Impeachment

The Senate's Impeachment Role

The United States Constitution provides that the House of Representatives "shall have the sole Power of Impeachment" (Article I, section 2) and that "the Senate shall have the sole Power to try all Impeachments .... [but] no person shall be convicted without the Concurrence of two-thirds of the Members present" (Article I, section 3). The president, vice president, and all civil officers of the United States are subject to impeachment.

The concept of impeachment originated in England and was adopted by many of the American colonial governments and state constitutions. At the Constitutional Convention in 1787, the framers considered several possibilities before deciding that the Senate should try impeachments.

Impeachment is a very serious affair. This power of Congress is the ultimate weapon against officials of the federal government, and is a fundamental component of the constitutional system of “checks and balances.” In impeachment proceedings, the House of Representatives charges an official by approving, by majority vote, articles of impeachment. A committee of representatives, called “managers,” acts as prosecutors before the Senate. The Senate Chamber serves as the courtroom. The Senate becomes jury and judge, except in the case of presidential impeachment trials when the chief justice of the United States presides. The Constitution requires a two-thirds vote of the Senate to convict, and the penalty for an impeached official is removal from office. In some cases, disqualification from holding future offices is also imposed. There is no appeal.

Historical Development

In *The Federalist*, No. 65, Alexander Hamilton wrote that impeachment is "a method of national inquest into the conduct of public men." Hamilton and his colleagues at the Constitutional Convention knew that the history of impeachment as a constitutional process dated from 14th-century England, when the fledgling Parliament sought to make the king's advisers accountable. By the mid-15th century, impeachment had fallen into disuse in England, but, in

the early 17th century, the excesses of the English kings prompted Parliament to revive its impeachment power. Even as the Constitution's framers toiled in Philadelphia in 1787, the impeachment trial of British official Warren Hastings was in progress in London and avidly followed in America. Hastings, who was eventually acquitted, was charged with oppression, bribery, and fraud as colonial administrator and first governor-general in India.

The American colonial governments and early state constitutions followed the British pattern of trial before the upper legislative body on charges brought by the lower house. Despite these precedents, a major controversy arose at the Constitutional Convention about whether the Senate should act as the court of impeachment. Opposing that role for the Senate, James Madison and Charles Cotesworth Pinckney asserted that it would make the president too dependent on the legislative branch. They suggested, as alternative trial bodies, the Supreme Court or the chief justices of the state supreme courts. Hamilton and others argued, however, that such bodies would be too small and susceptible to corruption. In the end, after much wrangling, the framers selected the Senate as the trial forum. To Hamilton fell the task of explaining the convention's decision. In *The Federalist*, No. 65, he argued:

> The Convention thought the Senate the most fit depository of this important trust. Where else than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel confidence enough in its own situation, to preserve unawed and uninfluenced the necessary impartiality between an individual accused, and the representatives of the people, his accusers?

There was also considerable debate at the convention in Philadelphia over the definition of impeachable crimes. In the early proposals, the president and other officials could be removed on impeachment and conviction for "corrupt conduct," or for "malpractice or neglect of duty." Later, the wording was changed to "treason, bribery, or corruption," and then to "treason or bribery" alone. Contending that "treason or bribery" was too narrow a definition, George Mason proposed adding "mal-administration," but switched to "other high crimes and misdemeanors against the state" when Madison commented that "mal-administration" was too broad. A final revision defined impeachable crimes as "treason, bribery or other high crimes and misdemeanors."

While the framers very clearly envisaged the occasional necessity of initiating impeachment proceedings, they put in place only a very general framework to guide future action. Perhaps most important, they did not clearly define what they meant by “high crimes and misdemeanors.” Despite the open-endedness, the framers reshaped a tool the English Parliament used to curb kings and punish placemen into a powerful legislative check upon executive and judicial wrongdoing. In the American version of impeachment, the power of the English House of Commons to impeach anyone, for almost any alleged offense, was restrained, and the threat of death upon conviction was lifted. In America, impeachment reflected indigenous experience and revolutionary tenets as well as English tradition and precedent.

Since 1789, one principal question has persisted—how to define “high crimes and misdemeanors.” This question has been hotly debated by members of Congress, defense attorneys, and legal scholars from the first impeachment trial to the most recent. Were misdemeanors lesser crimes, or merely misconducts? Did a high crime or misdemeanor have to be a violation of written law? Over the

years, "high crimes and misdemeanors" have been anything the prosecutors have wanted them to be. In an unsuccessful attempt to impeach Supreme Court Justice William O. Douglas in 1970, Representative Gerald Ford declared: "An impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history." The phrase is the subject of continuing debate, pitting broad constructionists, who view impeachment as a political weapon, against narrow constructionists, who regard impeachment as being limited to indictable offenses.

