

2023

Rules of Impeachment: An Overview of the South Dakota Legislature's Procedure

Reed L. Holwegner

Justin J. Goetz

John R. McCullough

Follow this and additional works at: <https://red.library.usd.edu/sdlrev>

Recommended Citation

Reed L. Holwegner, Justin J. Goetz & John R. McCullough, *Rules of Impeachment: An Overview of the South Dakota Legislature's Procedure*, 68 S.D. L. REV. 203 (2023).

Available at: <https://red.library.usd.edu/sdlrev/vol68/iss2/9>

This Article is brought to you for free and open access by USD RED. It has been accepted for inclusion in South Dakota Law Review by an authorized editor of USD RED. For more information, please contact dloftus@usd.edu.

RULES OF IMPEACHMENT: AN OVERVIEW OF THE SOUTH DAKOTA LEGISLATURE'S PROCEDURE

REED L. HOLWEGNER,[†] JUSTIN J. GOETZ^{††} & JOHN R. MCCULLOUGH^{†††}

I. INTRODUCTION

This article summarizes the legislative procedure utilized during the Second Special Session of the Ninety-Sixth South Dakota Legislature, which started on November 9, 2021, and concluded on June 22, 2022.¹ Starting with the constitutional and historical practices of the legislature, the article examines the procedures utilized by the House of Representatives and the Senate.² The article concludes with a few observations and conclusion about the unique procedures that the legislature implemented for the Impeachment Special Session.

Each legislative house determines the rules of its proceedings.³ This authorization allows for the adoption of joint rules by the legislature.⁴ The legislature's procedures are derived from several sources and take precedence in the following order:⁵ constitutional provisions and judicial decisions thereon;⁶ adopted rules;⁷ custom, usage, and precedents; statutory provisions;⁸ adopted parliamentary authority;⁹ and parliamentary law.¹⁰

When the legislature convenes a special session, the Senate and House customarily adopt the permanent rules that were previously adopted at the most recent regular session and further adopt special rules to streamline legislative processes, allowing the legislature to conduct its deliberations in a shorter duration

Copyright © 2023. All rights reserved by Reed L. Holwegner, Justin J. Goetz, John R. McCullough, and the *South Dakota Law Review*.

[†] MPA, Director of Legislative Research, Legislative Research Council.

^{††} J.D., Code Counsel, Legislative Research Council.

^{†††} J.D., Chief Research and Legal Analyst, Legislative Research Council.

1. For purposes of conciseness, the special session is referenced as the "Impeachment Special Session."

2. Accordingly, the article refrains from analyzing the substance of House Resolution 7002, which contains the articles of impeachment, and Senate Resolution 703, which memorializes proceedings of the Senate Court of Impeachment.

3. S.D. CONST. art. III, § 9.

4. NAT'L CONF. OF STATE LEGISLATURES, MASON'S MANUAL OF LEGISLATIVE PROCEDURE § 3, ¶ 5, at 11 (2020) [hereinafter, MASON'S].

5. *Id.* § 4, ¶ 2.

6. Legislative procedure is primarily found in South Dakota Constitution, Article III.

7. S.D. LEGIS. RSCH. COUNCIL, OFFICIAL DIRECTORY AND RULES OF THE SOUTH DAKOTA LEGISLATURE (96th Sess. 2021), <https://perma.cc/Q877-CNVH> [hereinafter THE REDBOOK].

8. SDCL tit. 2 (2021).

9. 2021 Senate Rule S5-2 and House Rule H4-2 both incorporate MASON'S to govern "in all cases not covered by" the other adopted rules in THE REDBOOK. THE REDBOOK, *supra* note 7, at 77, 89.

10. This includes certain indispensable basic principles, e.g., the requirement of a meeting, quorum, or a majority vote, that apply in all instances. See MASON'S *supra* note 4, § 4, ¶ 5, at 14.

of time. This is done by the Senate and House each adopting a committee report of a joint-select committee on rules.¹¹ Due to the unique nature of the Impeachment Special Session, where the legislative bodies carry out separate aspects of the impeachment process and therefore act more independently of each other, the House and Senate later established other procedures by the adoption of resolutions and concurrent resolutions.

