

# Chapter 27

## Impeachment

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#### Research References

U.S. Const. art. I, §§ 2, 3; art. II, § 4  
1 Hinds §§ 63–79; 3 Hinds §§ 2294–5220  
6 Cannon §§ 454–552  
Deschler Ch 14  
*Manual* §§ 173–176; 601–620

### A. Generally

#### § 1. In General; House and Senate Functions

Impeachment is a constitutional remedy addressed to serious offenses against the system of government. It is the first step in a remedial process—that of removal from public office and possible disqualification from holding further office. The purpose of impeachment is not personal punishment; rather, its function is primarily to maintain constitutional government. Deschler Ch 14 App. pp 726–728; 105–2, Dec. 19, 1998, p \_\_\_\_

Impeachment proceedings have been initiated more than 60 times since the adoption of the Constitution. 3 Hinds § 2294; 6 Cannon § 498; Deschler

Ch 14 § 1. Sixteen of these cases resulted in impeachment by the House: President Andrew Johnson in 1868, Secretary of War William W. Belknap in 1876, Senator William Blount in 1797, President William J. Clinton in 1998, and 12 Federal judges. Only seven impeachments have led to Senate convictions—all of them Federal judges.

An impeachment is instituted by a written accusation, called an “Article of Impeachment,” which states the offense charged. The articles serve a purpose similar to that of an indictment in an ordinary criminal proceeding. *Manual* § 609.

The power of impeachment is bifurcated by the Constitution. The House is given the “sole Power of Impeachment,” and the Senate is given “the sole Power to try all Impeachments.” U.S. Const. art. I, § 2, cl. 5; § 3, cl. 6. Impeachments may be brought against the “President, Vice President, and all civil Officers of the United States.” Conviction of “Treason, Bribery, or other high Crimes and Misdemeanors” is followed by “removal from Office” and may include “disqualification to hold” further public office. U.S. Const. art. I, § 3, cl. 7; art. II, § 4.

The term “impeach” is used in different ways at various stages of the proceedings. A Member rises on the floor to “impeach” an officer in presenting a resolution or memorial. 3 Hinds § 2469. The House votes to “impeach” in the constitutional sense when it adopts an impeachment resolution and accompanying articles. § 8, *infra*. The Senate then conducts a trial on these articles and either convicts by two-thirds vote or acquits the “impeached” accused Federal official. § 9, *infra*.

## § 2. Who May Be Impeached

The “President, Vice President, and all civil Officers of the United States” are subject to removal under the impeachment clause of the Constitution. U.S. Const. art. II, § 4. A private citizen who has held no public office may not be impeached. 3 Hinds §§ 2007, 2315.

The term “civil Officers” in article II, section 4 of the Constitution refers to those appointed by the President under article II, section 3, clause 2. The term is broad enough to include all officers of the United States who hold their appointment from the Federal government, whether their duties be executive, administrative, or judicial, or whether their position be high or low. Impeachment—Selected Materials, Committee on the Judiciary, H. Doc. No. 93–7, Oct. 1973, p 691. On the other hand, military officers are not subject to impeachment, since they are subject to disciplinary measures according to military codes. 3 Willoughby, *The Constitution* (1929) § 929; 9 Hughes, *Federal Practice* (1931) § 7228.

A Member of Congress is not a “civil Officer” within the meaning of the impeachment provisions of the Constitution. 3 Hinds §§ 2310, 2316. The contention that a Senator was not a civil officer within the meaning of the impeachment provisions of the Constitution was sustained by the Senate in 1799. The Senate dismissed impeachment charges brought to its bar by the House, finding that an impeachment of a Senator was beyond its jurisdiction. 3 Hinds § 2318; § 4, *infra*.

Federal judges are subject to removal under the impeachment provisions of the Constitution. Of the 16 impeachments reaching the Senate, 12 have been directed at Federal judges, and in seven of these cases the Senate voted to convict: Pickering in 1803 (3 Hinds §§ 2319–2341); Humphreys in 1863 (3 Hinds §§ 2385–2397); Archbald in 1912 (6 Cannon §§ 498–512); Ritter in 1936 (S. Doc. No. 74–200, 1936); and Claiborne, Nixon, and Hastings in 1986, 1988, and 1989, respectively (*Manual* § 176).

Impeachment proceedings were initiated against a Member of the President’s Cabinet in 1876, when impeachment charges were filed against William W. Belknap, who had been Secretary of War. The House and Senate debated the power of impeachment at length and determined that the Secretary remained amenable to impeachment and trial even after his resignation. 3 Hinds §§ 2007, 2467. In 1978, the House voted to table a privileged resolution impeaching Andrew Young, the United States Ambassador to the United Nations. 95–2, July 13, 1978, p 20606.

