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The editor of the *Journal of the American Society of Legislative Clerks and Secretaries* welcomes manuscripts which would be of interest to our members and legislative staff, including topics such as parliamentary procedures, precedent, management, and technology. Articles must be of a general interest to the overall membership.

Contributions will be accepted for consideration from members of the American Society of Legislative Clerks and Secretaries, members of other National Conference of State Legislatures staff sections, and professionals in related fields.

All articles submitted for consideration will undergo a review process. When the Editorial Board has reviewed a manuscript, the author(s) will be notified of acceptance, rejection or need for revision of work.

STYLE AND FORMAT

Articles should follow a format consistent with professional work, whether it is in the style of the Chicago Manual, the MLA, or APA. Articles should be submitted in MS Word, single spaced with normal margins.

All references should be numbered as footnotes in the order in which they are cited within the text. Accuracy of the content and correct citation is expected of the author. Specialized jargon should be avoided as readers will skip material they do not understand. Charts or graphics which may assist readers in better understanding the article's content are encouraged for inclusion.

SUBMISSION OF ARTICLES

Articles for the 2016 Journal should be submitted electronically, not later than July 1, to the Chair:

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Inquiries from readers and potential authors are encouraged. You may contact the Chair by telephone at (916) 651-4171 or by email at Bernadette.McNulty@sen.ca.gov.

Letters to the editor are welcomed and may be published at the conclusion of the journal to provide a forum for discussion.

From the Editor

Last year I offered an introduction to honor the first editor and chair of the Professional Journal, Ms. Millicent MacFarland, who had just passed away. I stated that it was the goal of this committee to continue to honor her (and indeed all those who have worked so hard on the journal over the last two decades) by publishing an annual volume of which our membership can be proud.

I was appointed to the Professional Journal committee in 2011 at the Branson PDS and have served on that committee since then. It has been a rewarding and fulfilling challenge, and serving as the chair for the last two years has been even more so; however I am very concerned.

It has only been a few years since our Journal was in fact shortened to one publication a year from two due to waning submissions, but in that time we had one year where we were unable to produce a journal at all (due to a lack of article submissions) and in fact, have essentially taken every article that has been submitted for publication. That is not to say that we have printed bad articles, we haven't, but our small committee has worked very hard to obtain submissions from the membership of our society and beyond and if this trend does not change, I worry there will be fewer and fewer volunteers left to do the important work of the Journal and it will die on the vine.

This Journal was put together by a small, yet dedicated, team and it is hoped that all members of the society will enjoy it. It has been a pleasure to work with a talented team of grammarians and editors from across the country and I hope that the Journal is successful for future members of our amazing organization. It will survive as long as you are willing to contribute and I would ask you all to consider participating in the future.

Sincerely,
Paul C. Smith, Ed.

Strategic Planning with Term Limits: Challenges with revolving leadership on long-term planning

By Jarad Perry, Legislator Assistant
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Introduction

Each new legislative session brings with it the possibility that the previous administrative frameworks will be upended. This is even more so in legislative bodies where the legislator's terms are limited. In a term-limited environment, leadership's roles are more transient than in bodies where members are not restricted in their length of service. Such a transitory environment brings with it various challenges from a legislative and administrative perspective. Many public policy issues must be addressed or are sought to be addressed in an expedited manner due to the limited time members have to accomplish the goals for which they were elected.

The prospective of new leadership every two years is always a possibility, but with a term-limited legislature it is almost inevitable. The establishment of specific term limits generates immediate pressure on legislators seeking to advance among the ranks of the legislative leadership.

In Missouri, members are restricted to four terms, each being two years in duration. A study in 2011 found that the average length of service for a House member was 2 years as compared to the 5.4 year average in 2001.[1] Practically speaking, this means that most often the newly elected speaker will serve only one term prior to being term limited. Therefore, a new speaker has only two years to achieve his or her policy objectives. They may completely change the structure and rules of the chamber only to have those changes negated by their successor. This fluctuation in leadership and uncertainty of continuity creates an environment where any type of long-term strategic planning is difficult.

In fact, "[s]trategy isn't always either possible or relevant. It's easier when the environment is reasonably stable or predictable."[2] While the Missouri legislature is a public institution that is constitutionally empowered with specific powers and authority, its primary responsibility is to enact laws governing the state. Essentially, the Missouri legislature must create public value and to do this it must be able to determine what the public value entails.

Public value can be subjective but there are common elements regardless of where one sits on the political spectrum. Added to the pressure of creating public value, elected officials must also contend with unforeseen events that may impact their ability to govern and to budget properly. Having a framework of strategic planning can help to stabilize situations that create onetime emergencies.

[1] (Lieb 2011)
[2] (Mulgan 2009, 19)

But how can a stable framework be created for the long-term when the leadership will change in two years and any plan may or may not be utilized? The question is complicated, but leads to the larger discussion of what the nature and purpose of legislative bodies are and how they fulfill their roles. Each member must plan for his or her future, but also be aware and part of the larger discussion about the future of the institution as well as how legislative changes affect their constituents.

Not all members will be part of the larger strategic planning of the day-to-day operations of the institution but each will have input in the appropriations process, and an opportunity to express their will through the budget.

Collaboration in planning

With term limits firmly in place, the importance of staff input becomes even more important for the long-term success of the institution, at least from an administrative viewpoint. However, the collaborative process is often plagued with turf battles over roles and functions, quickly descending into bureaucratic minutia. The staff roles vary from legislature to legislature, but some common categories are partisan and nonpartisan staff. While partisan staff plays a role in parts of the Missouri House, it is the nonpartisan staff that must engage in strategic planning because they are the ones tasked with the administrative responsibility for the institution. Also, while it is true that the leadership changes more often than would be ideal, there is at least some continuity. Those in leadership, because of term limits, become part of the leadership team earlier than usual so they at least have some familiarity with the process. However, this still means that planning may not occur a few years out, but rather decades out.

Bringing together the various stakeholders is important and this often includes those outside of the administrative side of the institution. Strategic planning is more than just talking about planning, it is the creation and implementation of a strategic framework that will help guide the institution over the next year, two years or more so that other issues may be addressed.

Those in leadership must learn to work their differences of perspective on how the institution will move forward because "the goal of collaboration is typically to achieve some degree of consensus among stakeholders."[3] Of course, this consensus must be achieved through the strategic planning process. It is important to clearly articulate the goals of the plan because "[s]trategic plans which set priorities and precise targets provide order for bureaucracies and at their best a line of sight from the front line to the top."[4]

However, if the strategic plan is done in an environment where the stakeholders change in a short period of time then it would be impractical to actually bring all the stakeholders together to create a plan only for it be discarded when new leadership is chosen.

This does not have to be the case and there are ways in which the new stakeholders can be brought in during the strategic planning phase. This is possible because, even though

[3] (Ansell and Gash 2008, 547)
[4] (Mulgan 2009, 137)

the new leadership has yet to be chosen, there is in a natural order to choosing leaders. In a term-limited environment, it is only practical to choose those who have been in the body for some time. Given the circumstances, it is also much easier to determine who will be in leadership next, especially at the higher levels, because those who serve in the lower rungs of leadership will, in all likelihood, be next in line.

This is not to say surprises do not happen or that the new leaders are predetermined, but it is not difficult to get a sense of who will be next in a legislature with term limits. Of course, this is not to argue that the next leader will wish to continue the administrative practices of their predecessor just that by bringing them into the conversation that they will have a better appreciation of the process and the need for continuity in some aspects of the institution.

Elected officials, however, must be aware of the political situations that arise from their decisions and the decisions of others. This could lead to problems in the actual implementation of the plan. In fact, "[s]takeholders may not have an incentive to participate, particularly if they see alternative venues for realizing their agenda."[5] This too makes strategic planning difficult in a legislative environment and the existence of term limits only adds layers to the difficulty.

What to plan for?

