

South Dakota Law Review

Volume 68 | Issue 2

2023

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Recommended Citation

Timothy R. Johns, *The Rule of Law and One Senator's Views on the Impeachment Trial of South Dakota's Attorney General Jason Ravensborg*, 68 S.D. L. REV. 210 (2023).

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THE RULE OF LAW AND ONE SENATOR'S VIEWS ON THE IMPEACHMENT TRIAL OF SOUTH DAKOTA ATTORNEY GENERAL JASON RAVNSBORG

TIMOTHY R. JOHNS[†]

I. INTRODUCTION

Much has been said lately in the media that the actions of all men are subject to the rule of law. Of it, United States President Dwight D. Eisenhower said two things that sum it up well. First, that “[t]he clearest way to show what the rule of law means to us in everyday life is to recall what has happened where there is no rule of law.”¹ And second, that

the rule of law does more than ensure freedom from high-handed action by rulers. It ensures justice between man and man however humble the one and however powerful the other. A man with five dollars in the bank can call to account the corporation with five billion dollars in assets—and the two will be heard as equals before the law.²

South Dakota Attorney General Jason Ravnsborg was tried by the South Dakota State Senate on June 21, 2022, in its chambers located in the State Capitol, on two articles of impeachment.³ At the conclusion of the trial, the Attorney General was found guilty of both articles and was therefore removed from office.⁴ By a separate vote, the Senate also decreed that the Attorney General was disqualified from holding any office of trust or profit under the State.⁵ Based on my viewpoint of the law and facts, I voted “not guilty” on each of the articles of impeachment, but I joined with the majority on the question of whether the Attorney General should be barred from holding any future State office when I

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1. *The Nation: May Day, U.S.A.*, TIME (May 5, 1958), <https://perma.cc/ELH9-9Q6V>.
2. Former President Dwight D. Eisenhower, Statement by the President on Observance of Law Day (Apr. 30, 1958), <https://perma.cc/EY4S-RQAG>.
3. Transcript of Proceedings 9, *In re Impeachment of Attorney General Jason Ravnsborg*, 96th Legis., Spec. Sess. (June 21, 2022), <https://perma.cc/CAU6-3Z9A>.
4. *Id.* at 266-69, 277-80.
5. *Id.* at 281-88.

considered all evidence in a light most favorable to the guilty verdicts. This article is one senator's view of the rule of law as it applied to the evidence adduced.

II. LAW OF THE CASE UNDER THE SOUTH DAKOTA CONSTITUTION AND THE RULES PASSED BY THE SENATE

Alexander Hamilton, in Federalist no. 65, wrote of impeachment trials of public officials, stating that

[a] well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.⁶

There are three sections in Article XVI of the South Dakota Constitution that speak directly to the impeachment process of constitutional officers. Section 1 provides that the “house of representatives shall have the sole power of impeachment.”⁷ The constitution does not, however, provide much guidance for the senators as to how they should view the evidence or the role they will play in trying a constitutional officer. In Section 2, it simply directs that “[a]ll impeachments shall be tried by the senate. When sitting for that purpose the senators shall be upon oath or affirmation to do justice according to law and evidence.”⁸ And in Section 3, it states the grounds.⁹ It reads that

[t]he Governor and other state and judicial officers, except county judges, justices of the peace and police magistrates, shall be liable to impeachment for drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanor in office, but judgment in such cases shall not extend further than to removal from office and disqualification to hold any office of trust or profit under the state.¹⁰

The Senate also passed Senate Resolution 702, which established the procedure the trial would follow and the form of the verdict for each article, which read, “Shall the Senate sustain the ____ article of impeachment against Attorney General Jason Ravnsborg and remove him from the office of Attorney General.”¹¹ It did not, however, set forth any definitions of any of the words or phrases used in the constitution that state the grounds for removal of office. Those were left to

6. THE FEDERALIST NO. 65, at 396 (Alexander Hamilton), <https://perma.cc/RDD5-CFDA>.

7. S.D. CONST. art. XVI, § 1.

8. *Id.* § 2.

9. *See id.* § 3.