A Commissioner of the District of Columbia has been held not to be a civil officer subject to impeachment under the Constitution. 6 Cannon § 548. Under section 596(a) of title 28, United States Code, an independent counsel appointed to investigate the President may be impeached. A resolution impeaching such independent counsel constitutes a question of the privileges of the House under Rule IX. *Manual* § 604.

### **Effect of Resignation**

The House and Senate have the power to impeach and try an accused official who has resigned. Deschler Ch 14 § 2. It was conceded (in the Belknap impeachment proceeding described above) that a Cabinet Secretary remains amenable to impeachment and trial even after his resignation. 3 Hinds §§ 2317, 2318. As a practical matter, however, the resignation of an official about to be impeached generally puts an end to impeachment proceedings because the primary objective—removal from office—has been accomplished. This was the case in the impeachment proceedings begun against President Richard M. Nixon in 1974 and Judge George English in 1926. Deschler Ch 14 §§ 2.1, 2.2. President Nixon resigned following the decision of the Committee on the Judiciary to report to the House recom-

mending his impeachment, and further proceedings were discontinued. 93–2, H. Rept. 93–1305, p 29361. Judge English resigned before commencement of trial by the Senate and the proceedings were discontinued at that point. 6 Cannon § 547.

### § 3. Grounds for Impeachment

#### Generally

The Constitution defines the grounds for impeachment and conviction as “Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. Const. art. II, § 4. When the House determines that grounds for impeachment exist, the articles of impeachment are presented to the Senate. Any one of the articles may provide a sufficient basis or ground for conviction. Deschler Ch 14 § 3.

The interpretation that has been placed on the words “high Crimes and Misdemeanors” is a broad one. The framers of the Constitution adopted the phrase from the English practice. At the time of the Constitutional Convention, the phrase “high crimes and misdemeanors” had been in use for over 400 years in impeachment proceedings in the British Parliament. Some of these impeachments charged high treason; others charged high crimes and misdemeanors. The latter included both statutory offenses and nonstatutory offenses. Many of the charges involved abuse of official power or trust. Deschler Ch 14 App. pp 706–708.

An offense must be serious or substantial in nature to provide grounds for impeachment. This requirement flows from the language of the clause itself—“*high* Crimes and Misdemeanors.” Although there is some authority to the contrary, it is generally accepted that the adjective “high” modifies “Misdemeanors” as well as “Crimes.” Impeachment—Selected Materials, Committee on the Judiciary, H. Doc. No. 93–7, Oct. 1973, p 682. As to what constitutes a serious, impeachable offense, one commentator has said:

To determine whether or not an act or a course of conduct is sufficient in law to support an impeachment, resort must be had to the eternal principles of right, applied to public propriety and civil morality. The offense must be prejudicial to the public interest and it must flow from a willful intent, or a reckless disregard of duty. . . . It may constitute an intentional violation of positive law, or it may be an official dereliction of commission or omission, a serious breach of moral obligation, or other gross impropriety of personal conduct that, in its natural consequences, tends to bring an office into contempt and disrepute.

Brown, *The Impeachment of the Federal Judiciary*, 26 Harv. L. Rev. 684, 703, 704 (1912).

The time when the offenses were committed is a factor to be taken into consideration. In 1973 the House declined to take any action on a request by Vice President Agnew for an investigation into allegations of impeachable offenses, where the offenses were not committed during his term of office as Vice President and where the offenses were pending before the courts. 93-1, Sept. 25, 1973, p 31368.

Exactly 100 years earlier, in a case that also involved the Vice President, the Committee on the Judiciary found that Schuyler Colfax could not be impeached for an alleged offense committed before his term of office as Vice President (the alleged conduct occurring while he was Speaker). 3 Hinds § 2510.

### **Presidential Impeachments**

In 1998 the Committee on the Judiciary recommended to the House four articles of impeachment against President Clinton, two of which the House adopted. 105-2, H. Res. 611, Dec. 19, 1998, p \_\_\_\_\_. The first and third articles, which the House adopted, charged the President with providing perjurious testimony to a Federal grand jury and with obstructing justice in a Federal civil action. The second and fourth articles, which the House rejected, charged him with providing perjurious testimony in a Federal civil deposition and with abuse of power for failing to adequately respond to questions asked by the Committee on the Judiciary during the impeachment inquiry. 105-2, H. Rept. 105-830, pp 108, 118, 119, 121. President Clinton was acquitted in the Senate on both articles adopted by the House. 106-1, Feb. 12, 1999, p \_\_\_\_\_.