II. HOUSE RESOLUTION OF PROCEDURE

The first formal steps toward possible impeachment occurred before the 2022 regular legislative session, on November 9, 2021, with the enactment of House Resolution (“HR”) 7001.¹² HR 7001 established a Select Committee on Investigation (“Select Committee”), charging it to investigate whether Attorney General Jason Ravnsborg’s conduct surrounding the death of Joe Boever involved impeachable offenses pursuant to the South Dakota Constitution.¹³ The House granted authority to the Select Committee to administer oaths, examine records, summon witnesses by request or subpoena, and to do all other things necessary to accomplish the purpose of its hearings and deliberations.¹⁴ The resolution outlined means by which the Select Committee could subpoena persons or information and enforce compliance.¹⁵

The Select Committee was required to adopt rules of procedure, which were to conform with chapter six of House rules,¹⁶ provided there was no conflict with the Select Committee’s charge or applicable law.¹⁷ The House authorized the Select Committee to employ a special counsel, who was appointed by the Speaker of the House.¹⁸ The director of the Legislative Research Council (“LRC”) was required to provide the resources necessary to facilitate the activities of the Select Committee.¹⁹

The House instructed the Select Committee to provide a written report and recommendations to the legislative body on whether articles of impeachment should issue and, if so, the language of the articles of impeachment and the way

11. See S. JOURNAL, 96th Legis., 2d Spec. Sess., First Day 5-7 (S.D. 2021), <https://perma.cc/3GQC-XANR>; H. JOURNAL, 96th Legis., 2d Spec. Sess., First Day 6-8 (S.D. 2021), <https://perma.cc/G5C5-4SME>. The rules adopted for a regular session may be amended or suspended by a two-thirds majority of the members-elect of the legislative body. THE REDBOOK, *supra* note 7, at 165-66 (Joint Rule 11-1). During this special session, as with some past special sessions, both legislative bodies authorized procedural rules to be amended or suspended by a majority of the members-elect.

12. H.R. Res. 7001, 96th Legis., 2d Spec. Sess. (S.D. 2022), <https://perma.cc/FZL3-8VDY>. Note that because the power to impeach is solely held by the House of Representatives, S.D. CONST. art. XVI, § 1, many of the actions taken leading up to, and then in executing the impeachment, were done by simple resolution to regulate procedure. Simple resolutions need only be passed by one house in order to be effective. THE REDBOOK, *supra* note 7, at 125 (Joint Rule 6A-1(1)).

13. S.D. H.R. Res. 7001.

14. *Id.*

15. *Id.*

16. See THE REDBOOK, *supra* note 7, at 93-96.

17. S.D. H.R. Res. 7001.

18. *Id.*

19. *Id.*

the House should manage its impeachment case in the Senate, should the House vote to impeach.²⁰ The Select Committee was required to redact all confidential or nonrelevant information prior to the release of information to the public.²¹ However, members of the House were granted nonpublic access to all information gathered by the Select Committee.²²

III. SENATE AND HOUSE CONCURRENT RESOLUTIONS

While in session, a legislative house may not adjourn for longer than three days without the consent of the other house.²³ Unlike a typical regular or special session where both legislative houses have legislation to deliberate upon, an impeachment process does not require the legislative houses to operate simultaneously in order to pass and transmit bills and resolutions between one another.²⁴ To accommodate the unique circumstance, the Senate and House passed concurrent resolutions on November 9, 2021, each allowing the other house to adjourn for more than three days.²⁵

Pursuant to its concurrent resolution, the House reconvened fourteen days after the Chief Clerk of the House received the report of the Select Committee. The Chief Clerk received the report on March 29, 2022,²⁶ and the House reconvened on April 12, 2022, to review the report and consider articles of impeachment.²⁷ After the House passed House Resolution 7002, which contained the articles of impeachment,²⁸ it adjourned day-to-day until reconvening at the start of the Senate trial.

