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Standing Committee on Procedure and House
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The Honourable Judi Longfield

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Wednesday, November 17, 2004

• (1635)

[English]

The Chair (Hon. Judi Longfield (Whitby—Oshawa, Lib.)): I'm calling the third meeting of the Subcommittee on Parliamentary Privilege of the Standing Committee on Procedure and House Affairs to order. Welcome to the members of the committee.

We have before us today Mr. Robert Marleau, the former Clerk of the House.

It's so good to have you, sir. I think you've done this on more than one occasion, so you know the drill. You have your 10- to 15-minute presentation, followed by questions from the members of the committee.

Welcome, sir.

[Translation]

Mr. Robert Marleau (Former Clerk of the House of Commons, As Individual): Thank you, Madam chair.

I wouldn't say that it is an honour and a privilege to be here with you again today, because I read the transcript from yesterday's meeting and Mr. Godin's questions,—

Some hon. members: Ah, ah!

Mr. Robert Marleau: It's a pleasure to be here with you again.

[English]

I was called on short notice, Madam Chair. I was out of the country last week, only read the e-mail on the weekend, and responded to the clerk of the committee that of course if the committee wished to hear from me I'd be happy to come. So I've not made a lengthy opening statement or presentation. From the evidence I've read, you're well briefed on the issues—article 9, Parliament of Canada Act, and the Constitution, section 18. So I won't go through all of that.

The issue as I see it, in terms of what you are confronted with to decide on and recommend to the House, is a very serious one. That you are taking it seriously is obvious, in terms of your deliberations on the issues that are at stake.

I would like to say that you are charged to do the right thing for Parliament. The focus of your discussions ought to be on what is right for parliamentarians, for your successors as parliamentarians, and for the witnesses who will appear in the future before committees in the House.

On the specific issue, in terms of the facts and the Gomery commission, I'm not all that familiar with all the details, other than what I've read in the media. I'm retired, and I have a passing interest in what goes on at Parliament Hill and around it, but I'm not as *au fait* as I used to be.

I reread last night the Joint Committee on Parliamentary Privilege report, a U.K. report of March 1999, which I think circumscribes a lot of the issues you are faced with. I don't know how much you know about that particular report, but the U.K. Parliament was faced with a review of privilege in the context of a defamation act that had created an exemption whereby an MP could waive parliamentary privilege to defend himself or herself in a court of law.

It led to several complications. I'll spare you all the details, but in fact the committee recommended to Parliament a series of recommendations that would put into statute exceptions other than the one on defamation. It declared that freedom of speech, in the context of article 9 of the Bill of Rights, was absolute. As a matter of fact, I think it said it was absolute and comprehensive. It also declared—which was not in doubt, but sometimes is in doubt in the deliberations of many parliaments—that the protection was not confined to members, and it did apply to officers of the House and non-members who participated in proceedings in Parliament, such as witnesses giving evidence before committees.

I draw a conclusion that the committee made from one of its recommendations. It recommended that a statute be enacted for certain exceptions. I'll just read you the relevant paragraph. It's on page two of page five of the excerpt, in the middle of the page.

The traditional view of article 9 as a blanket prohibition on examination of parliamentary proceedings in court should be confirmed, subject to specific and limited exceptions for court proceedings (1) so far as they relate to interpretation of a statute or subordinate legislation, or the judicial review of, or the consequences of, government decisions...

It has long been a practice of the courts in the U.K. to refer to Hansard to interpret legislation. What a minister said on a second-reading speech, for instance, was used to interpret the law. It became so commonplace, without the House interfering, that they recommend that be done as an exception.

The second is the one that caused me pause:

- (2) where there is no suggestion that anything forming part of the parliamentary proceedings was inspired by an improper motive or was untrue or misleading, and (3) when the House waives privilege.

•(1640)

The committee says that the courts or other places may refer to the proceedings where there is no suspicion of improper motive, or it was untrue or misleading. Conversely, what it is saying is if there is suspicion of an improper motive or it was untrue or misleading, then that other place cannot deal with that. What is implied there is that only the Commons can deal with those kinds of issues.

I find that interesting, because they were trying to create exceptions. Indirectly, I think it touches upon the issue you are faced with, the conduct of a witness before Parliament, his or her testimony before a commission of inquiry. There may be contradictions and there may be explanations for those contradictions. There is not necessarily, at face value, untruth or improper motives, until the individuals are heard.