In 1974 the grounds for invoking the impeachment power against the President were illustrated when the House initiated an inquiry into President Nixon's conduct as a result of charges arising out of a 1972 break-in at the Democratic National Headquarters in the Watergate Office Building in Washington, DC. The Committee on the Judiciary recommended to the House three articles of impeachment against President Nixon late in July 1974. The articles charged him with abuse of his Presidential powers, obstruction of justice, and contempt of Congress. Deschler Ch 14 § 3.7. Before the full House voted on these articles, President Nixon resigned after having been assured that his impeachment was a virtual certainty. His resignation terminated further action on the issue, although the articles were submitted to and accepted by the House by adoption of a resolution of "acceptance" considered under suspension of the rules rather than a resolution of impeachment. 93-2, Aug. 20, 1974, pp 29219-362.

In 1868 the House impeached President Andrew Johnson on the ground that he had violated the Tenure of Office Act by dismissing a Cabinet chief. Johnson was acquitted in the Senate. 3 Hinds §§ 2440, 2443.

### **Judicial Impeachments**

Since Federal judges hold office “during good Behaviour,” it has been suggested that misbehavior properly defines the bounds of “high Crimes and Misdemeanors” or even that lack of good behavior constitutes an independent standard for impeachment. U.S. Const. art. III, § 1; 6 Cannon § 464. The more modern view, however, is that the “good Behaviour” clause more aptly describes judicial tenure; that is, the clause does not constitute a standard for impeachability but merely means that Federal judges hold office for life unless they are removed under some other provision of the Constitution. Under this view, the power of removal together with the appropriate standard are contained solely in the impeachment clause. Impeachment—Selected Materials, Committee on the Judiciary, H. Doc. No. 93–7, Oct. 1973, p 666.

The grounds for impeachment of Federal judges were scrutinized in 1970 during an inquiry of a special subcommittee of the Committee on the Judiciary into the conduct of Associate Justice Douglas of the Supreme Court. The report of that special subcommittee concluded that a Federal judge could be impeached for judicial conduct that is either criminal or a serious abuse of public duty, or for nonjudicial conduct that is criminal. Deschler Ch 14 § 3.13 (proceedings discontinued for lack of evidence). The committee report recommending impeachment of President Clinton also discussed judicial impeachments. 105–2, H. Rept. 105–830, pp 110–18.

### **§ 4. — Impeachable Misconduct**

Impeachments have commonly involved charges of misconduct incompatible with the official position of the office holder. This conduct falls into three broad categories: (1) abusing or exceeding the lawful powers of the office; (2) behaving officially or personally in a manner grossly incompatible with the office; and (3) using the power of the office for an improper purpose or for personal gain. See Deschler Ch 14 App. p 719.

#### **Abusing or Exceeding the Powers of the Office**

The impeachment by the House of Senator William Blount in 1797 was based on allegations that he attempted to incite an Indian attack in order to capture certain territory for the British. He was charged with engaging in a conspiracy to compromise United States neutrality and with attempting to oust the President’s lawful appointee as principal agent for Indian affairs. 3 Hinds §§ 2294–2318. Although the Senate found that it had no jurisdiction

over the trial of an impeached Senator, it expelled him for having been guilty of a “high misdemeanor, entirely inconsistent with his public trust and duty as a Senator.” Deschler Ch 14 App. p 720.

The impeachment of President Andrew Johnson in 1868 was likewise based on allegations that he had exceeded the power of his office. Johnson was charged with violation of the Tenure of Office Act, which purported to limit the President’s authority to remove members of his own Cabinet. Johnson, believing the Act unconstitutional, removed Secretary of War Stanton and was impeached by the House three days later. Johnson was acquitted in the Senate. 3 Hinds §§ 2440, 2443.

A serious abuse of the powers of the office was a charge included among the recommended articles impeaching President Nixon in 1974. The Committee on the Judiciary found that his conduct “constituted a repeated and continuing abuse of the powers of the Presidency in disregard of the fundamental principle of the rule of law in our system of government.” Deschler Ch 14 § 3.7.

The House adopted an article of impeachment against President Clinton alleging that he obstructed justice in the course of a Federal civil action. However, the House rejected an article of impeachment against President Clinton alleging that he engaged in conduct that resulted in abuse of his office by inadequately responding to 81 written questions posed by the Committee on the Judiciary. 105–2, H. Res. 611, Dec. 19, 1998, p \_\_\_\_; 105–2, H. Rept. 105–830, p 121. President Clinton was acquitted by the Senate on that article adopted by the House. 106–1, Feb. 12, 1999, p \_\_\_\_.

#### **Behavior Grossly Incompatible with the Office**

Judge John Pickering was impeached by the House in 1803 for errors in a trial in violation of his trust and duty as a judge, and for appearing on the bench during the trial in a state of intoxication and using profane language. Pickering was convicted in the Senate and removed from office. 3 Hinds §§ 2319–2341.