Senate Concurrent Resolution 601 provided for the day-to-day adjournment of the Senate until fourteen days after the Secretary of the Senate received a message from the House regarding the disposition of the investigation and any articles of impeachment.²⁹ The Secretary received the message on the day the articles of impeachment were passed by the House.³⁰

20. *Id.*

21. *Id.*

22. *Id.* After introduction, the House amended HR 7001 with amendment HR7001B by including these last two provisions. See H. JOURNAL, 96th Legis., 2d Spec. Sess., First Day 10 (S.D. 2021), <https://perma.cc/G5C5-4SME>.

23. S.D. CONST. art. III, § 16.

24. Compare S.D. CONST. art. III, §§ 17-20 (summarizing the back-and-forth, traditional business of the Legislature between the houses) with S.D. CONST. art. XVI, §§ 1-2 (describing the discrete stages that each house exclusively operates regarding impeachment).

25. S. Con. Res. 601, 96th Legis., 2d Spec. Sess. (S.D. 2022), <https://perma.cc/W77J-JTXS>; H.R. Con. Res. 6001, 96th Legis., 2d Spec. Sess. (S.D. 2022), <https://perma.cc/227H-M873>. A concurrent resolution, unlike a simple resolution, *see supra* note 12, requires passage in both houses before enactment. See THE REDBOOK, *supra* note 7, at 124 (Joint Rule 6A-1(2)).

26. H. JOURNAL, 96th Legis., 2d Spec. Sess., Second Day 14 (S.D. 2022), <https://perma.cc/YGP4-A87C>.

27. *Id.* at 13.

28. *Id.* at 33.

29. S.D. S. Con. Res. 601.

30. S. JOURNAL, 96th Legis., 2d Spec. Sess., Second Day 12 (S.D. 2022), <https://perma.cc/ZS2V-29LV>.

IV. SENATE RESOLUTIONS OF PROCEDURE

On April 26, 2022, the Senate reconvened and, as memorialized in Senate Resolution 701, resolved itself into a Court of Impeachment.³¹ The Senate summoned the Attorney General to file a written answer to the articles of impeachment by June 1, 2022, and to appear personally or by counsel in the Senate chamber on June 21, 2022.³² The Senate also ordered the director of the Legislative Research Council to provide the resources necessary to facilitate the activities of the impeachment trial.³³

The rules for the Senate Court of Impeachment were adopted in Senate Resolution 702, which provided for the commencement of the trial (Chapter 1); organization (Chapter 2); pre-trial procedure (Chapter 3); trial procedure (Chapter 4); and verdict and judgment (Chapter 5).³⁴

Chapter 1 provided means by which notice was given to the Attorney General and the House as to when the trial would begin.³⁵

Chapter 2 provided for the administration of oaths to the President of the Senate, members of the Senate, and witnesses.³⁶ The chapter outlined means by which a decision or ruling of the presiding officer could be appealed to the Senate by a senator and the vote necessary to sustain a decision or ruling.³⁷ The Senate authorized the employment of a court reporter.³⁸ The President pro tempore was authorized to appoint one or more prosecutors.³⁹

Chapter 3 provided for the pre-trial procedure.⁴⁰ The House's entire impeachment file was to be made available for senators to review, and redacted files were to be posted on the legislative website.⁴¹ By June 1, 2022, the parties were expected to provide the presiding officer with the documents they intended to submit to the Senate in advance of the trial.⁴² The Senate rules provided the

31. S. Res. 701, 96th Legis., 2d Spec. Sess. (S.D. 2022), <https://perma.cc/F7PF-SANP>. The Senate Committee on Legislative Procedure recommended Senate Resolution 701 be amended to clarify its provisions and the Senate adopted the committee report to so clarify the resolution. See S. JOURNAL, 96th Legis., 2d Spec. Sess., Second Day 12-13 (S.D. 2022), <https://perma.cc/ZS2V-29LV>.

32. S.D. S. Res. 701.

33. *Id.*

34. S. Res. 702, 96th Legis., 2d Spec. Sess. (S.D. 2022), <https://perma.cc/BF28-Y4SJ>. The single amendment to Senate Resolution 702 was grammatical in nature. See S. JOURNAL, 96th Legis., 2d Spec. Sess., Second Day 13 (S.D. 2022), <https://perma.cc/ZS2V-29LV>.