I point that out to say that at least one other committee has been struggling with this kind of issue since as early as 1999 and seems to have.... To my knowledge, and probably Jamie Robertson can confirm this or not, the British House has not proceeded with statute flowing from this report yet. It may still, but it has not yet enshrined it in statute.

So it's clear that the committee wanted to tell the House that if there is misconduct by a witness or an individual in the proceedings of Parliament, it is a matter for Parliament alone to deal with, not an outside body.

The link I make to that is what I've read in some of your proceedings, that it might be helpful to have an outside body establish the truthfulness, the motives, or the misbehaviour of an individual in another place for something that took place here in the Commons, but that committee took a view that it would be incompatible with the other privilege of the House, which is that only the House controls its internal affairs.

I don't know if I've muddied the waters by bringing up that particular point, but it's the one that I found was most pertinent in the short time I had to help you in your deliberations.

The Chair: Before I go to Mr. Reynolds, just for my own clarification, Mr. Marleau, are you suggesting that the public accounts committee could take the testimony that was given at the Gomery commission and use it to determine whether it felt that a witness at the standing committee had perhaps misspoken or had misled the committee?

Mr. Robert Marleau: No, that's not what I intended to say. I hope that's not in fact what I did say.

What I'm saying is that this exception that was recommended by the committee for waiving privileges for the use of proceedings by another body specifically said it should not be used.

I'm not saying the public accounts committee can use the Gomery proceedings to determine whether any witness was untruthful or misleading. The public accounts committee can call those people back and test that if it wants to, and there's no question about that.

•(1645)

The Chair: Okay, that's actually what I meant to ask.

Mr. Robert Marleau: Clearly this U.K. committee was saying that it is not proper for an outside body to deal with those issues and that they would recommend not waiving privilege in that context and ensure that the House dealt with the matter.

The Chair: Mr. Reynolds.

Mr. John Reynolds (West Vancouver—Sunshine Coast—Sea to Sky Country, CPC): Thank you, Madam Chair.

Thank you very much for being here. You look too awfully young and happy to be retired.

Mr. Robert Marleau: I won't tell you where I was last week, Mr. Reynolds.

Mr. John Reynolds: You're getting right down to what my dilemma is when you talk about improper motives, improper or misleading comments that may or may not have been made in the committee here, and now there's the Gomery inquiry; and you say only the House controls its internal affairs, and I agree with that.

The House was very supportive of the Prime Minister in setting up this inquiry to get to the bottom of an issue and find us the facts, and the judge himself is saying now, "I don't understand Parliament not wanting to give us that information so I can do what the Prime Minister has asked me to do." Certainly it's not Parliament, but the Prime Minister and the government—but certainly with the support of all parties—that set up this inquiry.

Today somebody sent me a note from the Senate about how we waive our privilege every time the Senate gets a money bill, so it's not unusual for us to waive privilege where it's convenient—to the government, at times. If we're doing that, if the House is controlling its own affairs, one of the affairs we have right now is the Gomery inquiry to get at the issue and report back as to what he thinks was the problem—whether people were absconding with money from the taxpayers—and then he'll obviously advise the RCMP or whoever in his report, who will do further investigations, and in certain cases we already have charges against some of these witnesses, who will have to face those in a court of law.

My dilemma is I don't want to see Parliament now becoming a judge in the procedure and House affairs committee, and bringing somebody back, and taking his testimony there, and doing it here. Let's get it to Justice Gomery and let him make a decision once and for all on this whole issue. I would ask you: we have the power to do that, have we not, if we wanted to? If Parliament wanted to say "yes, we can waive these privileges for this specific issue without affecting anything in the future", we have the power to do it, don't we?

Mr. Robert Marleau: I believe the House of Commons has the power to waive its privileges in this kind of context. The problem I have is with the last part of your sentence—without any compromise to the future. The issue of having a second party to some degree determine whether there was wrongdoing, if you like, within a parliamentary proceeding is the issue I, as a former officer of the House, have difficulty with.

•(1650)

Mr. John Reynolds: All right. I can understand that.