Associate Supreme Court Justice Samuel Chase was impeached by the House in 1804. The House charged Chase with permitting his partisan views to influence his conduct in certain trials. His conduct was alleged to be a serious breach of his duty to judge impartially and to reflect on his competence to continue to exercise the power of the office. Chase was acquitted in the Senate. 3 Hinds §§ 2342–2363.

Judge West Humphreys was impeached by the House and convicted in the Senate in 1862 on charges that he joined the Confederacy without resigning his Federal judgeship. Judicial prejudice against Union supporters also was alleged. 3 Hinds §§ 2385–2397.

Judge George English was impeached by the House in 1926 for showing judicial favoritism and for failure to give impartial consideration to cases before him. It was alleged that his favoritism had created distrust of his official actions and destroyed public confidence in his court. 6 Cannon §§ 544–547. Judge English resigned before commencement of trial by the Senate, and the proceedings were discontinued at that point.

The House adopted an article of impeachment against President Clinton alleging that he prevented, obstructed, and impeded the administration of justice in a Federal civil rights action. 105–2, Dec. 19, 1998, p \_\_\_\_\_. President Clinton was acquitted by the Senate of that article of impeachment. 106–1, Feb. 12, 1999, p \_\_\_\_\_.

#### **Using the Office for an Improper Purpose or Personal Gain**

In 1826 Judge James Peck was impeached by the House for taking action against a lawyer who had publicly criticized one of his decisions, imprisoning him, and ordering his disbarment. The House charged that such conduct was unjust, arbitrary, and beyond the scope of his judicial duties. Peck was acquitted in the Senate. 3 Hinds §§ 2364–2366. Vindictive use of power also constituted an element of the charges in the articles of impeachment voted against Judge Charles Swayne in 1903. It was alleged that he maliciously and unlawfully imprisoned two lawyers and a litigant for contempt. 3 Hinds §§ 2469–2485.

Several impeachments have alleged the use of office for personal gain or the appearance of financial impropriety while in office. Secretary of War William Belknap was impeached by the House in 1876 for receiving substantial payments in return for his making of an appointment. He was acquitted in the Senate. 3 Hinds §§ 2444–2468.

The use of office for direct or indirect personal monetary gain was also involved in the impeachments of Judges Charles Swayne (1903), Robert Archbald (1912), George English (1926), Harold Louderback (1932), and Halsted Ritter (1936). Judge Swayne was charged with falsifying expense accounts. Judge Archbald was charged with using his office to secure business favors from litigants and potential litigants before his court. Judges English, Louderback, and Ritter were charged with misusing their power to appoint and set the fees of bankruptcy receivers for personal profit. 3 Hinds §§ 2469–2485 (Swayne); 6 Cannon §§ 498–512 (Archbald); §§ 544–547 (English); §§ 513–524 (Louderback); 74–2, Jan. 14, 1936, p 5602 (Ritter).

In 1986 the House agreed to a resolution impeaching Federal District Judge Harry Claiborne, who had been convicted of falsifying Federal income tax returns. His final appeal was denied by the Supreme Court, and he began serving his prison sentence. Because he declined to resign, how-



ever, Judge Claiborne was still receiving his judicial salary and, absent impeachment, would resume the bench on his release from prison. Consequently, a resolution of impeachment was introduced on June 3; and on July 16 the Committee on the Judiciary reported to the House four articles of impeachment against Judge Claiborne. On July 22 the resolution was called up as a question of privilege and adopted. After trial in the Senate, Judge Claiborne was convicted on three of the four articles of impeachment and removed from office on October 9, 1986. *Manual* § 176.

In the 100th Congress, the House agreed to a resolution reported from the Committee on the Judiciary impeaching Federal District Judge Alcee Hastings. The resolution specified 17 articles of impeachment, some of them addressing allegations of which the judge had been acquitted in a Federal criminal trial. 100–2, H. Res. 499, Aug. 3, 1988, p 20206. The judge was convicted in a trial before the Senate in the 101st Congress. 101–1, Oct. 20, 1989, pp 25329–35.

In 1989 the House voted to impeach Federal district Judge Walter L. Nixon, Jr. after he had been convicted on two counts of perjury before a grand jury about his relationship to a man whose son was being prosecuted for drug smuggling. The impeachment resolution charged that Judge Nixon had given false information about whether he had discussed the case with the local district attorney and attempted to influence its outcome. 101–1, May 10, 1989, p 8814. The Senate convicted Judge Nixon on two of the three articles of impeachment and removed him from office. 101–1, Nov. 3, 1989, p \_\_\_\_.