10. *Id.*

11. S. Res. 702, 96th Legis., 2d Spec. Sess., at R. 5-2 (S.D. 2022), <https://perma.cc/BF28-Y4SJ>.

the attorneys for the respective parties to address in their closing arguments and to the members of the Senate, when in their debates on the floor prior to their votes, they stated their rationale for the positions they were taking on the two articles. Nor did the resolution state any burden of persuasion that the prosecution of the articles was required to meet even though there was case precedent from our supreme court, *State ex rel. Steffen v. Peterson*,¹² that had adopted the clear and convincing standard.¹³ *Steffen* did not involve impeachment under our constitution but did address removal from public office pursuant to South Dakota Codified Law section 3-17-6.¹⁴ That statute provides that “[a]ny officer of any local unit of government may be charged, tried and removed from office for misconduct, malfeasance, nonfeasance, crimes in office, drunkenness, gross incompetency, corruption, theft, oppression, or gross partiality.”¹⁵

Since there was no precedent interpreting the provisions of South Dakota Codified Law section 3-17-6, the court looked to other authorities, which recognized the significance of removal from office. It quoted with approval from *Kemp v. Boyd*,¹⁶ “Removal of public officers from office is a drastic remedy, . . . and statutory provisions prescribing the grounds for removal are strictly construed.”¹⁷ It then went on to state that the remedy provided by removal statutes is heroic in nature and relatively drastic where the usual method of removing officeholders is by resort to the ballot.¹⁸ And finally, the court held that because of its drastic nature, “[e]vidence in a removal action must be ‘clear, satisfactory and convincing.’”¹⁹

III. HOUSE OF REPRESENTATIVES RESOLUTION 7002 CHARGING THE ARTICLES OF IMPEACHMENT

House Resolution 7002 was entitled, “A RESOLUTION, Providing for Impeachment of Jason Ravensborg, Attorney General of State of South Dakota, for certain crimes and for malfeasance in office.”²⁰ It recited several findings of significance before it introduced the two articles of impeachment. They are:

WHEREAS, Attorney General Ravensborg committed certain crimes while operating a motor vehicle, which led to and directly caused the death of South Dakota resident Joseph Boever, and which Attorney General Ravensborg pleaded no contest to at his criminal trial; and

12. 2000 SD 39, 607 N.W.2d 262.

13. *Id.* ¶ 19, 607 N.W.2d at 268.

14. *Id.* ¶ 10, 607 N.W.2d at 266.

15. SDCL § 3-17-6 (2021).

16. *Kemp v. Boyd*, 275 S.E.2d 297 (W. Va. 1981).

17. *Steffen*, 2000 SD 39, ¶ 19, 607 N.W.2d at 268 (quoting *Kemp*, 275 S.E.2d at 301).

18. *Id.* (citing *State v. Bartz*, 224 N.W.2d 632, 638 (Iowa 1974)).

19. *Id.* (citing *Bartz*, 224 N.W.2d at 638).

20. H.R. Res. 7002, 96th Legis., 2d Spec. Sess. (S.D. 2022), <https://perma.cc/K5M2-U2LN>.

WHEREAS, in Attorney General Ravensborg's conduct following the criminal acts, he, acting in his individual capacity and as attorney general, made numerous misrepresentations and misstatement of fact to law enforcement and the public and misused the assets of his office; and

WHEREAS, the attorney general of the State of South Dakota has a duty to serve and support law enforcement, a duty to serve the executive branch of the State of South Dakota, and a duty to hold himself to a high standard of personal and professional conduct for the benefit of the public and the criminal justice system of the State of South Dakota; and

WHEREAS, as a result of his criminal acts and his wrongful deeds, Attorney General Ravensborg has lost the faith of law enforcement, the executive branch, and the people of South Dakota; and

WHEREAS, it is the sense of the House of Representatives that criminally causing the death of a citizen of the State of South Dakota, committing wrongful deeds following such criminal acts, and losing the faith of law enforcement and the executive branch represent grave and exceptional circumstances meriting impeachment of Attorney General Ravensborg:

NOW THEREFORE, BE IT RESOLVED, by the House of Representatives of the Second Special Session of the State of South Dakota, that Jason Ravensborg, attorney general of the State of South Dakota, is impeached for crimes and for malfeasance in office.²¹

The Resolution then provided that:

The following articles of impeachment are exhibited by the House of Representatives of the State of South Dakota against Jason Ravensborg, attorney general of the State of South Dakota in maintenance and support of impeachment for crimes and for malfeasance in office.