But I would also read you part of a sentence, which I'm sure if not written by yourself was written by one of the other clerks, in the statement in the House. It says: "...but the waiver of said rights and privileges is not to be drawn into a precedent." That's written in when we waive the rights for the Senate to debate a money bill. It says right there "is not to be drawn into a precedent". Could we not say the same thing in this issue: "sure, take these tapes, but this is not to be drawn into any precedent"?

Mr. Robert Marleau: Well, there is waiving privileges in the context of relationships with the other place; there is waiving privileges in terms of access to the precincts. But I think in this one what you have is a very fundamental privilege, which is freedom of speech—probably the only one you really have that works any more in the modern context.

Since time immemorial and confirmed in 1818—I think that's the date I read in some of the briefings—this has been extended to witnesses appearing before Parliament. Citizens or others can come before parliamentary committees and speak the truth at their peril—at their peril—and with that have the power of the House to protect them should they be as frank as they can be. Or they can speak what they believe is the truth but is wrong at their peril—because if I say something that is wrong about someone else or a situation, I might be pursued, particularly if you can establish motive—

Mr. John Reynolds: But we've waived that twice—

Mr. Robert Marleau: Every time they come they have to come "without peril" for the parliamentary system to work. So if the House says we'll waive it in this context and it won't apply as a precedent to other situations, I think it would have a chill effect on witnesses coming before Parliament, because this is a political institution, and maybe the precedent is not on all fours today, but the politics of tomorrow might be entirely different and lead to the same context where the House would say we'll waive it again, but we're not using the last-time precedent and we're not creating a new precedent, but we'll waive it again.

I'd be very concerned about the chill effect that would have for witnesses coming before Parliament.

Mr. John Reynolds: We've done it twice in our history, and—

Mr. Robert Marleau: The 1978 one is not on all fours; it was for in camera proceedings; it was with the consent of witnesses. The 1892 case led to the expulsion of a member and had to do with corruption and bribery. I really don't think those two precedents are on all fours, in the context of.... You're saying, on the one hand, we don't want to create a precedent. Then, if you don't want to create a precedent, we shouldn't look to other precedents in order to justify this precedent. I'm very uncomfortable with using those.

Mr. John Reynolds: I know you are, but this is also about corruption, and bribery too.

Mr. Robert Marleau: Well, I don't know that, sir. That may well be where it leads, but at this juncture my submission to you is to do what's right for Parliament, not necessarily what is right for due process in another place.

The Chair: Okay.

Mr. Guimond.

[*Translation*]

Mr. Michel Guimond (Montmorency—Charlevoix—Haute-Côte-Nord, BQ): Thank you, Madam Chair.

Thank you, Mr. Marleau, for sharing your insight with us, especially since I read the very interesting *House of Commons Procedure and Practice*, which is of great use to us, parliamentarians. In fact it is commonly referred to as the Marleau-Montpetit. I don't know if the expression Marleau-Montpetit qualifies you personally, or if it refers to your co-author, Camille Montpetit.

Mr. Robert Marleau: We had specifically chosen not to call it Montpetit-Marleau.

Some hon. members: Ah, ah!

Mr. Michel Guimond: That's more or less what I was trying to get at, but you didn't give me the opportunity to do so.

I'd like to refer to Chapter 3, dealing with privileges and immunities. Do you agree with me in saying that the fact of accepting to waive parliamentary privilege in Mr. Guité's case, even if the information is in the public domain, could set a dangerous precedent for the 22 parliamentary committees we now have—as you know, several were created after your retirement—and for anything said by a parliamentarian in the House or in a committee? Mr. Walsh, in replying to one of my questions said that the swearing in of witnesses, as was the practice at the Standing Committee on Public Accounts last spring, the statement made by the chair or the clerk before each witness testified stipulating that the witness would be protected by parliamentary privilege—

Do you agree with me that the idea of removing or waiving this protection could set a dangerous precedent?

Mr. Robert Marleau: First of, I have to say that I do agree with you that it could set a dangerous precedent, even if you added the following words with respect to suspending parliamentary privilege: "This should not be considered as a precedent for any future testimony". I believe that the privilege of free speech is fundamental to the workings of the House and parliamentary committees. A member must feel entirely free to express his views, without fear of prosecution, without fear of being intimidated in any way because of what he says.