#### **Noncriminal Misconduct**

In the history of impeachments under the Constitution, the most closely debated issue has been whether impeachment is limited to offenses indictable under the criminal law—or at least to offenses that constitute crimes—or whether the word “Misdemeanors” in the impeachment clause extends to noncriminal misconduct as well. Although the precedents are not entirely uniform, the majority clearly favor the broader definition. As stated in the Ritter impeachment, the modern view is that the provision for impeachment in the Constitution applies not only to high crimes and misdemeanors as those words were understood at common law, but also to acts that, though not defined as criminal, adversely affect the public interest. 69–1, H. Rept. 69–653, pp 9, 10.

The historical evidence establishes that the phrase “high crimes and misdemeanors”—which over a period of centuries evolved into the English standard of impeachable conduct—had a special and distinctive meaning, and referred to a category of offenses that subverted the system of govern-

ment. Deschler Ch 14 App. p 724. The American experience with impeachment likewise reflects the view that impeachable conduct need not be criminal. Of the 16 impeachments voted on by the House since 1789, at least 11 involved one or more allegations that did not charge a violation of criminal law. Deschler Ch 14 App. p 725. The impeachment of Judge Pickering in 1803 was the first such proceeding to result in conviction and was based, at least in part, on noncriminal misconduct. The first three articles involved a series of flagrant errors on the part of the judge in his conduct of a case. 3 Hinds § 2319. Similarly, in 1974, in recommending articles impeaching President Nixon, the House Committee on the Judiciary concluded that the President could be impeached not only for violations of Federal criminal statutes but also for abuse of the power of his office and for refusal to comply with proper subpoenas of the committee. Deschler Ch 14 § 3.7.

Less than one-third of all the articles the House has adopted have explicitly charged the violation of a criminal statute or used the word “criminal” or “crime” to describe the conduct alleged. Much more common in the articles are allegations that the officer has violated his duties or his oath or seriously undermined public confidence in his ability to perform his official functions. Deschler Ch 14 App. p 723.

The theory of the proponents of impeachment of President Johnson was succinctly put by one of the managers in the Senate trial:

An impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives or for an improper purpose.

The Constitution of the United States of America—Analysis and Interpretation, p 558, Government Printing Office, 1992.

The House adopted an article of impeachment against President Clinton alleging that he gave perjurious, false, and misleading testimony to a Federal grand jury. However, the House rejected an article of impeachment against President Clinton alleging that he gave perjurious, false, and misleading written and deposed testimony in a Federal civil rights action. 105–2, H. Res. 611, Dec. 19, 1998, p \_\_\_\_\_. Some argued that neither allegation could be the subject of a successful criminal prosecution and thus would not be sufficient to establish an impeachable offense. 105–2, H. Rept. 105–830, p 211.

### § 5. Effect of Adjournment

An impeachment may proceed only when Congress is in session. 3 Hinds §§ 2006, 2462. However, an impeachment proceeding does not die with adjournment. An impeachment proceeding begun in the House in one Congress may be resumed by the House in the next Congress. 3 Hinds § 2321. An official impeached by the House in one Congress may be tried by the Senate in the next. *Manual* § 620; 3 Hinds §§ 2319, 2320.

Although impeachment proceedings may continue from one Congress to the next, the authority of the managers appointed by the House expires at the end of a Congress; and managers must be reappointed when a new Congress convenes. *Manual* § 620. Managers on the part of the House are reappointed by resolution. *Manual* § 604; Deschler Ch 14 § 4.2. Thus, the articles of impeachment against Judge Alcee Hastings were presented in the Senate during the second session of the 100th Congress (100–2, Aug. 3, 1988, p 20223) but were still pending trial by the Senate in the 101st Congress, when the House reappointed managers (101–1, Jan. 3, 1989, p 84). The articles of impeachment against President Clinton were presented to the Senate after the Senate had adjourned *sine die* for the 105th Congress, and the Senate conducted the trial in the 106th Congress. *Manual* § 620.

## B. Procedure in the House

### § 6. In General; Initiation and Referral of Charges

#### Generally

Under the modern practice, an impeachment is normally instituted by the House by the adoption of a resolution calling for a committee investigation of charges against the officer in question. This committee may, after investigation, recommend the dismissal of charges or it may recommend impeachment. Impeachment—Selected Materials, Committee on the Judiciary, H. Doc. No. 93–7, Oct. 1973, p 699. A resolution recommending impeachment is reported to the House simultaneously with the articles of impeachment setting forth the grounds for the proposed action. § 8, *infra*. Following the adoption of a resolution to impeach, the House appoints managers to conduct the impeachment trial in the Senate. The Senate is then informed of these facts by resolution. *Manual* § 607; Deschler Ch 14 § 9. When this resolution reaches the Senate, the Senate advises the House as to when the Senate will receive the managers appointed by the House. The managers then present themselves and the impeachment articles to the Senate, the

House reserving the right to file additional articles later. *Manual* § 608a; Deschler Ch 14 §§ 10, 11.