35. S.D. S. Res. 702, at ch. 1. The South Dakota Constitution provides that “[n]o person shall be tried on impeachment before he shall have been served with a copy thereof at least twenty days previous to the day set for trial.” S.D. CONST. art. XVI, § 7. The articles were served on counsel for the Attorney General on May 30, 2022. Admission of Service of Summons and Articles of Impeachment, *In re Impeachment of Attorney General Jason Ravnsborg* (May 30, 2022), <https://perma.cc/HX2J-VZY9>.

36. S.D. S. Res. 702, at ch. 2.

37. *Id.* at R. 2-5 to -7.

38. *Id.* at R. 2-10.

39. *Id.* at R. 2-11.

40. *Id.* at ch. 3.

41. *Id.* at R. 3-1(1).

42. *Id.* at R. 3-1(2).

presiding officer with the authority to subpoena individuals and information so the parties could present their cases.⁴³ Members of the legislature, Senate officers or employees, legislative staff, and counsel for both parties could not be called as witnesses, nor could their personal records be subject to subpoena.⁴⁴ Senators had until June 13, 2022, to submit written questions to the presiding officer for either or both parties to answer.⁴⁵ No depositions or other pre-trial discovery were permitted.⁴⁶ A motion to dismiss an article of impeachment, or the Senate's consideration of such a motion, was out of order.⁴⁷

Chapter 4 provided for the trial procedure.⁴⁸ Evidence could be admitted if it was relevant, material, and not redundant.⁴⁹ The South Dakota Rules of Evidence did not apply to the proceeding, although only relevant, material evidence that was not redundant would be admissible.⁵⁰ Senate Court Rule 4-3 provided an outline for the daily start of the trial and the maximum time periods for opening statements, presentation of the case, cross examination of witnesses, and closing statements.⁵¹ If the respondent testified, however, that testimony was not subject to any time requirements.⁵² Each senator, through the presiding officer, was allowed to submit additional questions to witnesses or either party when the presentation of the case was complete and prior to closing arguments.⁵³

Chapter 5 provided the Senate's procedure to determine a verdict and judgment, with each impeachment article voted upon separately.⁵⁴ A two-thirds majority vote of the members-elect was required to sustain an impeachment article.⁵⁵ If the Senate voted to sustain an article of impeachment, the result would be a judgment of conviction and removal from office.⁵⁶ For each sustained impeachment article, the Senate then voted on whether the respondent would be disqualified from holding any office of trust or profit under the state.⁵⁷ The Senate set this vote requirement to be two-thirds of the members-elect.⁵⁸

43. *Id.* at R. 3-3.

44. *Id.* at R. 3-4.

45. *Id.* at R. 3-1(3).

46. *Id.* at R. 3-5.

47. *Id.* at R. 3-2.

48. *Id.* at ch. 4.

49. *Id.* at R. 4-2.

50. *Id.*

51. *Id.* at R. 4-3.

52. *Id.* at R. 4-3(6).

53. *Id.* at R. 4-3(8).

54. *Id.* at ch. 5.

55. S.D. CONST. art. XVI, § 2; S.D. S. Res. 702, at R. 5-5.

56. S.D. S. Res. 702, at R. 5-5.

57. S.D. CONST. art. XVI, § 3; S.D. S. Res. 702, at R. 5-6.

58. S.D. S. Res. 702, at R. 5-9. The South Dakota Constitution specifies a two-thirds voting requirement for "conviction." S.D. CONST. art. XVI, § 2. As the constitution only specifies two potential outcomes of a judgment of conviction—"removal from office and disqualification to hold any office of trust or profit under the state"—the threshold for conviction was kept the same for both outcomes. *See* S.D. CONST. art. XVI, § 3.

V. OBSERVATIONS AND CONCLUSIONS

As the House Select Committee on Investigations noted in its report, there previously had been no state-wide impeachment inquiries in the history of the state, but there was an inquiry of a judge in January of 1917.⁵⁹ Procedurally, the Impeachment Special Session of 2021 was not the first state-wide inquiry into impeachment but the second inquiry. The first such impeachment inquiry occurred during the 2021 regular session.⁶⁰ However, the House amended the resolution, stating its intent to evaluate whether articles of impeachment were necessary until after the case against Jason Ravnsborg had been resolved.⁶¹

By means of its petition process and legislative proclamation,⁶² the legislature convened its special session on November 9, 2021.⁶³ This allowed the legislature to conduct the special session and the subsequent 2022 regular session concurrently. The legislature is restricted to conduct its regular sessions over the course of no more than forty legislative days; however, if there is an impeachment inquiry, there is no time limit to the duration of that regular session.⁶⁴ While this provision discourages persons from attempting to “run out the clock” during an impeachment inquiry, there are other less desirable consequences that could arise if an impeachment inquiry, and potentially a Senate trial, was conducted during a regular session.