The same protection was granted witnesses in order to create an environment of trust between them and parliamentarians during questioning. In a case of a non-cooperative witness or in very serious circumstances, the swearing in of witnesses crystallizes, shall I say, the importance of the process as well as the witness's presence and his testimony. Legal action may be brought against him for perjury under a section of the Parliament of Canada Act if the witness is not being truthful.

What I was saying earlier, in English, is that suspending parliamentary privilege in this instance, especially for the witnesses, could not only set a bad precedent, but cause future witnesses to have a reaction, not that they wouldn't come and testify before parliamentarians, but they certainly would be very, very careful as to what they say in such circumstances. Since then, the parliamentary process has worked in such a way to give assurance to the citizen that he or she can come and interact with members in a committee setting, and that the institution will guarantee his or her security, for instance against intimidation.

There have been several cases of intimidation, even in Canada. Recently, a witness admitted before a committee that a Crown corporation had questioned him before his testimony, and the committee established that there had been contempt and that the witness had been subject to intimidation. The institution reacted to protect the witness. So, I'm not as concerned about the bad precedent which could be set as I am about the effect it would have on your future business.

● (1655)

Mr. Michel Guimond: Let me give you an example. You said that a witness would accept to come and testify freely and voluntarily and share his insight with parliamentary committees in return for certain assurances. What you say is interesting. The witness could end up being more reluctant, and Parliament may find itself forced to summon witnesses to appear before the committees, by having them subpoenaed.

To the best of your knowledge, in your time in the House, were you aware of situations where witnesses were summoned to appear before a committee, under the current regime?

Mr. Robert Marleau: I wouldn't say it happened often, but it did happen. It can happen two or three times per Parliament, perhaps less.

I'll give you a hypothetical example. A witness appears before the finance committee which is investigating banking fees. The witness complains about his bank and mentions a series of problems. Several weeks later, he asks for a mortgage, which isn't granted to him because he made some negative comments about the bank. Parliament would react strongly to such a situation, and rightfully so. If Parliament were not to react, even though in this case we're not dealing with a crime or perjury, but rather the intimidation of a witness, all future witnesses would raise this situation where that previous witness had not been defended.

Mr. Michel Guimond: Yes, but in your example, you...

[English]

The Chair: Mr. Guimond, you're going to have to leave this until the second round. I'm sorry; I hate to do that.

Madame Boivin.

[Translation]

Ms. Françoise Boivin (Gatineau, Lib.): I'm going to continue along the same vein as my colleague across the way, who asked a question regarding the swearing-in of witnesses before the Standing Committee on Public Accounts. According to what we've heard and according to the facts, it was more than that, they were given a letter confirming the notion of privilege, etc.

Could this not be perceived as some kind of a trap? Let say I'm not a parliamentarian, but someone from the outside coming to testify here before one of the committees. I come to answer questions and I get sworn in. Before doing that, I am told that they will be no problem with me appearing, so I do not naturally see the need to come with a lawyer. I feel free to express my views. That is what privilege is supposed to protect.

Wouldn't there be something fundamentally indecent in saying that a person does not consent to giving us back the privilege granted to him? Doesn't this problem go to the very heart of this notion of privilege which is granted to a person?

We have seen statements, but no one is in a position to tell us today, with a straight face, that they are convinced that there has been a lie or fraud in such and such a place, as was the case in the examples cited from 1892 and 1978. According to me, that would be going even further than removing someone's privilege after having sworn him in and having confirmed his privilege in writing.

● (1700)

Mr. Robert Marleau: The letter merely crystallizes how serious the situation is. The same would be true even without the letter. The letter indicates that the testimony will be protected by parliamentary privilege and can therefore not be used against the person in other setting. You raise the moral contract issue, which is the idea of promising one thing and changing one's mind afterwards.

I can imagine a scenario in which the House, after investigating the situation, determines that perjury took place, for example. If the House makes a determination of contempt of Parliament, it can decide to waive parliamentary privilege for the individual or individuals in question, who are before another court or commission of inquiry.

Ms. Françoise Boivin: We are not at that point yet.

Is this not too hasty? In my opinion, making a decision now might even give the impression that we are not considering this seriously. After all, nothing with respect to this issue would justify that decision, except for the fact that a commission judge, for whom I have a great deal of respect, posed a somewhat existentialist question to the Crown, knowing that a big debate was brewing. Would the House be willing at this stage to simply withdraw its privilege? Is that not a bit hasty?