### **Initiation of Charges**

In most cases, impeachment proceedings in the House have been initiated either by introducing a resolution of impeachment through the hopper or by offering a resolution of impeachment on the floor as a question of the privileges of the House. *Manual* § 603; Deschler Ch 14 § 5.

Other methods of setting an impeachment in motion in the House include:

- Charges initiated by a petition from one or more citizens and referred to committee. 3 Hinds §§ 2364, 2491, 2494.
- Charges transmitted in a message from the President. 3 Hinds §§ 2294, 2319; 6 Cannon § 498.
- Charges transmitted from the legislature of a State. 3 Hinds § 2469.
- Charges arising from a grand jury investigation. 3 Hinds § 2488.
- Charges arising from an independent counsel investigation under section 595(c) of title 28, United States Code. *Manual* § 603.

In the 93d Congress, Vice President Agnew used a letter to the Speaker to attempt to initiate an investigation by the House of charges against him of possible impeachable offenses; the House took no action on the request. *Manual* § 603.

In the 105th Congress, an independent counsel transmitted to the House under section 593 of title 28, United States Code, a communication containing evidence of alleged impeachable offenses by the President. The House adopted a privileged resolution reported by the Committee on Rules referring the communication to the Committee on the Judiciary, restricting Members' access to the communication, and restricting access to committee meetings and hearings on the communication. Later, the House adopted a privileged resolution reported by the Committee on the Judiciary authorizing an impeachment inquiry by that committee. The authority to appoint an independent counsel under section 595(c) of title 28, United States Code, expired on June 30, 1999. *Manual* § 603.

### **Referral to Committee**

Resolutions introduced through the hopper that directly call for an impeachment are referred to the Committee on the Judiciary, whereas resolutions merely calling for a committee investigation with a view toward impeachment are referred to the Committee on Rules. Deschler Ch 14 §§ 5.10, 5.11. In the 105th Congress the House adopted a privileged resolution reported by the Committee on Rules referring a communication from an inde-

pendent counsel alleging certain impeachable offenses to the Committee on the Judiciary. Later, the House adopted a privileged resolution reported by the Committee on the Judiciary authorizing an impeachment inquiry by that committee. *Manual* § 603.

All impeachments to reach the Senate since 1900 have been based on resolutions reported by the Committee on the Judiciary. Before that committee's creation in 1813, impeachments were referred to a special committee for investigation. *Manual* § 603; 6 Cannon § 657.

### § 7. Committee Investigations

Committee impeachment investigations are governed by those portions of Rule XI relating to committee investigative and hearing procedures, and by any rules and special procedures adopted by the House and by the committee for the inquiry. *Manual* § 605; Deschler Ch 14 § 6.3. The House may by resolution waive or supplement a requirement of these rules in a particular case. In two recent instances, the House agreed to a resolution authorizing the counsel to the Committee on the Judiciary to take depositions of witnesses in an impeachment investigation and waiving the provision of Rule XI that requires at least two committee members to be present during the taking of such testimony. Deschler Ch 14 § 6.3; 105–2, H. Res. 581, Oct. 8, 1998, p \_\_\_\_.

Under the earlier practice the committee sometimes made its inquiry *ex parte*. 3 Hinds §§ 2319, 2343, 2385. However, the modern trend is to permit the accused to testify, present witnesses, cross-examine witnesses, and be represented by counsel. 3 Hinds §§ 2445, 2470, 2471, 2501, 2518; Deschler Ch 14 § 6; 105–2, H. Rept. 105–830. Constitutionality, see § 9, *infra*.

#### Confidentiality of Material; Access

The House and the Committee on the Judiciary may adopt procedures to ensure the confidentiality of impeachment inquiry materials and to limit access to such materials. Deschler Ch 14 §§ 6.9, 15.3; 105–2, H. Res. 525, Sept. 11, 1998, p \_\_\_\_\_. Where a Federal court subpoenas certain evidence gathered by the committee in an impeachment inquiry, the House may adopt a resolution granting such limited access to the evidence as will not violate the privileges of the House or its sole power of impeachment under the Constitution. Deschler Ch 14 § 6.13.

#### Subcommittee Investigations

An investigative subcommittee charged with an impeachment inquiry is limited to the powers expressly authorized by the House or by the full committee. Deschler Ch 14 § 6.11; 105–2, H. Res. 581, Oct. 8, 1998, p \_\_\_\_.