Once an institution has decided that they will engage in strategic planning, the planners must then decide what their goals are going to be and how they will be achieved. Strategic planners must address a myriad of issues relating to the overall institution and the many facets that must come together to make that institution operate. In fact, "[s]trategic planners at their best are likely to think of organizations in relation to their environments as flows of various kinds through time and across place, for example, of people, resources, activities, decisions, attention, services, and so forth."[6] To further elaborate on this point, "[w]hat strategic planning tries to do is inform and foster decisions and actions meant to affect something important about those flows."[7]

In the legislative environment, the various resources are not as clear or easily maneuvered to where they are most needed. The delineation of staff into partisan and nonpartisan staff makes it difficult to maximize those resources to where they are needed most. This is the nature of legislative institutions. If public value is to be created from these institutions it is "going to require many innovations in the ways that public services are organized, managed and delivered," and they "must be driven by a clear understanding of the social outcomes that citizens expect from public services."[8]

The legislature has a unique role in society by its passage and creation of laws. Strategic planning, then, is not required for the content of the legislation but for the process by which it is passed. Bills are most-often drafted by nonpartisan staff, heard in committees, and then debated on the floor. During this process, there are employees responsible for

[5] (Ansell and Gash 2008, 556)
[6] (Bryson 2010, S257)
[7] Ibid.
[8] (Cole and Parston 2006, 141)

printing bills, ensuring that the information is accurate, that the public can read the legislation online, and myriad of other tasks that occur away from the public eye. The point is that the process is where the necessity to formulate strategic plans is necessary.

To ensure the smooth operation of the process there needs to be adequate resources available that can also be allocated in a timely fashion. Much of what is done is built upon lessons from past sessions, but that is not necessarily the case when new leadership is elected. Many of the same nonpartisan staff members may continue to be part of the process, yet they must enact the mandates from leadership.

It is important that new leadership understand what worked in the past and where improvements can be made, but they are not required to heed that advice. Of great concern is that many of the practices that worked in the past will be replaced with new and untested processes. These new means for product or service delivery, of course, can be successful and should not necessarily be discounted. The planning process, however, should always be looking for improvements but not at the expense of the overall process.

Rapidly changing stakeholders and the short terms of those in leadership positions puts long-term plans in jeopardy if the leadership decides to take a new direction.

An area removed from the legislative process in which strategic planning is difficult, is purchasing and expenses. Missouri State Representatives are allocated a set amount of money for office expenses. These expenses are governed by rules, policies and practices. Each change in leadership, however, can drastically impact the process and utilization of these funds.

Many legislators purchase office supplies with that expense account yet do not use the same vendors. In fact, with one-hundred and sixty-three members in the Missouri House, the reality is that they will be using different vendors. The problem with this approach is that each member will be utilizing those resources in a manner that is not necessarily cost-effective. It also creates a disparity between some members and other members in that they may be purchasing the same goods at different prices and either maintaining a sufficient level of resources or not. The problem that arises for the institution is a trade-off between control of the funds by an individual legislator versus the control of the institution to optimize efficiency in expenditures in the aggregate.

Even if there were to be a centralized location within the institution to purchase office supplies or if there was a process in place for the institution to bid out to various vendors on basic office supplies, the policy could change every two years or however frequently leadership changed. This creates an environment where strategic planning on the most basic of supplies is difficult.

Conclusion

Strategic planning is an important tool that should be utilized to better handle issues that arise, but that process is made more difficult when the various stakeholders change frequently. In a term-limited legislature the leadership is more likely than not to change every two years, or with each new session. This creates an environment where planning for the future is difficult at best.

Term limits have negatively impacted Missouri's legislature by preventing long-term strategic plans from being crafted and fully realized. The inability to plan when the stability of leadership is in question impacts the overall functioning and process of the institution. As I have examined in this paper, the practically of strategic planning for the legislative process is fraught with problems.

A general critique of term limits was not my purpose, just their impact on one aspect of a legislative institution. Yet given what the strategic planning process entails, it is reasonable and accurate to posit that term limits are a net negative on legislative institutions when the issue of strategic planning is discussed. It would be wise for legislatures with term limits to reexamine the practical effects they are having on the overall functioning of the institution and how they are impacting the creation of public value in a cost-effective manner.

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Wielding the Gavel: the 2014 NH Speaker's Race

By Paul C. Smith, Clerk of the House
New Hampshire House of Representatives

Every two years, the citizens of New Hampshire vote for 400 souls to serve in the New Hampshire House of Representatives; a number which, despite serving the best interests of the constituents of this state, continues to boggle the minds of many across the nation. 2014 was an interesting year in New Hampshire House politics however, and seemed to be of sufficient interest to warrant an article.

As has been the nature of late in New Hampshire, the 2014 election saw a change in majority – indeed, the House has swung back and forth from Republican to Democratic and back again four times since 2006 – and while that may be hard in forming consensus and consistent leadership, it does require members (in theory, anyway) to work together.

In November, the voters had elected Republicans as the party to govern both chambers of the legislature. Two weeks later the Republicans caucused and had to decide between two former Speakers, Bill O'Brien and Gene Chandler. In 2012, after the Democrats resumed the majority, they re-elected former House Speaker Terie Norelli as the Speaker again, and in 2014, Bill O'Brien (who had served as Speaker during the Republican majority of 2010-2012) was attempting the same sort of come-back and to a lesser extent, so was Gene Chandler who had served as Speaker from 2000-2004. Representative O'Brien won the caucus by just a few votes, four to be exact, and while Representative Chandler was quick to say he wouldn't pursue the gavel further on Organization Day, several in the Republican caucus were not happy with the outcome, one of whom was a member of O'Brien's past leadership team, and twenty year veteran of the House, Representative Shawn Jasper. Democrats elected their candidate for Speaker, and eventual Minority Leader, Representative Stephen Shurtleff without competition.

Orientation of the new members went on as expected and all signs seemed to point to the type of Organization Day where the two candidates spoke, made their pitches and continued on to the other business of the day (such as electing the Clerk, Sergeant-at-Arms and going into joint convention to elect the Secretary of State and State Treasurer). However, in the two days prior to our constitutionally fixed first Wednesday in December, Representative Jasper made it known that if members were interested in an alternative to Representative O'Brien, he would present himself as such. This ignited a bit of a firestorm. Representative Chandler, the candidate who had run against O'Brien, and indeed, the entire state Republican apparatus endorsed O'Brien and stated it would be bad for the party to not select the elected nominee for Speaker.

On Organization Day, the Republicans caucused in the legislative office building and O'Brien, the presumptive Speaker, ran the meeting and invited several members of the caucus who had supported Chandler to come up and offer their support for his election; Rep. Jasper attended the caucus. Representative David Bates, an ardent O'Brien supporter; presented a set of proposed ground rules to the caucus for explanation. I was

invited to address the caucus as their candidate for Clerk and then I exited to head for the Chamber and the day's events.

Retiring Clerk of the House Karen Wadsworth assumed the Chair and called the House to order and we went through our normal pleasantries of calling the roll (of all 400, a process which took over sixteen minutes to complete, and an additional two to tally), introduction of guests and the swearing in of members by the Governor and Executive Council.

Next, Rep. Bates proposed ground rules for the election of Speaker. The proposed rules were similar to those that have been adopted in the past for said election, but diverged substantially from past practice in two instances. In the first, it provided that the election for Speaker be by roll call (voice, as our electronic system was not set for the new members at that time). In the second, it said that once nominations for Speaker had been closed, they could not be reopened. Typically, the ground rules had been prepared by the Clerk and distributed to the caucus nominees for agreement; following that tradition, the Clerk had prepared a set of proposed ground rules for the Speaker nominees of both parties.

