of evidence even when it is relevant "if its probative value is substantially outweighed by a danger of one or more of the following:

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[26] An impeachment trial is a unique constitutional proceeding in the Senate. While it is appropriate for the Senate to employ rules of evidence in this setting, Congress should not be so constrained when conducting oversight or legislative responsibilities—or even when either branch or one of their respective committees is investigating potentially impeachable conduct.

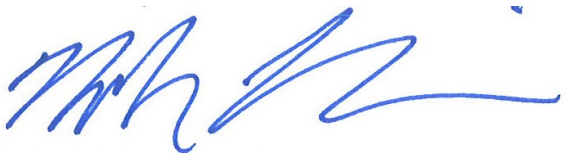
[27] *See, e.g.,* Mem. in Support of Motion *in Limine* to Exclude Irrelevant Evidence Proffered by Judge Claiborne, S. Hrg. 99-812 Pt. 1, at 493 (1986) ("The Senate Rules are consistent with rules governing the introduction of evidence in federal courts."), *available at* https://hdl.handle.net/2027/uc1.b5158533?urlappend=%3Bseq=514; Mem. in Support of Motion to Accept Prior Admissions of Judge Claiborne, S. Hrg. 99-812 Pt. 1, at 395 (1986) ("Although the Federal Rules of Evidence are not binding on the Senate, they do offer guidance on what types of evidence are admissible."), available at https://hdl.handle.net/2027/uc1.b5158533?urlappend=%3Bseq=416. Report of the Senate Trial Committee, S. Hrg. 99-812 Pt. 1, at 20 ('Senator Hatch: I think the committee can do pretty well whatever it wants to do, but they recommended following the Federal rules, which I think would probably be a pretty good approach to take with something as important as this."); Impeachment Trial of Judge Hastings, S. Hrg. 101-194, Pt. 2A, at 188 ("The rules of evidence have been established over a very long period of common law practice and my own view, having had some experience in the practice of law, is to give very great weight to what these decades and centuries of practice have had to say about the rules of evidence.").

unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. While there may be less reason to worry that the members of the Senate will be "misled" by evidence as compared to a jury at a civil or criminal trial, the Senator's obligation to do impartial justice could just as easily be undermined by evidence or argument that is calculated to confuse, delay, or obscure rather than help the Senate answer the solemn questions before it.

An impeachment trial in which the parties present and argue relevant evidence will not happen automatically. Achieving that result will require the active participation of the Chief Justice and each member of the Senate. Senate practice provides unambiguous precedent for the Senate taking seriously its fact-finding responsibilities. The Federal Rules of Evidence provide a neutral, non-partisan framework for the solemnity and gravity of an impeachment trial of the President.

We respectfully request that you, the presiding officer and leaders of the Senate, be prepared to invoke those precedents and principles so that the Senate can fulfill its constitutional obligation to conduct a Senate trial and its responsibility to do impartial justice.

Sincerely,



Noah Bookbinder
Executive Director