After completing its investigation, the subcommittee ordinarily submits recommendations to the full committee as to whether impeachment is warranted. See, *e.g.*, Final Report of the Special Subcommittee on H. Res. 920 of the Committee on the Judiciary, 91–2, committee print, Sept. 17, 1970.

### Form

For forms of resolutions authorizing an investigation of the sufficiency of grounds for impeachment and conferring subpoena power and authority to take testimony, see Deschler Ch 14 § 6.

## § 8. Consideration in the House; Voting

### Generally

The respondent in an impeachment proceeding is impeached by the adoption of the House of articles of impeachment. Only a majority vote is necessary, whereas a two-thirds vote of Members present is required in the Senate for conviction and removal. U.S. Const. art. I, § 3; Impeachment—Selected Materials, Committee on the Judiciary, H. Doc. No. 93–7, Oct. 1973, p 700. In this regard, as is the usual practice, the committee's recommendations as reported in the resolution are not binding on the House until they are adopted. In 1933 the House voted to impeach Judge Harold Louderback, even though the Committee on the Judiciary found insufficient grounds to warrant impeachment. 6 Cannon § 514.

### Impeachment Propositions as Privileged

A resolution impeaching an officer is highly privileged under the Constitution, and therefore supersedes other pending business, including an election contest. *Manual* § 604; 3 Hinds §§ 2045–2048, 2581; 6 Cannon § 468. Such a resolution may be considered immediately in the House as a question of privilege. It is, therefore, not subject to the three-day layover requirement of Rule XIII. *Manual* § 604. It does not lose its privilege from the fact that a similar proposition has been considered previously during the same session. 3 Hinds § 2408. However, a resolution offered from the floor simply proposing an investigation is not privileged, even though impeachment may be a possible consequence. 3 Hinds §§ 2050, 2546; 6 Cannon § 463.

A committee to which resolutions of impeachment have been referred may report and call up as privileged resolutions incidental to the consideration of the impeachment question. *Manual* § 604; Deschler Ch 14 § 5.8. If, however, such a resolution is offered on the floor by a Member on his own initiative and not reported from the committee to which the impeachment has been referred, it is not privileged for immediate consideration because it is subject to the notice requirement of rule IX. See, *Manual* § 699.

Propositions incidental to an ongoing impeachment proceeding taken up as privileged (3 Hinds § 2400) have included:

- Reports relating to the investigation (3 Hinds § 2402; Deschler Ch 14 § 8.2).
- Resolutions providing for the selection of managers (6 Cannon § 517).
- Propositions to abate an impeachment proceeding (6 Cannon § 514).
- Proposals to confer subpoena authority or to provide funding for the investigation (*Manual* § 604; 6 Cannon § 549).
- Resolutions authorizing depositions by committee counsel (*Manual* § 604).

Following adoption of the articles of impeachment, the House adopts resolutions appointing managers to present the articles before the Senate, notifying the Senate of the adoption of articles and appointment of managers, and authorizing the managers to prepare for and to conduct the trial in the Senate. *Manual* § 607; 6 Cannon §§ 499, 500, 514, 517. These privileged incidental resolutions may be merged into a single indivisible privileged resolution. *Manual* § 607.

Although charges or resolutions of impeachment are privileged, they cannot be presented while another Member has the floor unless he yields for that purpose. Deschler Ch 14 § 5.2. A resolution of impeachment offered by a Member on his own initiative and not reported from the committee to which the impeachment has been referred is not privileged for immediate consideration because it is subject to the notice requirement of rule IX. *Manual* § 699.

On several occasions the Committee on the Judiciary, having been referred a question of impeachment, reported a recommendation that impeachment was not warranted and, thereafter, called up the report as a question of privilege. Deschler Ch 14 § 1.3. Under section 596(a) of title 28, United States Code, an independent counsel appointed to investigate the President may be impeached; and a resolution impeaching such independent counsel constitutes a question of the privileges of the House under rule IX. *Manual* § 604.

### **Debate; Motions**

Propositions of impeachment are considered under the general rules of the House applicable to other simple House resolutions, unless the House otherwise provides by special order. Deschler Ch 14 § 8; 105–2, Dec. 18, 1998, p \_\_\_\_\_. Since 1912, the House has considered the resolution together with the articles of impeachment. Deschler Ch 14 § 8.2. The House may consider the resolution and articles under a unanimous-consent agreement fixing and controlling the time for debate. Deschler Ch 14 §§ 8.1, 8.4; 105–2, Dec. 18, 1998, p \_\_\_\_\_. The motion for the previous question and the mo-

tion to recommit are applicable, and a separate vote may be demanded on each article of impeachment contained in the resolution. *Manual* § 608; Deschler Ch 14 §§ 8.8–8.10. The resolution also is subject to a motion to lay on the table before debate thereon. Deschler-Brown Ch 29 § 1.15.