Upon questioning by Rep. Shurtleff as to whether the ground rules presented to the members of the House were the same and who was offering the rules, the Chair said they were not the same rules she had prepared and in the second question, it was asserted by Rep. Bates that they were agreed upon in the Republican caucus. Rep. Bates requested a roll call (again, verbal) to adopt the rules. Rep. Shurtleff moved to have a paper ballot for the adoption of the rules. Another member tried to raise a point of order that there was a pending motion on the floor and insisted the motion for a paper ballot could not be adopted while that question was pending. The Clerk, ably standing at the rostrum, informed the member she would let Rep. Shurtleff continue his remarks on the motion to adopt rules, where he proceeded to talk about the sanctity of secret ballots. The Chair informed the member raising the point of order that Rep. Shurtleff had made a motion to amend the motion for a roll call to a secret ballot and would allow the motion to stand.

Rep. Bates spoke against the amendment and insisted that his rules proposal would speed up the process. Members proceeded to speak both for and against the notion of recorded votes for Speaker, including Rep. Jasper who mentioned that the state Supreme Court had ruled previously that the House sets its own agenda and organizes in a manner they see fit. More questions and debate followed until finally, a member moved the previous question. After a misunderstanding regarding the question before the body, a division was requested to limit the debate. With 383 votes in the affirmative and 8 in the negative, debate was limited. Immediately following the vote, Rep. O'Brien approached the well and asked a parliamentary inquiry of the chair, if the question was at the Shurtleff amendment and also, if it would be appropriate to have Rep. Bates withdraw his request for a roll call on that vote so that Rep. O'Brien could ask for a division vote. The Chair allowed the request, Rep. Bates withdrew his request and O'Brien asked for a division vote.

After some confusion about what the actual Shurtleff motion would in fact do (it was not clear if the motion was about adopting the rules by paper ballot or if he was amending the

proposed rules to substitute the roll call vote within the proposed rules for a secret ballot), Rep. Shurtleff offered a parliamentary inquiry whereby he intoned that he had intended an up or down vote on the proposed rules. The House proceeded to divide and with 222 voting in the affirmative and 171 in the negative, the motion to allow for the adoption of the ground rules by secret ballot was adopted.

Rep. Jasper rose to offer an amendment to the proposed rules; he offered the rules that had been prepared by the Clerk to the Speaker candidates in the days prior. The Chair put the House in recess until after lunch so that copies of the amendment could be run and distributed to all members. When the House reconvened, Rep. Jasper withdrew his motion and the House proceeded to vote by secret ballot for the adoption of ground rules. The vote being 162 in the affirmative and 224 in the negative, the proposed rules offered by Rep. Bates failed.

Rep. Jasper offered the proposed rules previously prepared by the Clerk, Rep. O'Brien then spoke in favor of the proposed rules and it was adopted by a voice vote. After over three hours, nominations for Speaker were finally in order. Rep. William O'Brien was nominated by two members of the Republican Party and Rep. Stephen Shurtleff was nominated by two members of the Democratic Party. With no further nominations, the Chair declared nominations closed. The Chair was reminded that the nominations had to be accepted and Reps. O'Brien and Shurtleff addressed the House. The ballots were distributed and of the 387 votes cast, 194 were needed for election. Rep. O'Brien received 190 votes, Rep. Shurtleff received 168 and lacking the necessary majority, there was no winner on the first ballot.

A Jasper supporter, Representative Sytek, moved that nominations be reopened and debate ensued as to whether to allow it. The Chair was asked whether nominations could be reopened according to the adopted rules; the Chair mentioned that in preparation for the election, blank ballots were prepared and that there was nothing to preclude nominations from being reopened. Upon further questioning, the Chair reiterated that a majority was not attained, blank ballots having been counted as ballots cast. Another member rose to a point of order, citing section 516 of Mason's Manual, in order for the Clerk to consider the blank votes cast not be counted in the final tally, thereby electing Rep. O'Brien. The Chair responded that the practice and precedent in the New Hampshire House was that blank ballots turned in would be considered as ballots cast. Representative Stephen Stepanek then moved to challenge the ruling of the Chair. The Chair responded that House Rules stipulated that practice and precedent supersede Mason's and that is why she made the ruling. Rep. Jasper spoke in favor of the ruling of the Chair. After several members spoke, Rep. O'Brien asked Rep. Stepanek to withdraw his challenge of the chair, which he did, and the question was put before the House as to whether or not to reopen nominations. On a division vote of 199 to 182, the motion prevailed. Per the adopted rules, there would be a recess after the first ballot, and a 15 minute recess was called by the Chair.

Immediately following the return from recess, Rep. O'Brien moved for a 15 minute recess for the purposes of a Republican caucus. Rep. Jasper spoke against the motion and a division was requested. On a vote of 222 to 157, the motion was adopted and the House went into recess for the purposes of a Republican caucus. According to accounts provided

me by Rep. Jasper, Rep. O'Brien (the Republican nominee for Speaker) had the chairman of the NH Republican State Committee enter the caucus, where they proceeded to drive home that Republicans needed to stick together behind their nominee.

Upon returning from the recess, the Chair ruled that nominations were in order. Rep. Jasper was nominated and addressed the House. Rep. Shurtleff withdrew his name for consideration for Speaker. Representative Lynne Ober then spoke on behalf of Rep. O'Brien for Speaker. The Chair declared the nominations closed and informed the members that the ballots contained a blank line that had to be filled in, and the voting began.

There were 380 ballots cast, 191 being necessary for election. Rep. O'Brien received 187 votes and Rep. Jasper received 190 votes and no candidate was elected on the second ballot. Reps. Jasper and O'Brien met with the Clerk and indicated that they wished for no further speeches but to proceed directly to the ballot. The Chair reminded the members that the House was constitutionally obligated to meet in joint convention with the Senate that day to elect a State Treasurer and the Secretary of State and still needed to vote for the offices of Clerk of the House and Sergeant-at-Arms.

On the third ballot, 377 votes were cast, 189 being necessary for election. Rep. O'Brien received 178 votes; Rep. Jasper received 195 and was declared the duly elected Speaker of the House for the 2015-2016 biennium. The Speaker spoke very briefly and opted not to give a full address due to the timing of the day. He postponed the House officer elections so that the House could move into joint convention before the Senate lost its quorum. The joint convention elected the two constitutional officers and arose at its conclusion. The House then proceeded to the contested election of Clerk of the House and the uncontested election of Sergeant-at-Arms, passed its housekeeping resolutions and proceeded to adjourn until January.

There had been cases historically where Organization Day lasted far longer in length than the norm, but in the instance of December 3, 2014, I believe the record was set, at over nine hours in totality. In the aftermath of December, the first few session days of the House had some instances by members of the majority who still felt slighted showing a little less decorum than would otherwise be expected. However, Speaker Jasper having served as many terms as he has and having a grasp on history and precedent, and having a Clerk standing next to him who cares just as deeply for both, has served the institution well over the intervening period and kept the ruckus to a minimum. Certainly New Hampshire's contentious House Organization Day doesn't rival the historical case of North Carolina in 2003, but it is an interesting study in modern politics and certainly strains the parliamentary limits of most observers of the process.

Impeachment Procedure in the Texas Legislature

By Jeff Hedges, Staff Attorney
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The impeachment process is a powerful though rarely invoked tool for holding public officials accountable between elections. In Texas, as in most states, the removal of a public official through impeachment is a two-step process beginning in the House of Representatives and culminating in the Senate, which conducts the trial on impeachment. Adjudicated by the legislature rather than the judiciary, impeachment is an exception to the traditional separation of powers framework. This unique nature of impeachment, as well as the paucity of precedent, renders the process somewhat unpredictable and affords the legislature considerable latitude in conducting impeachment proceedings.

This article considers impeachment and removal under the Texas Constitution, with particular focus on the role of the Senate. In Texas, the impeachment process is governed by Article XV of the Texas Constitution and Chapter 665 of the Texas Government Code.[9] Except as I have otherwise provided, all citations to constitutional and statutory provisions refer to the Texas Constitution or the Texas Government Code, as applicable.