Article I: Crimes Causing the Death of Joseph Boever
S.D. Const., Art. XVI, § 3 provides that the House of Representatives may impeach "state and judicial officers," for "drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanors in office."

Attorney General Jason Ravensborg committed crimes causing the death of Joseph Boever, specifically:

- (1) On the evening of September 12, 2020, Attorney General Ravensborg failed to operate his vehicle within its proper lane, crossed outside such lane, diverted his attention from the

21. *Id.* (emphasis added).

road, and struck pedestrian and Highmore, South Dakota, resident Joseph Boever;

- (2) Joseph Boever died immediately from the collision; and
- (3) Attorney General Ravnsborg pleaded no contest and was found guilty of two separate crimes, including illegal lane change, the crime that caused the death of Joseph Boever.

Wherefore, this Article of Impeachment for crimes causing the death of Joseph Boever is here adopted, and Attorney General Jason Ravnsborg must face trial for impeachment in the Senate of the State of South Dakota pursuant to S.D. Const., Art. XVI, § 2.

Article II: Malfeasance in Office Following the Death of Joseph Boever

S.D. Const., Art. XVI, § 3 provides that the House of Representatives may impeach “state and judicial officers,” for “drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanors in office.” Attorney General Jason Ravnsborg committed malfeasance in office following the death of Joseph Boever.

Attorney General Jason Ravnsborg committed the following wrongful deeds:

- (1) Immediately following the collision, Attorney General Ravnsborg identified himself by his official title and made a direct misrepresentation to the dispatch officer, misleading first responders as to the crime he had just committed;
- (2) During the investigation, Attorney General Ravnsborg made numerous misrepresentations and misstatements of fact to law enforcement and to the public regarding his conduct surrounding his criminal acts; and
- (3) Attorney General Ravnsborg used assets of the Office of the Attorney General to benefit himself personally with respect to the investigation into his criminal activity.

Wherefore, the foregoing wrongful deeds amount to malfeasance in office as provided in S.D. Const., Art. XVI, § 3. Accordingly, this Article of Impeachment for malfeasance in office following the death of Joseph Boever is adopted, and Attorney General Jason Ravnsborg must face trial in the Senate of the State of South Dakota pursuant to S.D. Const., Art. XVI § 2.²²

While impeachment is presented by some as a political matter, the obligation of members of the Senate is to follow the law according to the oath or affirmation they took to “do justice according to the law and the evidence.”²³ In that respect, they do not have unbridled discretion much as the Governor does not have

22. *Id.*

23. S.D. S. Res. 702, at R. 2-9.

unlimited discretion when he or she removes a constitutional officer not subject to impeachment under Section 4 of Article XVI of the constitution.²⁴ That section provides that “[a]ll officers not liable to impeachment shall be subject to removal for misconduct or malfeasance or crime or misdemeanor in office, or for drunkenness or gross incompetency, in such manner as may be provided by law.”²⁵ That constitutional provision is implemented in South Dakota Codified Law section 3-17-1, which provides: “All constitutional state officers not liable to impeachment may be removed by the Governor, after notice and hearing, for crimes, misconduct, or malfeasance in office or for drunkenness or gross incompetency.”²⁶

In the 1938 case of *Craig v. Jensen*,²⁷ the South Dakota Supreme Court interpreted these constitutional and statutory provisions, holding that

[t]he Legislature has seen fit to vest in the Governor this power of removal provided in the Constitution. It should be noted that under this constitutional and Code provision, the Governor is not vested with an unlimited power of removal. The power may be exercised only for certain specified causes. If none of the specified causes for removal exist, the Governor is without power. As stated in the early case of *State ex rel. Holmes v. Shannon*: “By expressly enumerating the causes for which such an officer may be removed, the constitution not only limits the causes, but limits removals to cases where such causes exist.”²⁸

IV. ANALYSIS OF THE ALLEGATIONS IN THE ARTICLES AND THE LAW

Under Section 1 of Article XVI of the South Dakota Constitution, only the House of Representatives can bring the articles of impeachment,²⁹ and, therefore, the senators’ deliberations on the articles were limited to what the articles charged and not what they could have or should have charged. This concept is in accord with Article VI, Section 7 of our constitution that provides that “[i]n all criminal prosecutions the accused shall have the right . . . to demand the nature of the cause of the accusation against him.”³⁰

24. See S.D. CONST. art. XVI, § 4.

25. *Id.*

26. SDCL § 3-17-1 (2021).

27. 278 N.W. 545, 547 (S.D. 1938).