Mr. Robert Marleau: That is why I gave you the three exceptions mentioned by the British committee, which indicated implicitly that this is not done before the House has determined that the truth is not being told or there has been some other misconduct. It states clearly that this must be the reason.

Ms. Françoise Boivin: Would that mean that theoretically, if there was any doubt, it would have to go back to the Standing Committee on Public Accounts, which was the only place where the testimony was heard?

Mr. Robert Marleau: If the testimony was indeed given before the Standing Committee on Public Accounts. However, I do not know which of the two testimonies is inaccurate.

Ms. Françoise Boivin: You are telling us that only the committee

Mr. Robert Marleau: If the testimony before the Standing Committee on Public Accounts is at issue, it is not up to the Gomery Commission, in my opinion, to determine whether it is true or false. That would be up to the Standing Committee on Public Accounts, initially. The committee would be expected to report the contempt to the House, which would decide what measures to take against the witness.

I hesitate to say that a commission of inquiry, which cannot do anything in this context either, could determine indirectly that there had been misconduct in a parliamentary committee.

Ms. Françoise Boivin: Mr. Reynolds talked about the fact that privilege was often withdrawn when a matter was referred to the Senate. If you know about that procedure, could you perhaps explain it to us in a little more detail? Does it have any connection with what we are deciding?

Mr. Robert Marleau: I do not think it has any connection with the specific issue that you are dealing with. That is a particular context, in which a bill or an amendment may contain financial aspects. Under the Constitution, the House must initiate these financial aspects. So this could happen if the Senate claimed that the amendment was not really financial in nature and the House of Commons was of the opposite view. After debate and an exchange of messages to avoid a conference between the two Houses, —nobody remembers what these conferences are or how they work—the House would accept an amendment and choose to suspend his privilege in the interest of the bill.

In this case, we have two institutions that exist under the same part of the Constitution. Without repeating what others have told you, power is divided among three branches, the executive, the legislative and the judicial. The Gomery Commission is not part of the judicial branch at present. It was created as an initiative of the executive branch. The Senate and the House of Commons are legislative bodies.

• (1705)

Ms. Françoise Boivin: So the only two cases in Canada's history are the ones that you mentioned in your text, in 1892 and 1978.

Mr. Robert Marleau: Yes.

Ms. Françoise Boivin: Thank you. That is fine.

The Chair: Mr. Godin, you have the floor.

Mr. Yvon Godin (Acadie—Bathurst, NDP): Thank you, Madam Chair.

I would like to thank you for coming this evening, Mr. Marleau, and I hope that you are really retired, that you are not working more than before and that you are often on vacation in some sunny place,

because you deserve your retirement. Nevertheless, if you were to be doing something, we would not hold it against you.

My colleague asked you earlier why the title Montpetit-Marleau would not be adopted. We already have the dictionary called *Le Petit Robert*, which I'm sure made a great deal of money for Mr. Robert. I noticed that your first name is Robert as well, so...

I think the issue we are discussing here is very important. You said clearly that in 1978, when privilege was waived, the witnesses were in agreement. There's a difference in this case. Some have said that this did not create a precedent. Despite my respect for Mr. Reynolds, who thinks this was done in 1978 and in 1892 as well, I think those were precedents, since we are talking about these cases. If that were not the case, these incidents would not be mentioned at all.

In addition, I do not think the Gomery commission can lay charges. The job of the commission is to find out what happened and to make that public. I do not think it has the mandate to solve our problems.

Basically, as a member of Parliament, I cannot imagine telling my fellow citizens who appear before a committee that they can speak freely because of privilege, whereby their comments cannot be used in legal proceedings or the proceedings of an outside commission, and then subsequently take this privilege away from them because of a question of interpretation as to whether or not they lied. I think it is up to the Gomery commission to get at the truth with the assistance, as Ms. Boivin said, of their battery of lawyers. There are courts of law here, charges can be laid, and anything can be done.

You have considerable experience in Parliament. You are well aware that we do not always enjoy a great deal of credibility. In the short term, there is no problem, but in the long term, we could even do harm to the institution of Parliament.