History of Impeachment under the Texas Constitution of 1876

Under the Texas Constitution of 1876, there have been just four trials on impeachment in the Senate. Lessons from past trials are valuable because many procedural aspects of trials on impeachment are not addressed by the constitution or statutes. Past trials however, are not necessarily binding on the present Senate, especially because they were conducted under statutes that have since been amended. Nonetheless, these precedents are instructive and are discussed throughout this article. The four trials are:

- In 1893, General Land Commissioner W.L. McGaughey was acquitted.
- In 1917, Governor James Ferguson was convicted.
- In 1931, Judge J.B. Price was acquitted.
- In 1976, Judge O.P. Carrillo was convicted.

Officers Subject to Impeachment

Impeachment is one of several methods of removal from office, each applicable only to certain public officials. The Texas Constitution and various statutes provide other, often overlapping methods of removal for legislators,[10] judges and justices,[11] commissioners of agriculture and insurance,[12] and others. Multiple methods may be pursued concurrently.[13] This article however, is limited to a discussion of removal by impeachment, as set forth by the constitution.

[9] Formerly, Art. 5961 et seq., Vernon's Ann.Civ.St. (1925), governed impeachment, but those statutes were codified as Chapter 665, Tex. Government Code, by Senate Bill 248, Ch. 268, 73rd Legislature, Regular Session (1993).
[10] Tex. Const. Art. III, §11.
[11] Tex. Const. Art. XV, §8.
[12] Tex. Government Code, §665.051.
[13] *Matter of Carrillo*, 542 S.W.2d 105 (Sup. 1976).

The Texas Constitution provides that the Governor, Lieutenant Governor, Attorney General, land commissioner, comptroller, and certain judges are subject to impeachment.[14] In addition, the legislature "shall provide by law for the trial and removal from office of all officers of this State, the modes for which have not been provided in this Constitution."[15] The legislature may not, however, establish alternative methods for removing public officials for whom the Texas Constitution provides a removal process.[16] Thus, the legislature may establish novel methods of removal only for officers on whom the constitution is silent; constitutionally established methods may only be elaborated upon, not substituted.

As required under Article XV, the legislature enacted Chapter 665, which both expands the list of officers subject to and clarifies the procedure for impeachment. That chapter adds to the list a "state officer," a "head of a state department or state institution," or a "member, regent, trustee, or commissioner having control or management of a state institution or enterprise."[17] These terms are not defined in the constitution or pertinent statutes, but the term "state officer" is generally interpreted as "including only those officers whose jurisdiction is coextensive with the boundaries of the state or such general officers as immediately belong to one of the three constituent branches of the state government."[18] This is a broad definition, but recall that Chapter 665 does not apply to state officers, such as legislators, for whom the Texas Constitution has established a removal process other than impeachment.[19]

Grounds for Impeachment

Neither the Texas Constitution nor the Government Code provides grounds for impeachment. The determination of whether particular misconduct warrants impeachment is left to the House as the investigatory body and the Senate as the court of impeachment. Historically, in both the American and English traditions, the wrongs justifying impeachment need not be statutory offenses or common law offenses, or even violations of any law.[20]

Other methods of removal from office have enumerated grounds. For example, judges may be removed by the Governor with the concurrence of two-thirds of each House for "wilful neglect of duty, incompetency, habitual drunkenness, oppression in office, or other reasonable cause."[21] But for impeachment purposes, these grounds are merely instructive, not decisive; this judgment is left to the legislature.

Investigation and Impeachment by the House of Representatives

[14] Tex. Const. Art. XV, §2.
[15] Tex. Const. Art. XV, §7.
[16] *Dorenfield v. State ex rel. Allred*, 123 T. 467, 73 S.W.2d 86-87 (1934).
[17] Tex. Government Code, §665.002.
[18] Tex. Jur. 3d, *State of Texas*, §7, pp. 386-388 (2003).
[19] *See* Tex. Const. Art. III, §11, providing for the removal of state legislators.
[20] *Ferguson v. Maddox*, 114 T. 85, 263 S.W. 888 (1924).
[21] Tex. Const. Art. XV, §8.

The role of the House of Representatives is similar to that of a grand jury in a criminal prosecution. The House investigates, hears witnesses, and determines whether there are grounds justifying impeachment (i.e., the presentment of charges to the Senate).[22]

The House of Representatives may conduct an impeachment proceeding at a regular or called session without further call or action.[23] Neither the House nor the Senate is limited by the scope of the Governor's call for a special session, because impeachment is a judicial, not legislative, function of the legislature.[24] If the House is conducting an impeachment proceeding when a session expires, the House may continue in session or adjourn to a later time to complete the proceeding.[25] If not already in session, the House may be called to convene for an impeachment proceeding by the Governor, by the Speaker of the House upon written petition of 50 or more members, or by a written proclamation signed by a majority of the members of the House.[26] A call to convene triggers certain notification requirements.[27] Once convened for the impeachment proceeding, members of the House are entitled to the same per diem and mileage rate as during a legislative session.[28]

To initiate the proceedings, the Speaker of the House charges a committee with investigating the matter in question, often at the urging of a member's resolution.[29] A private citizen may not initiate impeachment proceedings.[30] The committee, which may be a committee of the whole, conducts the investigation with the power to issue subpoenas and, arguably, to punish for contempt.[31] (For analysis of contempt authority, see the "Senate" section, *infra*.) With few formal rules for this phase, the committee chair largely controls the process. Often the approach has been to investigate, vote on whether grounds exist for impeachment, and then, if appropriate, draft the articles of impeachment and vote on whether to recommend them to the House as a whole.

The articles of impeachment should provide clear notice to the respondent of the alleged grounds for impeachment. Though similar to an indictment, the articles do not have to be written with the same technical precision.[32] If the committee or the House as a whole finds multiple grounds for impeachment, the articles should be itemized so that the Senate may vote on each.[33]

Once the committee has recommended articles of impeachment, the matter comes before the House as a whole, which may continue the investigation or proceed directly to a vote

[22] Tex. Att'y Gen. Op. No. 0-898 (1939).
[23] Tex. Government Code, §665.003(a).
[24] *Ferguson v. Maddox*, 114 T. 85, 263 S.W. 888 (1924), holding that Tex. Const. Art. III, §40, which limits the subject matter of legislation during special sessions to topics designated by the governor, does not apply to impeachment proceedings under Tex. Const. Art. XV.
[25] Tex. Government Code, §665.003(b).
[26] Tex. Government Code, §665.004(a).
[27] Tex. Government Code, §665.004(b) and (c).
[28] Tex. Government Code, §665.006.
[29] Tex. Att'y Gen. Op. No. 0-898 (1939).
[30] Id.
[31] Tex. Government Code, §665.005; Tex. Const. Art. III, §15.
[32] Tex. Att'y Gen. Op. No. 0-898 (1939).
[33] *See*, e.g., House Resolution 161, 64th Legislature, Regular Session (1975).

on whether to "prefer" the articles to the Senate. The constitution and statutes are silent regarding the requisite vote for preferring the articles, but the consensus is that a majority vote of those present is required.[34]

Here, again, the lack of formal rules affords considerable latitude to the Speaker of the House and parliamentarian. But any attempt by the speaker to thwart the will of the majority would seem to contravene the legislative intent behind Chapter 665, which authorizes a majority of representatives to convene the House for an impeachment proceeding even without the cooperation of the Governor or Speaker.[35] It is unlikely that the enacting legislature intended to allow impeachment proceedings to be initiated, but not completed, without the Speaker's assent.

If the House votes to prefer the articles of impeachment, the respondent is impeached and shall be suspended from the exercise of the duties of his or her office "during the pendency of such impeachment."[36] Although this contradicts the common law principle that the accused is innocent until proven guilty, the drafters of the first state constitution conceived of holding public office as a privilege, not a right.[37] The governor may make a provisional appointment to fill the vacancy in the meantime.[38]

With its duty as grand jury complete, the House of Representatives traditionally assumes the role of prosecutor in the Senate's trial on impeachment.[39] A House committee called a board of managers is appointed to conduct the prosecution.[40] The committee employs outside legal counsel, often including staff from the attorney general's office,[41] to assist in the prosecution.