Narrow constructionists won a major victory when Supreme Court Justice Samuel Chase was acquitted in 1805, using as his defense the argument that the charges against him were not based on any indictable offense. President Andrew Johnson won acquittal with a similar defense in 1868. The first two convictions in the 20th century, however, those of Judge Robert Archbald in 1913 and Judge Halsted Ritter in 1936, neither of whom had committed indictable offenses, made it clear that the broad constructionists still carried considerable weight. The debate continued during the 1974 investigation into the conduct of President Richard Nixon, with the staff of the House Judiciary Committee arguing for a broad view of "high crimes and misdemeanors" while Nixon's defense attorneys understandably argued for a narrower view.

Influential Impeachment Cases

The bitter animosities growing out of the Civil War gave rise to the first impeachment trial of a United States president, that of President Andrew Johnson in 1868. When Johnson succeeded to the presidency in 1865, following the assassination of Abraham Lincoln, his ideas for a mild Reconstruction of the southern states clashed with the wishes of a majority of the Congress, controlled by Radical Republicans who favored much stronger action. Over the next three years, Johnson and Congress were locked in battle.

The Tenure of Office Act, the violation of which was to be the legal basis for impeachment, was passed over Johnson's veto on March 2, 1867. It forbade the president to remove civil officers appointed with the consent of the Senate without the approval of the Senate. Despite the certain consequences, Johnson decided to remove Secretary of War Edwin Stanton, an ally of the Radical Republicans. This act enraged Johnson’s political enemies and set in motion the first presidential impeachment.

Johnson's Senate trial began on March 5, 1868, operating under newly revised rules and procedures. On May 16, after weeks of tense and dramatic proceedings, the Senate took a test vote on Article XI, a catch-all charge thought by the House managers most likely to achieve a conviction. The drama of the vote has become legendary. With 36 votes for “guilty” needed to constitute a two-thirds majority for conviction, the roll call produced 35 votes for “guilty” and 19 votes for “not guilty.” Seven Republicans, known as the “Republican Recusants,” joined the 12 Democrats in supporting Johnson. Ten days later, a vote on two more articles produced the same results. To head off further defeats, the Radical Republicans moved to adjourn the trial *sine die*, abruptly ending the impeachment trial of President Andrew Johnson. The president was saved from removal, and the independence of the executive was strengthened.

Another influential impeachment trial came in 1905, when Florida District Judge Charles Swayne was impeached for filing false travel vouchers, improper use of private railroad cars, unlawfully imprisoning two attorneys for contempt, and living outside of his district. Swayne's trial consumed nearly three months of the Senate schedule before it ended on February 27, 1905, when the Senate voted to acquit. There was little doubt that Swayne was guilty of some of the offenses charged against him. Indeed, his counsel admitted as much, and called the lapses "inadvertent." The Senate refused to convict Swayne, however, because many senators did not believe his offenses amounted to "high crimes and misdemeanors." During this long trial, it was suggested that a Senate committee, rather than the Senate as a whole, should hear impeachment evidence, and Senator George F. Hoar of Massachusetts proposed that the presiding officer appoint such a committee. While Hoar's proposal would eventually be embodied in Rule XI of the Senate's impeachment rules, in 1905 the resolution was referred to the Rules Committee, which took no action.

The next impeachment trial was that of Judge Robert Archbald of the Commerce Court. In 1913, Archbald was charged with serious acts of misconduct stretching over many years, including using his office to obtain advantageous business deals and free trips to Europe. As in the Swayne case, none of the articles of impeachment charged an indictable offense. Yet, apparently because of the seriousness and extent of the charges, the Senate convicted Archbald. At the conclusion of the trial, the suggestion of an impeachment committee surfaced once again. Archbald's defense attorney argued that many senators were not in attendance when evidence was taken before the full Senate, relying instead on testimony printed in the *Congressional Record*, and recommended the use of a committee to hear evidence in future trials.

In 1933, the House Judiciary Committee recommended censure, rather than impeachment, for federal judge Harold Louderback of California. A minority of the committee, however, took the issue to the floor of the House where they persuaded that body to adopt five articles of impeachment, charging Louderback with conspiracy, abuse of power, showing favoritism, and bringing "the court of which he is a judge unto disrepute." Louderback's Senate trial consumed nearly all of May 1933, during the First Hundred Days of the New Deal era, one of the busiest legislative periods in congressional history. Democrats charged Republicans with using the trial to delay a banking reform bill, a charge Republicans denied. Tempers in the Senate frayed as witness after witness cast doubt on the charges. The Senate finally voted on May 24, 1933, acquitting Louderback on all five articles.