28. *Id.* (quoting *State ex rel. Holmes v. Shannon*, 64 N.W. 175, 179 (S.D. 1895)). *State ex rel. Holmes v. Shannon* went to state on the question of the power of removal of a state officer from office by either the Governor, legislature, or court that

[w]e must not be understood as saying or meaning that such cause must first be judicially declared to exist before any power of removal can be exercised, but we do mean to say that the constitution plainly and unmistakably does forbid the removal of such an officer at, the pleasure anybody, whether governor, legislature, or court.

Holmes, 64 N.W. at 179.

29. S.D. CONST. art. XVI, § 1.

30. S.D. CONST. art. VI, § 7.

Article I charged that Attorney General Jason Ravnsborg committed crimes causing the death of Joseph Boever.³¹ It then went on to bring very specific allegations:

- (1) On the evening of September 12, 2020, Attorney General Ravnsborg failed to operate his vehicle within its proper lane, crossed outside such lane, diverted his attention from the road, and struck pedestrian and Highmore, South Dakota, resident Joseph Boever;
- (2) Joseph Boever died immediately from the collision; and
- (3) Attorney General Ravnsborg pleaded no contest and was found guilty of two separate crimes, including illegal lane change, the crime that caused the death of Joseph Boever.³²

What is stated is certainly true. It is true that on the night in question the Attorney General did operate a motor vehicle that he failed to keep within its proper lane of travel, crossing outside his lane, which resulted in him striking a pedestrian, Joseph Boever, who died as a result of the accident.³³ Finally, it is true that the Attorney General would not have hit Joseph Boever but for the fact that the Attorney General was distracted from his driving; for there was no other evidence that was offered, such as a mechanical failure, that can explain why he left his lane of travel and crossed onto the shoulder where the decedent was walking while carrying a lit flashlight.³⁴

The allegations, however, specifically charged no more than two misdemeanors while the Attorney General was in office. The misdemeanors were a lane violation and using a cellphone while driving (that he may have been looking at the time of the actual collision but was not talking on as shown by cellphone records).³⁵ And while the misdemeanors occurred while Mr. Ravnsborg was holding the office of Attorney General, it cannot be said that they were misdemeanors in office as the term “in office” is used since there are myriad misdemeanors, such as jay walking or speeding, that have nothing to do with the official’s duties of their office. South Dakota Codified Law section 1-11-1 contains a list of the duties of the Office of Attorney General.³⁶ It should also be noted that the drafters of our constitution had some reason for mentioning both “crimes” and “misdemeanors in office.”³⁷ If they would have wanted to make an official subject to impeachment for any crime, they could have just done so. Instead, they mentioned both, and for that reason, it is only logical that the only misdemeanors for which they intended an official to be impeached for are those that take place due to their performance or lack of performance in the duties of that office. It is also logical to conclude that the term “crimes” was intended to

31. S.D. H.R. Res. 7002.

32. *Id.*

33. See Transcript of Proceedings, *supra* note 3, at 248.

34. See generally *id.* at 12-208 (discussing the evidence).

35. *Id.* at 44-45.

36. SDCL § 1-11-1 (2021).

37. See S.D. CONST. art. XVI, § 3.

include offenses other than misdemeanors, irrespective of whether they have any relation to one's office.