The Senate as a Court of Impeachment

The Senate is the court of impeachment. It decides both the law and the facts.[42] It judges the sufficiency of the evidence on the matters in the articles of impeachment, assesses the credibility of witnesses, and renders final judgment on whether the grounds provided in the articles justify conviction.[43]

Convening the Senate

If the Senate is already in session when the House impeaches the respondent, the House simply presents the articles of impeachment to the Senate, which then sets a day and time to resolve into a court of impeachment.[44] As with the House, the Senate may conduct a trial on impeachment at a regular or called session regardless of the scope of the

[34] Vernon's Texas Constitution, interpretive commentary to Art. XV, §1, Volume III, 1993 (p. 5).
[35] Tex. Government Code, Section §665.004(a)(3).
[36] Tex. Const. Art. XV, §5.
[37] Vernon's Texas Constitution, interpretive commentary to Art. XV, §5, Volume III, 1993 (p. 9).
[38] Tex. Const. Art. XV, §5.
[39] *Ferguson v. Maddox*, 114 T. 85, 263 S.W. 890 (1924).
[40] *See*, e.g., Senate Journal, p. 563, 23rd Legislature, Regular Session (April 14, 1893).
[41] *See*, e.g., Record of Proceedings of the High Court of Impeachment, p. 47, 64th Legislature (Sept. 3, 1975).
[42] *Ferguson v. Maddox*, 114 T. 85, 263 S.W. 893 (1924).
[43] Tex. Att'y Gen. Op. No. 0-898 (1939).
[44] Tex. Government Code, §665.022(a).

Governor's call.[45] If a trial on impeachment is ongoing at the conclusion of the legislative session, the Senate may continue in session for impeachment purposes or adjourn until a set day and time.[46] On the other hand, if the Senate is not in session when the House impeaches the respondent, the House must deliver a certified copy of the articles to the Governor, the Lieutenant Governor, and each Senator, with various requirements for delivery and recordation.[47] Once the required deliveries are made, the Governor, or another official under one of several contingencies (discussed in the next paragraph) is responsible for issuing a written proclamation fixing a date for convening the Senate.[48] This date must be not later than the 20th day after the issuance of the proclamation, and the proclamation must be published in at least three daily newspapers of general circulation.[49] A copy must be sent to each member of the Senate and to the Lieutenant Governor.[50]

When the Senate is not already in session when the House impeaches, there is some question as to whether the Senate is required to convene for a trial on impeachment. Under Section 665.021, "[i]f the house prefers articles of impeachment against an individual, the Senate shall meet as a court of impeachment." But recall that Section 665.023(b) requires a proclamation to convene the Senate for the trial. The proclamation is to be signed and issued by the Governor; but if the Governor fails to act within 10 days from the date the articles were preferred by the House, the duty falls to the Lieutenant Governor; if the Lieutenant Governor fails to act within 15 days from preferment, the duty falls to the President Pro Tempore of the Senate; and, finally, if the President Pro Tempore fails to act within 20 days from preferment, the duty falls to a majority of the senators. Note, however, that none of the possible issuers are required to issue the proclamation; even the senators themselves, the final contingency, seem to have the choice of whether to sign the proclamation.

If no one issues the proclamation, the Senate will not convene. If the Senate does not convene, it is unclear whether the respondent remains suspended indefinitely or returns to office. An indefinite suspension would effectively remove the respondent from office without a trial on impeachment, which surely contravenes legislative intent and likely violates the United States Constitution's due process clause. But neither the Texas Constitution nor Chapter 665 addresses the timing of the respondent's return to office if no proclamation is issued. A return to office after some designated period of inaction is a reasonable outcome, but it is unclear who would have the authority to set such a time frame. Fortunately, this scenario is unlikely, as it would require the Governor, the Lieutenant Governor, the President Pro Tempore, and a majority of senators to refuse to issue the proclamation.

Finally, if no proclamation has been issued upon the convening of a *legislative* session, the House could force the Senate to consider the matter by passing new articles, which

[45] *Ferguson v. Maddox*, 114 T. 85, 263 S.W. 888 (1924).
[46] Tex. Government Code, §665.022(b).
[47] Tex. Government Code, §665.023(a).
[48] Tex. Government Code, §665.023(b)
[49] Tex. Government Code, §665.023(c).
[50] Tex. Government Code, §665.023(d).

would be presented directly to the Senate while in session, circumventing the proclamation required by Section 665.023.

Oath of Impartiality

The senators shall be under oath or affirmation to impartially conduct the trial.[51] In some cases, the Senate has adopted a resolution providing the text of the oath and naming a particular judge or justice to administer the oath,[52] but this does not appear to be necessary.[53] Typically, a justice of the Texas Supreme Court or of a civil court of appeals administers the oath to the presiding officer, and then, after a roll call, the presiding officer administers the same or a similar oath to each senator.[54] Any absent senators are sworn in upon arrival.[55] The presiding officer also administers oaths to court reporters, transcribers, and certain other personnel.[56]

There are no formal requirements for the text of the oath itself. The oath administered in the trial on impeachment of Judge O.P. Carrillo is typical: "You, and each of you, do solemnly swear or affirm that you will impartially try [the respondent] upon the impeachment charges submitted to you by the House of Representatives and a true verdict render according to the law, and the evidence, so help you God."[57]

Rules of Procedure

The Senate adopts rules of procedure for the trial on impeachment,[58] and there are no substantive requirements for those rules. In the trial on impeachment of Governor James Ferguson, a special committee to formulate the rules of procedure was appointed by simple resolution,[59] and the committee's recommended rules were adopted by the Senate in the form of a committee report.[60] The same approach was taken in the trials on impeachment of Commissioner W.L. McGaughey[61] and Judge J.B. Price.[62] In the trial on impeachment of Judge O.P. Carrillo, a resolution containing proposed rules was referred

[51] Tex. Const. Art. XV, §3.
[52] *See* Senate Resolution 4, Record of Proceedings of the High Court of Impeachment, pp. 9-10, 64th Legislature (1975), regarding O.P. Carrillo; *See also* Senate Journal, p. 582, 23rd Legislature, Regular Session (April 17, 1893), regarding W.L. McGaughey.
[53] *See* Senate Journal, p. 636, 23rd Legislature, Regular Session (April 24, 1893), in which previously absent senators were administered the oath by an associate justice of the civil court of appeals despite the initial resolution (p. 583, discussed *supra*) calling for administration by the chief justice or an associate justice of the Texas Supreme Court.
[54] *See* Record of Proceedings of the High Court of Impeachment, pp. 18-19, 64th Legislature (Sept. 3, 1975).
[55] *See* Senate Journal, p. 636, 23rd Legislature, Regular Session (April 24, 1893).
[56] *See* Record of Proceedings of the High Court of Impeachment, pp. 18-19, 64th Legislature (Sept. 3, 1975).
[57] Id.
[58] Tex. Government Code, §665.024.
[59] Senate Resolution 39, 35th Legislature, Second Called Session (1917).
[60] Senate Journal, pp. 71-73, 35th Legislature, Second Called Session (Aug. 27, 1917).
[61] Senate Journal, pp. 634-636, 23rd Legislature, Regular Session (April 24, 1893).
[62] Senate Journal, p. 10, 42nd Legislature, Second Called Session (Sept. 10, 1931).

to the Committee on Administration.[63] The committee amended and passed the resolution, and the Senate as a whole considered further amendments before adopting it.[64]

Past trials on impeachment have operated under fairly similar rules,[65] but these precedents are not binding. Typically, the rules grant floor privileges to the respondent and his or her counsel and to the prosecution and its counsel. They usually set forth the form of subpoenas to be issued by the Senate, as well as the timing and form requirements of the respondent's answers and demurrers. They prescribe the oath to be administered to witnesses. The respondent and the prosecution are usually authorized to invoke what is commonly called "The Rule," which concerns the sequestration of expected witnesses when other testimony or evidence is introduced. More broadly, the rules for a trial on impeachment typically incorporate the rules of procedure from the most recent legislative session to the extent they are not inconsistent with trial rules.