A wide range of debate is permitted on impeachment proposals, and a Member may refer to the political, social, and even the familial background of the accused. Deschler Ch 14 § 8.5. However, Members must abstain from language personally offensive. *Manual* § 370. Furthermore, Members must abstain from comparisons to the personal conduct of sitting Members of the House or Senate. *Manual* § 370.

To a privileged resolution of impeachment, an amendment in the motion to recommit proposing instead to censure, which is not privileged, was held not germane. *Manual* § 604.

### C. Procedure in the Senate

#### § 9. In General

The sole power to try impeachments is vested in the Senate under the Constitution. U.S. Const. art. I, § 3, cl. 6. On the day of the trial, the Senate resolves itself into a court for the trial of the impeachment. Deschler Ch 14 § 11.5. The President of the Senate presides over the trial, except in the case of the impeachment of the President of the United States or the Vice President, in which case the Chief Justice presides. Deschler Ch 14 § 11. Upon organization of the court, the managers appear and the trial of the case proceeds. In the later practice, the resolution and articles of impeachment have been considered together and exhibited simultaneously in the Senate by the House managers. 6 Cannon §§ 501, 515; Deschler Ch 14 § 11. Objections to the articles of impeachment on the ground that they duplicate and accumulate separate offenses have been overruled. Deschler Ch 14 §§ 3.4, 13.6.

For precedents relating to the conduct of Senate impeachments, see S. Doc. 93–102, “Procedure and Guidelines for Impeachment Trials in the United States Senate. For a detailed description of the impeachment trial against President Clinton see *Manual* § 608a.

The presentation of the evidence follows a traditional sequence. The evidence against the accused is first presented by the managers. Evidence in defense is then presented by the accused, and the concluding evidence is presented by the managers. The accused is permitted to testify in answer to the charges contained in the articles. 6 Cannon §§ 511, 524; Deschler Ch 14 § 12.11. Counsel are permitted to appear, to be heard, to argue on pre-



liminary and interlocutory questions, to deliver opening and final arguments, to submit motions, and to present evidence and examine and cross-examine witnesses. Deschler Ch 14 § 12. House counsel did not participate in the trial of President Clinton.

The use of a Senate committee in judicial impeachment proceedings does not violate any constitutional rights or offend fundamental notions of justice. *Hastings v. United States Senate, Impeachment Trial Committee*, 716 F. Supp. 38 (D.D.C. 1989). In one recent case, the court denied the claim of a former Federal judge that conviction voted by the Senate on two articles of impeachment adopted by the House was void because the judge was not afforded trial before the “full” Senate, rather than before a Senate committee. The court ruled that the Senate’s denial of the former judge’s motion for hearing before the full Senate, while according him the opportunity to present and cross-examine witnesses before the 12-member committee, and an opportunity to argue both personally and by counsel before the full Senate, did not make the controversy justiciable or the claim meritorious. *Nixon v. United States*, 744 F. Supp. 9 (D.D.C. 1990), *aff’d* 938 F.2d 239 (D.C.Cir. 1991), *aff’d* 506 U.S. 224 (1993).

At the conclusion of the evidence, there is argument, followed by deliberation by the Senate in executive session and a vote in open session. Deschler Ch 14 § 13. Before the vote, the proceedings may be dismissed in the Senate on the advice of the House managers. Deschler Ch 14 § 2.2.

### § 10. Voting and Judgment

Under the Constitution, a two-thirds vote of Senators present is required to convict the accused on an article of impeachment as the articles are voted on separately under the Senate rules. U.S. Const. art. I, § 3, cl. 6; Deschler Ch 14 § 13. The yeas and nays are taken on each article. 3 Hinds §§ 2098, 2339. In some instances, the Senate has adopted an order to provide a method of voting and putting the question separately and successively on each article. 6 Cannon § 524; Deschler Ch 14 § 13.2.

The Constitution provides for removal from office on conviction and also allows the further judgment of disqualification from holding further office. U.S. Const. art. I, § 3, cl. 7. No vote is required on removal following conviction, since removal follows automatically from conviction under this constitutional provision. Deschler Ch 14 § 13.9. However, the further judgment of disqualification from holding future office requires a majority vote. Deschler Ch 14 § 13.10. The Senate has held that a question on removal and disqualification is divisible. 3 Hinds § 2397; 6 Cannon § 512.

**§ 10**

## HOUSE PRACTICE

The impeachment and removal from office of a Federal District Judge did not necessarily disqualify him from holding office as a Member of the House, absent any specific action taken by the Senate to disqualify him from future Federal office. *Waggoner v. Hastings*, 816 F. Supp. 716 (S.D. Fla. 1993).