Generally, enacted bills do not have the force of law until a minimum of ninety days have passed since the legislature adjourned sine die.⁶⁵ This allows the people the opportunity to review the work of their legislature and determine whether any act should be referred to a public vote.⁶⁶ If a regular session concluded in late spring or early summer, the statutory July 1 effective date for most legislation would not apply,⁶⁷ and the constitutional provision would control. Such a situation could lead to the unnecessary entanglements with the various legal, administrative, economic, and political aspects of public policy.

Legislative resolutions, whether “simple” or concurrent, are generally utilized to express the opinion of one or both legislative houses.⁶⁸ However, the resolutions discussed in this article gave form and structure to the Impeachment Special Session, assigning responsibilities and charges and exercising the inherent legislative power to conduct inquiries and obtain information, which in many ways

59. H.R. SELECT COMM. ON INVESTIGATION, MAJORITY REPORT OF HOUSE SELECT COMMITTEE ON INVESTIGATION, H.R. 96th Legis., 2d Spec. Sess., at 9 (2022), <https://perma.cc/P8JG-NZDX>; H. JOURNAL, 96th Legis., 2d Spec. Sess., Second Day 21 (S.D. 2022), <https://perma.cc/YGP4-A87C>.

60. H.R. Res. 7001, 96th Legis., Reg. Sess. (S.D. 2022) (as introduced), <https://perma.cc/S73V-VA63>.

61. H.R. Res. 7001, 96th Legis., Reg. Sess. (S.D. 2022) (enacted), <https://perma.cc/X4ZT-B3EQ>.

62. S.D. CONST. art. III, § 31.

63. See S. JOURNAL, 96th Legis., 2d Spec. Sess., First Day 1 (S.D. 2021), <https://perma.cc/3GQC-XANR>; H. JOURNAL, 96th Legis., 2d Spec. Sess., First Day 1 (S.D. 2021), <https://perma.cc/G5C5-4SME>.

64. S.D. CONST. art. III, § 6.

65. *Id.* § 22.

66. See *id.* § 1.

67. SDCL § 2-14-16 (2021).

68. THE REDBOOK, *supra* note 7, at 124-25 (Joint Rules 6A-1(1)-(2)).

is the “fuel” for any legislative session. Internal to the lawmaking branch of government, these adopted legislative documents can have a “law-like” quality.⁶⁹

It was noted in the introduction that legislative precedent is one of the sources of legislative procedure. However, it must be emphasized that legislative precedent may be relied upon only to the extent to which a future legislature or legislative house wishes to use it. The power of a legislative house to determine its proceedings is a *continuous power*.⁷⁰ At any time, a legislative house may exercise its power to determine its rules of procedure. Provided the rule does not ignore constitutional restraints or violate fundamental rights, the power to determine its rules cannot be challenged by a body or tribunal.⁷¹ A house of the legislature cannot tie its own hands by establishing unchangeable rules, and rules of procedure adopted by one legislature are not binding on a future legislature.⁷²

It is unlikely that any reader of this article would look forward to the day where the legislature must conduct another impeachment proceeding. However, if such a time arises, the legislative history of the Impeachment Special Session should be viewed as a guide and not as a manual. Finally, the authors wish to acknowledge the effort, guidance, and patience of the various members of the House and Senate that played roles in these proceedings. The authors also wish to thank our LRC staff colleagues and other legislative staff who dedicated countless hours to this endeavor.

69. See MASON’S *supra* note 4, § 10, at 17-18.

70. *Id.* § 13, ¶ 3, at 20.

71. *Id.*

72. *Id.* § 13, ¶¶ 4-5, at 20-21.