In past trials on impeachment, the rules have been particularly consistent regarding the disposition of motions and objections by the parties, including questions concerning the admissibility of evidence.[66] Upon a motion or incidental question, the presiding officer may either submit the question to a vote of the members of the Senate or, if no senator objects, rule on the matter unilaterally. In contrast, the respondent's exceptions and demurrers typically may be resolved only by a majority vote of all members present.[67] In most cases, the rules of procedure incorporate Texas' rules of evidence to the extent applicable.[68]

When meeting as a court of impeachment, the senators and lieutenant governor receive the same mileage rate and per diem as during a legislative session. If the Senate is not in session as a court of impeachment for more than four consecutive days because of recess or adjournment, however, the members and lieutenant governor are not entitled to a per diem for those days.[69] Because per diem and mileage are provided by statute, the rules of procedure need not address the subject.

Attendance of Senators

Under Section 665.026, each senator "*shall* be in attendance when the Senate is meeting as a court of impeachment" (emphasis added). Under Texas' Code Construction Act,

[63] Senate Resolution 4, Record of Proceedings of the High Court of Impeachment, pp. 10-17, 64th Legislature (1975).
[64] Record of Proceedings of the High Court of Impeachment, pp. 20-45, 64th Legislature (Sept. 3, 1975).
[65] *See*: For Carrillo, Record of Proceedings of the High Court of Impeachment, pp. 10-17, 20-25, 64th Legislature (Sept. 3, 1975); for Price, Senate Journal, pp. 18-23, 42nd Legislature, Second Called Session (Sept. 10, 1931); for Ferguson, Senate Journal, pp. 71-73, 35th Legislature, Second Called Session (Aug. 27, 1917); for McGaughey, Senate Journal, pp. 634-636, 23rd Legislature, Regular Session (April 24, 1893).
[66] *See* Rules 5-6 (Carrillo), Rule 14 (Price), Rule 14 (Ferguson), and Rule 5 (McGaughey), as seen in the citations listed in Footnote 57.
[67] *See* Rule 7 (Price), Rule 7 (Ferguson), and Rule 12 (McGaughey), as seen in the citations listed in Footnote 57.
[68] *See* Rule 14 (Price), Rule 14 (Ferguson), and Rule 5 (McGaughey), as seen in the citations listed in Footnote 57.
[69] Tex. Government Code, §665.028.

"shall" imposes a duty whereas "must" creates a condition precedent, or prerequisite.[70] By using "shall," Section 665.026 imposes a duty on each senator to attend all meetings of the court of impeachment, but full attendance is not a prerequisite to proceeding with the trial because "must" is not used. Instead, the standard quorum under the constitution--two-thirds of all senators--applies to trials on impeachment.[71] Provided a quorum is met, the senators' duty to attend is a firm recommendation, not an absolute requirement.

Because two-thirds of the members make a quorum and the concurrence of two-thirds of members *present* is necessary to convict,[72] a respondent could theoretically be convicted by just 14 of 31 senators. Given the senators' role as both judge and jury in trials on impeachment, this possibility may be troubling. In practice however, strong attendance is likely because a trial on impeachment is a rare, highly consequential, and closely watched political event. Moreover, the alternative--requiring all senators to be present for all proceedings of the trial on impeachment--would likely be problematic. An illness or prior obligation of a single senator would bring the proceedings to a halt. Further, such a requirement would allow a single senator to delay the trial by refusing to attend and remaining outside the jurisdiction of the enforcement procedures (discussed in the next paragraph). Because a respondent is suspended from office once the House of Representatives votes to impeach,[73] the suspension would continue indefinitely without trial in this scenario. To avoid such dilemmas, the legislature opted to stop short of requiring full attendance at trials on impeachment.

Although full attendance is not necessary, the senators' duty to attend is enforceable through the Senate's broad authority to compel the attendance of absent members. The constitution authorizes the Senate to "compel the attendance of absent members, in such manner and under such penalties" as it may provide, regardless of whether the two-thirds quorum is met.[74] The Senate may provide for the manner of compulsion in its rules, including by simply incorporating the relevant legislative rule of procedure.[75] As in legislative sessions, the jurisdiction to compel attendance ends at the Texas border.

Respondent's Rights

In Article XV, the word "trial" is used in its ordinary accepted meaning;[76] the respondent is guaranteed a full and fair trial on the charges against him or her.[77] As a matter of due process, the respondent must be sufficiently informed by the articles of impeachment of the nature of the charges. The respondent must be given an opportunity to appear before the court of impeachment and confront the witnesses and evidence against him or her.[78]

[70] Tex. Government Code, §311.016.
[71] Tex. Const. Art. III, §10.
[72] Tex. Const. Art. XV, §3.
[73] Tex. Const. Art. XV, §5.
[74] Tex. Const. Art. III, §10.
[75] *See* Rule 5.04, Senate Rules, 84th Legislature (adopted Jan. 21, 2015).
[76] *Dorenfield v. State ex rel. Allred*, 123 T. 467, 73 S.W.2d 83 (1934).
[77] *Matter of Laughlin*, 153 T. 183, 265 S.W.2d 805 (1954); appeal dismissed 75 S.Ct. 84, 348 U.S. 859, 99 L.Ed. 677.
[78] Tex. Att'y Gen. Op. No. 0-898 (1939).

Notifying the respondent of the charges and date of commencement of the trial is essential. In the trial on impeachment of Judge O.P. Carrillo, the Senate adopted a resolution instructing the secretary of the Senate to transmit to the respondent copies of the articles of impeachment, the governor's proclamation convening the Senate, and the resolution itself.[79] In the trial of Commissioner W.L. McGaughey, a writ of summons containing the text of the articles and the date of commencement was served to the respondent by the sergeant-at-arms.[80] When the respondent appears on the day of commencement, he or she files an answer to the articles or may request additional time to prepare an answer. If the respondent fails to appear, the trial proceeds as though the respondent entered a plea of not guilty.[81]

Once the trial begins, the customary rules of procedure should provide ample protection for the respondent, especially because they incorporate the established rules of evidence in Texas to the extent applicable. Proper notification, reasonable rules of procedure and evidence, and the oath of impartiality should alleviate any concerns over due process.

Powers of Senate

The Senate has broad authority to conduct a trial on impeachment like an ordinary trial. The Senate may employ third parties to execute the orders, mandates, and writs issued while meeting as a court of impeachment, and it may meet in closed session for purposes of deliberation. More broadly, the Senate is authorized to "exercise any other power necessary to carry out its duties under Article XV of the Texas Constitution."[82] Two specific powers warrant further discussion: the power to issue subpoenas and, especially, the power to punish for contempt.

The Senate may issue subpoenas to "compel the giving of testimony" and to "send for persons, papers, books, and other documents."[83] Oddly, the House of Representatives may only "send for persons or papers,"[84] not "books" or "other documents," but this seems to be a distinction without a difference. A subpoena may be issued at the request of the board of managers, the respondent, or a senator. The rules of procedure should prescribe the form of the subpoena and the method of service of process, which should be made in person or by certified or registered mail, if practicable, or alternatively by leaving a copy at the appropriate person's residence or place of business.[85] The sergeant-at-arms, as bailiff, oversees the service of the subpoena.