In *Steffen*, the South Dakota Supreme Court addressed the meaning of the terms “malfeasance or nonfeasance in office” as those terms were used in South Dakota Codified Law section 3-17-6.³⁸ There the court observed that the acts complained of must be done by the officer in their official duties or capacity.³⁹ The court wrote:

“To constitute malfeasance or nonfeasance, conduct must affect the performance of official duties and must relate to something of a substantial nature directly affecting the rights and interests of the public.” Malfeasance is “not susceptible of an exact definition but it has reference to evil conduct or an illegal deed, the doing of that which one ought not to do, the performance of an act by an officer in his official capacity that is wholly illegal and wrongful.” Nonfeasance is the “neglect or refusal, without sufficient excuse, to do that which is the officer's legal duty to do.”⁴⁰

The court then went on to discuss a number of cases where malfeasance or nonfeasance was or was not found.⁴¹ In each case, the determining factor was whether the official's intent was to evade or otherwise circumscribe the law.⁴² It then cited *State v. Manning*,⁴³ where the Iowa Supreme Court stated:

Acts, whether of omission or commission, in order to constitute grounds for removal must have been done knowingly, willfully and with an evil or corrupt motive and purpose The primary purpose of the law . . . is to protect the public interest. . . . While we cannot place our stamp of approval upon the manner and method pursued by these defendants in the management of the affairs of the municipality, and are in no way excusing acts and conduct which amount to actual violation of statutory laws, yet we can discern no purpose, on the part of said officials in what they did, to harm, or which was inimical to the interests of such city. No corrupt or evil design or purpose is manifest from the evidence[.]⁴⁴

And in the case of *Craig*, our supreme court interpreted the term misconduct in office as used in Section 4 of Article XVI of the constitution and South Dakota Codified Law section 3-17-1.⁴⁵ There the court noted that it must be performed by virtue or authority of the office.⁴⁶ It stated:

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38. *State ex rel. Steffen v. Peterson*, 2000 SD 39, ¶¶ 16-21, 607 N.W.2d 262, 267-69.
 39. *Id.* ¶ 20, 607 N.W.2d at 268-69.
 40. *Id.* (quoting *Claude v. Collins*, 518 N.W.2d 836, 842 (Minn. 1994) (internal citations omitted)).
 41. *Id.* ¶ 21, N.W.2d at 269.
 42. *Id.*
 43. 259 N.W. 213 (Iowa 1935).
 44. *Id.* at 215-16 (emphasis added).
 45. *Craig v. Jensen*, 278 N.W. 545, 547 (S.D. 1938).
 46. *Id.* at 549 (quoting *State ex rel. Wynne v. Examining & Trial Bd.*, 117 P. 77, 78 (Mont. 1911)).

The charge is misconduct in office. This term “misconduct in office” is a general term, and, so far as we can determine, has no well-defined meaning. The misconduct sufficient to justify a removal must be a misconduct in the conduct of the office, but just what constitutes misconduct is difficult of definition. The term itself implies as much as any definition of the term. It has been defined as such acts as amount to a breach of the good faith and right action that are tacitly required of all officers or any act which is contrary to justice, honesty, principle, or good morals, if performed by virtue of office or by authority of office. Other definitions might be found, but none of them are very helpful. We think misconduct in office means simply the doing of something which the officer ought not to do, or the failure to do something which he ought to do, in the conduct of his office. Each case must rest upon its own facts.⁴⁷

The pleadings can be interpreted to include a misdemeanor of careless driving since the Attorney General’s distracted driving certainly equates to negligence, but the pleadings cannot be interpreted to include a “reckless killing” of another human being which is required for second degree manslaughter.⁴⁸ South Dakota Codified Law section 22-1-2(1)(d) describes “reckless” as follows:

The words, “reckless, recklessly,” and all derivatives thereof, import a conscious and unjustifiable disregard of a substantial risk that the offender’s conduct may cause a certain result or may be of a certain nature. A person is reckless with respect to circumstances if that person consciously and unjustifiably disregards a substantial risk that such circumstances may exist.⁴⁹

While this writer takes the position that the Senate should not have considered whether Attorney General Ravensborg’s conduct rose to the level of a reckless killing, in due respect of the majority vote of guilty of Article I, I recognize there is a rational basis for their decision if you view the evidence in a light most favorable to the prosecution and if you draw all inferences therefrom to support the prosecution’s claims. If you do so, you would conclude that the Attorney General drove his motor vehicle in “such a manner as to evidence a reckless disregard for the safety of others,”⁵⁰ thereby committing the crime of manslaughter in the second degree. Thus, the majority vote to convict can be said to arguably be the right result but for the wrong reason.

In Article II, the House of Representatives charged that Attorney General Jason Ravensborg committed malfeasance in office following the death of Joseph Boever by committing the following wrongful deeds:

47. *Id.* (internal citations omitted).