I think this issue goes much further. I would like to hear your comments on the following. If privilege is waived for one witness, it could also be waived for a member of Parliament in the House of Commons. When we speak in the House, all Canadians can watch us and hear us live on CPAC.

I will not mention the name of the bank you alluded to earlier, but the fact is that if privilege were waived, you could be taken to court tomorrow morning. It would not be right to decide in two weeks that Mr. Robert Marleau's privilege would be waived and the bank would be allowed to lay charges against him. It could also be said that he told the committee lies, because he said something different publicly the day before. I believe this comes down to a question of respect.

I do not want to use inappropriate language, because that really does bother me, but when we promise someone something, we must keep our word. We are Parliament—we pass laws and we represent the public. As I understand it, we must be able to communicate with people very freely, they must be able to come and sit down with members of Parliament and explain their position. If there's a problem somewhere else, it is up to the individuals involved to act accordingly, but the words spoken in Parliament should not be used.

I referred earlier to the potential danger for members of Parliament. What would happen if we agreed to waive privilege this time? If an election were held next year, or in two or three years, and if an independent member of Parliament said things that people did not like, that could mean that we parliamentarians could decide to remove the member's privilege.

You read the transcript of yesterday's meeting, so you know what I said about this. I would like to hear your opinion. I believe you have already stated it, but I would like you to repeat what damage such an action could cause in the future. What would we say to future...? As a member of Parliament sitting on a parliamentary committee, should I tell witnesses that they are protected by parliamentary privilege, but only so long as Parliament does not withdraw this protection? We have to be honest with people. I think that withdrawing the protection provided by parliamentary privilege would be an extremely dangerous decision.

• (1710)

Mr. Robert Marleau: I very much agree with your last statement. Unfortunately, our knowledge of history is very poor. Article 9 of the Bill of Rights cost the citizens of Britain dearly during the time leading up to the signing of this provision. It had to be established once and for all that the Crown would not interfere in the affairs of the House of Commons or Parliament, either through the courts or through the executive.

I'm afraid that, if the House of Commons waives privilege on this matter, there could be a weakening of Sections 9 and 18 of the Canadian Constitution. To some extent, it would also weaken a particular section of the Parliament of Canada Act, which provides that parliamentary privileges are part of Canadian law and that judges must familiarize themselves with it. If Parliament waives privilege, judges could then ask Parliament to waive privilege in other cases to facilitate their work, because there would be a precedent. In my opinion, you would be weakening the very essence of Section 9.

Mr. Yvon Godin: I can understand that, Mr. Marleau. If we made a mistake, making another will not improve things. If we invite people to appear before a committee and tell them they have no privilege, that it has been waived and that everything they say could be used against them, then I have no problem. That is what is known as honesty. However, if we tell them that we will protect them and

then two years later we waive their privilege, that is dishonest. There is no other word for it. That is my view of this.

Mr. Robert Marleau: It is a question of the moral contract you have with people, which I referred to earlier.

We must make a distinction here. You referred to the precedent, the 1978 decision. There is a very great difference between the current situation and the one in 1978. In 1978, the issue involved in-camera testimony before a parliamentary committee. The MacDonald Commission was granted two things: access to the in-camera proceedings, and permission from the witnesses to provide this access to the in-camera proceedings, with some quite severe restrictions.

In the case before us, the testimony was public. I think that a person does not have to be a brilliant lawyer to find out who said what and when before Parliament and to respect that testimony as inadmissible. Everything is there. It can be read. There is no ban on reading the proceedings and the testimony given before committees, it is public. All that is required is to find a clever enough lawyer to achieve the desired objective by asking the right questions without quoting the testimony.

It would be a different matter if the testimony had been given in-camera, because the commission might think that Parliament learns something that could be useful to the inquiry. In this case, the testimony is public. Everyone knows what was said. Waving immunity in a public context is even worse, in my view. It is more dangerous.

• (1715)

[*English*]

The Chair: I can do a three-minute round for... Mr. Guimond? No. Madame Boivin? No. All right.

Then I'm going to thank you very much. You've given us a lot to think about.

The committee will go in camera, so we're going to suspend momentarily. Members of the media and those who are not directly related to a member as staff I'm going to ask to leave.

Thank you.

[*Proceedings continue in camera*]

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