The Senate may punish for contempt when acting as a court of impeachment, but the source and scope of that authority are unclear. Legislative contempt is unique because the power to convict and punish is vested outside the judicial branch. When analyzing a

[79] Senate Resolution 1, Record of Proceedings of the High Court of Impeachment, pp. 3-4, 64th Legislature (1975).
[80] Senate Journal, p. 633, 23rd Legislature, Regular Session (April 24, 1893).
[81] *See*, e.g., Rule 13, Record of Proceedings of the High Court of Impeachment, p. 12, 64th Legislature (Sept. 3, 1975).
[82] Tex. Government Code, §665.027.
[83] Id.
[84] Tex. Government Code, §665.005.
[85] *See*, e.g., Record of Proceedings of the High Court of Impeachment, p. 16, 64th Legislature (Sept. 3, 1975).

legislature's power of contempt as a general matter, the fundamental question is whether that authority is inherent or must be specifically granted to the legislature by the relevant constitution. Many states have held that their legislatures inherently possess contempt power as necessary to carrying out their purposes, including conducting impeachment proceedings, but Texas courts rejected this view long ago. In Texas, adjudicating and punishing contempt is considered a judicial function, so under separation of powers principles[86] the legislature does not have this judicial power unless expressly granted by the constitution.[87] There are, arguably, two such grants of contempt power: Article III, Section 15, and Chapter 665, as authorized by Article XV, Section 7.

Article III, Section 15, is the more straightforward of the two. That provision grants each chamber of the legislature the power to imprison, for not more than 48 hours, any nonmember "for disrespectful or disorderly conduct in its presence, or for obstructing any of its proceedings."[88] This power may be exercised only by the House or Senate as a whole, not by a committee, though a committee may refer a matter to the whole body for judgment.[89] The 48-hour punishment may be imposed anew for each subsequent refusal to testify or other misconduct.[90]

The second authorization derives from Article XV, Section 7, which requires the legislature to "provide by law for the trial and removal from office of all officers of this State, the modes for which have not been provided in this Constitution." Pursuant to this, Sections 665.005 and 665.027 (hereafter "Chapter 665 grants") authorize each respective House to "punish for contempt to the same extent as a district court." This authority is subject to the same limitations as a district court's contempt authority,[91] which in Texas means that punishment for Chapter 665 contempt may not exceed a $500 fine, six months in county jail, or both.[92] By allowing the legislature to impose a punishment more severe than 48-hour imprisonment, the Chapter 665 grants purport to expand the legislature's power of contempt beyond the limits of Article III contempt.

But are the Chapter 665 grants a valid exception to the Texas Constitution's separation of powers framework? The Texas attorney general, in a nonbinding opinion, concluded that a court would likely find these grants to be valid,[93] but the courts have yet to weigh in. In laying out the three branches of state government, the constitution specifically states that "no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, *except in the instances herein expressly permitted*"[94] (emphasis added). The broad wording of Article XV, Section 7, can hardly be said to "expressly permit" the legislature to usurp judicial authority over contempt. That section does not even mention contempt; in contrast, the Article III grant (discussed *supra*) is unequivocal. Yet the constitutionality of the Chapter 665 grants depends

[86] *See* Tex. Const. Art. II, §1.
[87] *Ex Parte* Gray, 64 Tex. Crim. 311, 342; 144 S.W. 569, 585 (Tex. Crim. App., 1911).
[88] Tex. Const. Art. III, §15.
[89] *Ex parte Youngblood*, 94 Tex. Crim. 330, 338; 251 S.W. 509, 512 (1923).
[90] Id.
[91] Tex. Att'y Gen. Op. No. GA-1057 (2014).
[92] Tex. Government Code, §21.002(b).
[93] Tex. Att'y Gen. Op. No. GA-1057 (2014).
[94] Tex. Const. Art. II, §1.

entirely on such an interpretation of Section 7. Without express permission from the constitution, a statute simply cannot grant a judicial power to the legislature under Texas' separation of powers jurisprudence.

Further muddying the waters, Article XV, Section 7, applies only to impeachment proceedings against "officers of this State, the modes for which have not been provided in this Constitution." Because Section 2 of that article does provide the mode of removal for the Governor, Lieutenant Governor, Attorney General, et al., Section 7 does not apply to impeachment proceedings against those officials. So even if the Chapter 665 grants of contempt power are authorized by Section 7 that authorization extends only to impeachment proceedings against officials not listed in Section 2. Thus, reading Section 7 broadly enough to validate the Chapter 665 grants would result in a bizarre system in which the permissible punishment for contempt in an impeachment proceeding against, say, a regent of a state university is significantly more severe than in an impeachment proceeding against the governor. Surely the drafters of the Texas Constitution did not intend such an inconsistency, casting more doubt on the constitutionality of the Chapter 665 grants.

Assuming, despite the preceding analysis, that Chapter 665 contempt authority is a valid exception to the doctrine of separation of powers, the question of the interplay between the two sources of legislative contempt authority remains. This issue centers on the differing limitations on punishment for the two grants. Recall that Article III, Section 15, limits punishment for contempt to imprisonment for 48 hours, whereas Chapter 665 authorizes a $500 fine, six months in county jail, or both.[95] If both grants are available as alternatives in impeachment proceedings, the Chapter 665 grant renders the Article III grant practically meaningless because the maximum punishment for the former greatly exceeds that of the latter. Nonetheless, while the availability of a more severe punishment may appeal to legislators, it would be prudent to opt for the constitutionally sturdy Article III contempt.

Finally, note that the legislature by statute has created another offense, contempt of legislature, which is not expressly authorized by the Texas Constitution but is nonetheless valid because the judicial branch, not the legislature, must try and convict the perpetrator.[96] While the conduct giving rise to this offense relates to the legislature, the authority to try and convict the perpetrator remains, as usual, with the judicial branch, so this offense raises no separation of powers concerns. Though likely slower, and being out of the legislature's control, this is another tool available to each legislative body during impeachment proceedings.[97]

Final Judgment and Consequences of Conviction

Once the Senate convenes as a court of impeachment, the trial must continue until the matter is disposed of by final judgment on the articles of impeachment.[98] The

[95] Tex. Government Code, §21.002(b).
[96] Tex. Government Code, §301.026, et seq.
[97] Tex. Att'y Gen. Op. No. GA-1057 (2014).
[98] *Ferguson v. Maddox*, 114 T. 85, 263 S.W. 892 (1924).

prosecution bears the burden of proof, and a concurrence of two-thirds of senators present is required to convict.[99]

The standard of proof-whether it is preponderance of the evidence, clear and convincing evidence, or evidence beyond a reasonable doubt-is unclear. In the trial on impeachment of Judge O.P. Carrillo, the rules of procedure specified that the standard of proof was beyond a reasonable doubt.[100] The issue was not considered in any other trial on impeachment. For other methods of removal, the standard has been a preponderance of the evidence[101] or clear and convincing evidence.[102] Given the many differences between criminal proceedings and trials on impeachment, there is little reason to infer that the constitution or Government Code requires a standard of proof above a preponderance of the evidence.

The Senate is not required to vote on every article of impeachment, and any article that is not voted on is considered dismissed without a decision on the merits.[103] An article is sustained only if two-thirds of the present senators vote to convict the respondent on that article. If not, the article is not sustained, and if none of the articles are sustained, the respondent is acquitted. On the other hand, if any of the articles are sustained, the respondent is convicted. In the trial on impeachment of Judge O.P. Carrillo, the Senate declined to consider additional articles once it had voted to sustain one article, reasoning that doing so would be superfluous.[104] In contrast, in the trial on impeachment of Governor James Ferguson, the Senate voted on each article even after sustaining one of them.[105] A conviction under this approach may be more likely to withstand an appeal because the more articles the Senate sustains, the less likely the conviction will be overturned.

After voting on the punishment, the Senate has generally appointed a committee to draft a final judgment of either conviction or acquittal. The committee's draft, in the form of a committee report, may be amended on the Senate floor.[106] The final judgment should note which articles were sustained, if any, and by what vote, as well as the punishment for conviction, if appropriate. Presumably, the two-thirds requirement also applies to the vote to adopt the final judgment. A copy of the final judgment should be enrolled and certified by the presiding officer and secretary of the Senate, printed in the Senate Journal, and deposited in the office of the secretary of state.