48. SDCL § 22-16-20 (2017).

49. SDCL § 22-1-2(1)(d) (2017).

50. *State v. Olsen*, 462 N.W.2d 474, 477 (S.D. 1990).

- (1) Immediately following the collision, Attorney General Ravnsborg identified himself by his official title and made a direct misrepresentation to the dispatch officer, misleading first responders as to the crime he had just committed;
- (2) During the investigation, Attorney General Ravnsborg made numerous misrepresentations and misstatements of fact to law enforcement and to the public regarding his conduct surrounding his criminal acts; and
- (3) Attorney General Ravnsborg used assets of the Office of the Attorney General.⁵¹

The first two allegations refer specifically to acts that were not committed in office, as they were not acts in the performance of the duties of the Office of the Attorney General. The simple fact that Mr. Ravnsborg introduced himself as Attorney General Jason Ravnsborg in his call to the 911 dispatcher to report the accident does not make it an act that was done in the performance of his office, and there was no evidence in the record that he did not always introduce himself in that manner.⁵² And the statements made in the second allegation were made as an individual who was being investigated by law enforcement for possible criminal charges, not because he held the Office of Attorney General. These same conclusions were recognized in the preamble to House Resolution 7002 when it recognized, in part, that certain actions of Ravnsborg occurred “in his individual capacity and as attorney general” when he made certain misstatements of fact and misused the assets of his office.⁵³

As to the third allegation, misuse of assets, the Attorney General’s acts did occur “in office” as they occurred by virtue or authority of that office. Those acts were: (1) that he used his position as Attorney General to consult with a Division of Criminal Investigation expert about digital forensics and what law enforcement might learn from his use of his cellphones⁵⁴ and (2) that he used stationary from the Office of Attorney General to put out a press release.⁵⁵ That said, however, his consultation with personnel within his office was clearly in an effort to simply get information, as he did not seek to have them do anything on his behalf. And as to the use of his office letterhead, it can be said to be, at a minimum, a mistake; poor judgment; or incompetence, but the use did not, in my opinion, rise to the level of “evil conduct or an illegal deed . . . [or] the performance of an act by an officer in his official capacity that is wholly illegal and wrongful.”⁵⁶

This writer does not approve or sanction Attorney General Ravnsborg’s acts that occurred following the collision whether or not they occurred “in office.” My vote of not guilty was based on the directive that the deeds and actions “must have been done [1] knowingly, [2] willfully and [3] with an evil or corrupt motive and

51. S.D. H.R. Res. 7002.

52. See generally Transcript of Proceedings, *supra* note 3 (containing the record).

53. S.D. H.R. Res. 7002.

54. Transcript of Proceedings, *supra* note 3, at 250.

55. *Id.*

56. State *ex rel.* Steffen v. Peterson, 2000 SD 39, ¶ 20, 607 NW.2d 262, 269.

purpose.”⁵⁷ Based on my analysis of all the evidence, the third element was not proven by clear and convincing evidence or even by a preponderance. That is, the evidence and all reasonable inferences to be drawn from it did not show that the Attorney General acted with an evil or corrupt motive and purpose as those words are commonly understood.

V. CONCLUSION

The impeachment trial of Attorney General Jason Ravnsborg is now one for the books. Thankfully, impeachment of constitutional officers and judges, unlike in some states such as Michigan,⁵⁸ is a rarity in South Dakota, but it can and may well happen again. The question of fitness of an officer to hold their office should be left to the voters, if at all possible, but sometimes the drastic remedy of removal must be resorted to if the rights and interests of the general public are in jeopardy. Because the remedy is drastic, it is recommended that a statute be enacted to mandate (1) that the burden of persuasion be clear and convincing evidence at the time of a Senate trial and (2) that the senators must be instructed on it for use in their deliberations.

57. *Id.* (quoting *State v. Manning*, 259 N.W. 213, 215-16 (Iowa 1935)).

58. *See, e.g.*, Samantha May, *Michigan Republicans File Articles to Impeach Gov. Whitmer*, NEWS CHANNEL 3 (Nov. 19, 2020), <https://perma.cc/K5TW-W4DA> (discussing the introduction of impeachment articles against Michigan Governor Gretchen Whitmer for claims she violated the constitution for orders issued during the pandemic).