Joseph Kraft

WXPost AUG 6 1974

Impeachment: The Rules Debate in the Senate

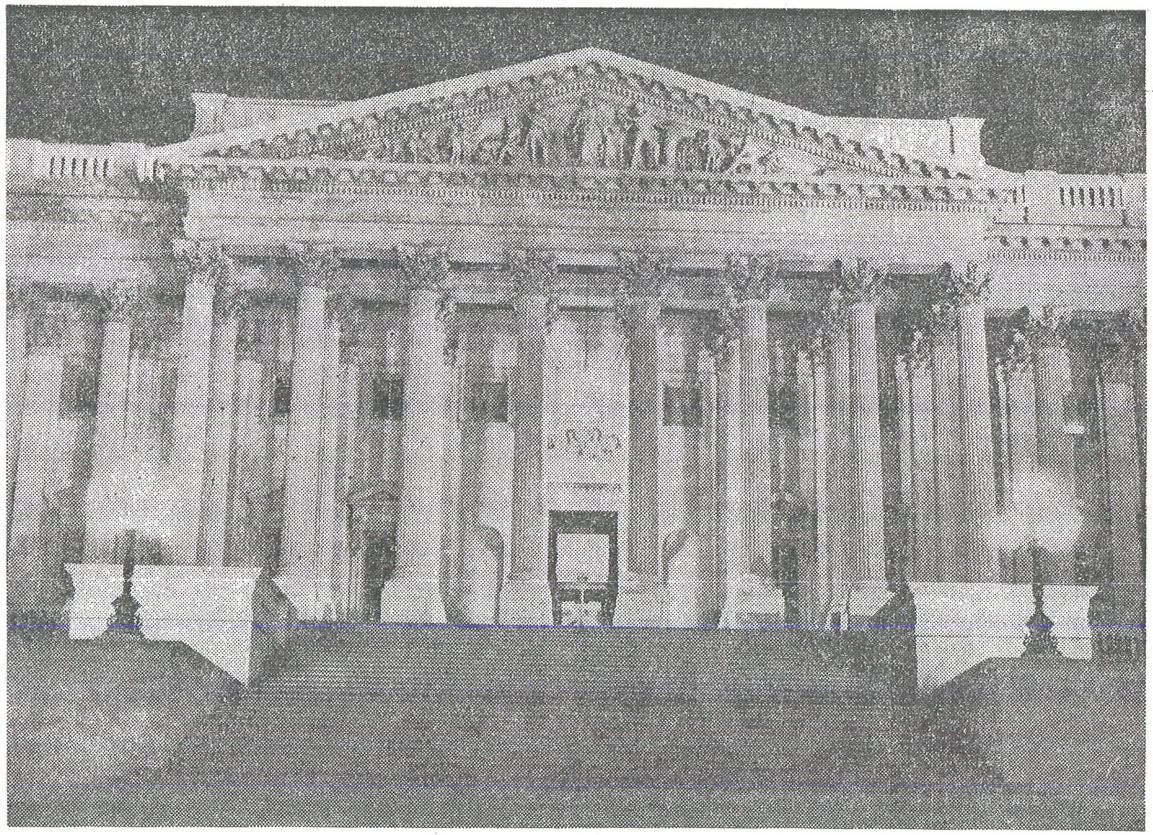
The President's latest release of material from the White House tapes shows that the light of reality is at last beginning to break in on Mr. Nixon. To admit as he now has that he allowed his lawyers to lie to the Congress and to the Supreme Court makes sense only in the context of a bargain on resignation.

Still it is just possible that we are going to have to have a Senate trial. In that context there is need to pay special attention to the ego games now being played in the Senate on the issue of the rules of impeachment.

The Senate rules for impeachment were written over a hundred years ago in the white heat of the trial of Andrew Johnson. They were subsequently amended as less absorbing impeachment trials came up. Not surprisingly, they are not only archaic, but full of ambiguities and uncertainties.

For example, the rules say nothing about standards of proof to be used or rules of evidence. They have no provision for the kind of pre-trial stipulation between defense and prosecution which does much to give pace to modern trials. Far from accommodating to the development of mass media and increased citizen interest, they stipulate that senators can only speak in executive sessions.

The most ambitious and hard-working senators long ago perceived that mastery of the rules would yield important opportunities for arbitrating the impeachment trial. On the Democratic side, Robert Byrd of West Vir-



vinia, the Majority Whip, began steeping himself in the lore of impeachment. On the Republican side John Tower of Texas, the chairman of the policy committee, began developing staff resources to deal with impeachment procedures.

The possible advancement of these conservative senators worried some of their more liberal brothers. Four liberal senators from both sides of the aisle—Edward Kennedy of Massachusetts and Philip Hart of Michigan, Democrats; and Jacob Javits of New York and Charles Mathias of Maryland, Republicans—did a study of the Senate rules. The study isolated many anachronisms and ambiguities, which were then summarized in the form of 97 questions and addressed to Majority Leader Mike Mansfield and Minority Leader Hugh Scott.

Senator Mansfield referred the questions to his staff, headed by Charles Ferris. Mr. Ferris worked up a list of proposed changes in the rules. Senator Mansfield and Senator Scott pushed through the Senate a joint resolution sending the proposed change to the Rules Committee.

Normally the proposed changes would have gone to a subcommittee under Senator Byrd. But the majority and minority leaders, jealous of their status, decreed otherwise. They arranged that the issue should be heard by the full Rules Committee on which they both sit. The chair is occupied by Sen. Howard Cannon of Nevada, not Senator Byrd.

The substantive issues beneath this jockeying for position are not at all that earth-shaking. For example, one question has to do with whether the Chief Justice should decide in the event of a tie vote—which is not exactly a big probability.

A second, more important question, is whether the standard of proof should be "beyond reasonable doubt," as in criminal cases, or "clear and convincing evidence," which obtains in civil cases. A good resolution, suggested by Senator Javits, would be to have no formal standard, but to let each individual senator vote according to his own judgment.

Despite their less than insoluble nature, these questions have taken on importance because big Senate egos are involved. So unless the procedural difficulties are eased in advance, they could be used by the President's defenders to tie the Senate in knots.

At least two good ways to limit the procedural difficulty commend themselves. First, the Senate Rules Committee could authorize Chief Justice Warren Burger to arrange for pre-trial consultation with the prosecution and the defense. By advance stipulation, many o fthe most abstruse procedural issues could be solved even before the Senate trial got under way.

More important still, there is the principle of open procedures, including television coverage of the trial itself. It is not merely that democratic procedure dictates maximum publicity. As a practical fact, full coverage, and especially television, works to cut down on ego games.

As the House Judiciary Committee performance shows, exposure to the camera tends to make elected officials careful and responsible. They are conscious of being on television and the instinct to play number one, which is given free rein when the Senate operates as a kind of close private club, is held in check by the fear of seeming ridiculous.