Even if the respondent resigns from office before final judgment, the trial on impeachment may proceed and final judgment may still be rendered. While resignation

[99] Tex. Const. Art. XV, §3.
[100] Record of Proceedings of the High Court of Impeachment, pp. 13, 21, 64th Legislature (Sept. 3, 1975).
[101] *Matter of Carrillo*, 542 S.W.2d 105 (Sup.1976), regarding removal of district judge under Art. V, §1-a.
[102] *Matter of Laughlin*, 153 T. 191, 265 S.W.2d 809 (1954), regarding removal of district judge under Art. XV, §6; appeal dismissed 75 S.Ct. 84, 348 U.S. 859, 99 L.Ed. 677.
[103] *See* for Carrillo, Record of Proceedings of the High Court of Impeachment, pp. 1559-1560, 64th Legislature (Jan. 23, 1976); *See also Matter of Carillo*, 542 S.W.2d 105 (Sup. 1976); *See* for Price, Senate Journal, p. 691, 42nd Legislature, Second Called Session (Sept. 30, 1931).
[104] Record of Proceedings of the High Court of Impeachment, p. 1571, 64th Legislature (Jan. 23, 1976).
[105] Senate Journal, pp. 882-906, 35th Legislature, Third Called Session (Sept. 25, 1917).
[106] Senate Journal, p. 991, 35th Legislature, Third Called Session (Sept. 25, 1917).

makes the question of removal moot, the possibility of disqualification remains. In the trial on impeachment of Governor James Ferguson, the governor participated in the trial, but when the members voted to sustain the articles against him, he resigned before a final judgment could be drafted and adopted. The Senate proceeded anyway, and a court later held that the final judgment removing and disqualifying the governor was not void because of the resignation.[107]

Under Article XV, Section 4, the punishment for conviction "shall extend only to removal from office, and disqualification from holding any office of honor, trust or profit under this State." Removal and disqualification are the only permissible punishments for a conviction in a trial on impeachment; the Senate may not, for example, impose fines or imprisonment on the respondent, nor may it disqualify the respondent's spouse from holding office.[108]

The issue of whether the Senate may bifurcate the punishment for conviction has been the subject of much debate in past trials on impeachment. A conviction clearly results in removal from present office, but the language of Article XV, Section 4 is unclear as to whether the Senate may vote to remove the respondent but not disqualify him or her from future office. No statute addresses this matter. Most recently, in the trial on impeachment of Judge O.P. Carrillo, the Senate first voted to convict and remove and then voted on whether to disqualify, so the punishment was treated as bifurcated.[109] In the trial of Judge J.B. Price, however, a majority of members voted to sustain a point of order that the punishment was indivisible, not subject to bifurcation.[110] Finally, in the trial of Governor James Ferguson, the Senate voted to sustain the articles of impeachment before deciding whether the punishment was indivisible. In that trial, the committee appointed to draft the final judgment produced two reports, a majority report treating the punishment as indivisible and a minority report treating the punishment as bifurcated. The Senate adopted the majority report.[111] Taken together, these precedents suggest that the Senate has discretion over whether to disqualify a convicted respondent.

In addition to the Senate's punishment, a convicted respondent "shall also be subject to indictment, trial and punishment according to law."[112] Though not stated expressly, presumably an acquitted respondent would also remain subject to judgment by a traditional court. To some, this is an exception to the bar on double jeopardy;[113] to others, the trial on impeachment does not constitute a criminal proceeding, so no double jeopardy issue arises. In any case, this provision makes clear that a respondent's conviction or acquittal on impeachment does not insulate him or her from more conventional punishments for the alleged misconduct, like fines or imprisonment.[114]

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[107] *Ferguson v. Maddox*, 114 T. 85, 263 S.W. 893 (1924).
[108] *Dickson v. Strickland*, 114 Tex. 176, 265 S.W. 1024 (1924).
[109] Record of Proceedings of the High Court of Impeachment, pp. 1560-1564, 64th Legislature (Jan. 23, 1976).
[110] Senate Journal, p. 684, 42nd Legislature, Second Called Session (Sept. 30, 1931).
[111] Senate Journal, p. 995, 35th Legislature, Third Called Session (Sept. 25, 1917).
[112] Tex. Const. Art. XV, §4.
[113] Vernon's Texas Constitution, interpretive commentary to Art. XV, §4, Volume III, 1993 (p. 8).
[114] *See* Vernon's Texas Constitution, interpretive commentary to Art. XV, §4, Volume III, 1993 (p. 8).

The Governor may not pardon a conviction on impeachment.[115] Nor may the legislature modify or nullify the final judgment by subsequent act.[116] Once the final judgment is rendered, only the judicial branch may review or alter it.

Judicial Review

When acting as a court of impeachment, the Senate is a court of original, exclusive, and final jurisdiction.[117] The Senate is responsible for determining facts, assessing the credibility of witnesses, and judging the sufficiency of the charges and evidence. Within the scope of this constitutional authority, no court may question its judgment.[118] The Senate's determination that evidence was or was not sufficient for conviction is not subject to judicial review, nor are its findings of fact.

The result of a trial on impeachment is, however, subject to judicial review for adherence to broadly applicable constitutional principles, particularly the United States Constitution's due process clause and the Texas Constitution's due course of law clause.[119] The procedural requirements discussed throughout this article likely ensure that the trial easily meets these standards.

The result of a trial on impeachment is also subject to judicial review for lack of jurisdiction or for action exceeding constitutional power.[120] In other words, while the judiciary may not question the legislature's judgment, it may question the legislature's authority to render that judgment. For instance, a court could nullify an impeachment conviction for lack of jurisdiction if the Senate tried an official who was not subject to impeachment or who had not first been impeached by the House of Representatives. Likewise, a court could entertain a challenge for action in excess of constitutional authority if the Senate pronounced a judgment other than removal or disqualification.[121]

Unfortunately, principles of reviewability are easier to recite than apply, mostly because of the lack of precedent. The procedural rules of Chapter 665 are especially problematic. For instance, Section 665.023(c) requires the Senate to convene not later than the 20th day after the issuance of the proclamation calling for a trial on impeachment. If the Senate does not convene until the 21st day after the proclamation, could a court hear a convicted respondent's complaint that the Senate acted outside its jurisdiction or beyond its constitutional authority? On the one hand, the Texas Constitution requires the legislature to "provide by law" the mode of removal,[122] so conducting a trial on impeachment in violation of the statutes enacted pursuant to that provision would arguably violate not only the statute but also the constitution, strengthening the case for judicial review. On the other hand, many Chapter 665 provisions are simply codifications of matters typically handled by the Senate's rules of procedure, such as

[115] Tex. Const. Art. IV, §11(b).
[116] *Ferguson v. Wilcox*, 119 Tex. 280, 28 S.W.2d 526 (1930).
[117] *Ferguson v. Maddox*, 114 T. 85, 263 S.W. 894 (1924).
[118] Id., at 891.
[119] Tex. Att'y Gen. Op. No. GA-1057 (2014); *See* U.S. Const., Amend. XIV, §1; *See also* Tex. Const. Art. I, §19.
[120] *Ferguson v. Maddox*, 114 T. 85, 263 S.W. 893 (1924).
[121] Id.; *See Dickson v. Strickland*, 114 Tex. 176, 265 S.W. 1024 (1924).
[122] Tex. Const. Art. XV, §7.

attendance. Courts are deferential to legislative rules of procedure on separation of powers grounds, so perhaps procedural statutes for judicial functions would receive the same deference. Also unclear is whether and to what extent the materiality of the violation would be considered.

In sum, the scope of judicial review, like so many other aspects of the impeachment process, is unclear. There is too little precedent and only minimal constitutional and statutory instruction. Perhaps this vagueness is intentional, as it gives considerable latitude to the legislators conducting the impeachment proceeding. Regardless, in the face of uncertainty, the only safe course of action is strict adherence to precedent and compliance with the constitution and statutes.

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