The Louderback trial again brought to the fore the problem of attendance at impeachment trials in the midst of a busy legislative calendar. After the trial, Representative Hatton Sumners of Texas, one of the House managers, recalled the scanty attendance: "At one time only three senators were present, and for ten days we presented evidence to what was practically an empty chamber." In 1934, Senator Henry Ashurst of Arizona, chairman of the Judiciary Committee, offered the resolution that became Rule XI after its adoption the following year. Rule XI provided:

> That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of senators to receive evidence and take testimony at such times and places as the committee may determine . . .

Rule XI was not used in the next impeachment trial, that of Florida district judge Halsted Ritter in 1936. Ritter was charged with a wide range of improprieties and misconduct that included practicing law while serving as a judge, filing false income tax returns, and extortion. Ritter's counsel argued that the judge had committed no offense that could be labeled a high crime or misdemeanor and was guilty only of exercising "poor judgment." In fact, Ritter was found "not guilty" by narrow margins on six of seven articles of impeachment, but on the seventh article was found guilty, by exactly the required two-thirds vote. The Senate was putting judges “on notice that Congress would remove them from office if the sum total of their conduct was regarded as showing unfitness for judicial office,” commented *The New York Times*, “regardless of whether a specific high crime or misdemeanor, in the language of the Constitution, could be established under ordinary rules of evidence” (“Judge Ritter Convicted by Senate,” April 18, 1936).

During the summer of 1974, in the wake of the Watergate scandal, the Senate prepared for the possibility of a second presidential impeachment trial, as the House of Representatives moved ever closer to impeaching President Richard Nixon. In July, the Senate adopted a resolution directing the Senate Committee on Rules and Administration to review the existing impeachment rules and precedents and recommend revisions. The committee, aided by Senate parliamentarian Floyd Riddick, devoted long hours to the Senate’s constitutional role in impeachment proceedings. The committee was meeting on August 8, 1974, when President Nixon announced that he would resign. Despite this unprecedented event, the panel continued with its work under a mandate from the Senate to file a report by September 1. The report contained recommendations that were primarily technical changes in the rules that had been adopted in 1868 for the impeachment trial of Andrew Johnson. With the resignation of President Nixon, no further action was taken.

The committee’s recommendations were revised in 1986, however, and informed the debates on how to conduct the trials of three federal judges between 1986 and 1989. The impeachment of Harry E. Claiborne in 1986 finally put into action Rule XI, and the Senate established a special trial committee to hear evidence and report to the full Senate. Likewise, Senate trial committees considered evidence in the cases of Alcee Hastings (1989), Walter Nixon, Jr. (1989), and G. Thomas Porteous, Jr. (2010), all of whom were convicted and removed from office. Nixon challenged the use of an impeachment committee on constitutional grounds. In 1993, in the case *United States v. Nixon*, the Supreme Court upheld the Senate’s right to determine its own procedures, including the use of a trial committee.

Complete List of Senate Impeachment Trials

To date, the Senate has conducted formal impeachment proceedings 19 times, resulting in 7 acquittals, 8 convictions, 3 dismissals, and one resignation with no further action.

William Blount, Senator

Date of Final Senate Action: January 11, 1799

Result: expelled, charges dismissed

John Pickering, Judge

Date of Final Senate Action: March 12, 1804

Result: guilty, removed from office

Samuel Chase, Justice

Date of Final Senate Action: March 1, 1805

Result: not guilty

James H. Peck, Judge

Date of Final Senate Action: January 31, 1831

Result: not guilty

West H. Humphreys, Judge

Date of Final Senate Action: June 26, 1862

Result: guilty

Andrew Johnson, President

Date of Final Senate Action: May 16/26, 1868

Result: not guilty

Mark H. Delahay, Judge

Date of Final Senate Action: no action

Result: resigned

William Belknap, Secretary of War

Date of Final Senate Action: August 1, 1876

Result: not guilty

Charles Swayne, Judge

Date of Final Senate Action: February 27, 1905

Result: not guilty

Robert Archbald, Judge

Date of Final Senate Action: January 13, 1913

Result: guilty, removed

George W. English, Judge

Date of Final Senate Action: December 13, 1926

Result: resigned, charges dismissed

Harold Louderback, Judge

Date of Final Senate Action: May 24, 1933

Result: not guilty

Halsted Ritter, Judge

Date of Final Senate Action: April 17, 1936

Result: guilty, removed from office

Harry E. Claiborne, Judge

Date of Final Senate Action: October 9, 1986

Result: guilty, removed from office

Alcee Hastings, Judge

Date of Final Senate Action: October 20, 1989

Result: guilty, removed from office

Walter Nixon, Judge

Date of Final Senate Action: November 3, 1989

Result: guilty, removed from office

William J. Clinton, President

Date of Final Senate Action: February 12, 1999

Result: not guilty

Samuel B. Kent, Judge

Date of Final Senate Action: July 22, 2009

Result: resigned, case dismissed

G. Thomas Porteous, Jr., Judge

Date of Final Senate Action: December 8, 2010

Result: guilty, removed from office
