



The Role of the House of Representatives in Judicial Impeachment Proceedings: Procedure, Practice, and Data

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Summary

Within the past two years, the House of Representatives has conducted impeachment investigations into the conduct of two sitting federal judges: Samuel B. Kent, district court judge for the Southern District of Texas, and G. Thomas Porteous, Jr., district court judge for the Eastern District of Louisiana. In both cases, the House Judiciary Committee recommended the adoption of articles of impeachment. On June 19, 2009, Judge Kent was impeached on charges that he sexually abused court employees and obstructed a federal investigation into sexual abuse allegations against him. On March 11, 2010, the House impeached Judge Porteous for, among other things, accepting kickbacks, soliciting favors, and falsifying bankruptcy documents. While no judges are currently under investigation by the House of Representatives, it is certain that the House will be called on in the future to fulfill this weighty constitutional responsibility.

This report examines the history, practice, and procedures of the House of Representatives in fulfilling its constitutional obligation to impeach judges the House deems to be guilty of high crimes and misdemeanors. This report also analyzes historical trends in House impeachment proceedings with empirical data collected by the authors. Generally, the structure of the report parallels the practice of impeachment in the House. The first section provides a brief overview of the impeachment process. The second discusses methods of initiating impeachment in the House. Special attention is given to changes in this process over time and the modern involvement of the judiciary in identifying judges for whom impeachment may be appropriate. The third section presents the procedures of the House investigating committee, as well as changes in the structure and activities of those types of committees over time. The fourth section explores floor procedures for consideration of impeachment resolutions reported by the investigating committee. The fifth and final section examines the House's responsibilities in a subsequent Senate impeachment trial.

Although the constitutional responsibilities in the House have not changed over time, House practices have. By increasing the involvement of the judiciary at the beginning of the impeachment process, the House has given some structure to what was once a highly idiosyncratic process. The establishment of the House Judiciary Committee as a standing committee in 1813 moved impeachment investigations to a permanent home. Finally, the involvement of outside counsel in assisting House managers in a Senate impeachment trial has grown over time, with counsel playing an increasing role in pre-trial proceedings and, in some case, the cross-examination of witnesses in the Senate trial.

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Introduction

In 2009 and 2010, the House of Representatives conducted impeachment investigations into the conduct of two sitting federal judges: Samuel B. Kent, district court judge for the Southern District of Texas, and G. Thomas Porteous, Jr., district court judge for the Eastern District of Louisiana. In both cases, the House Judiciary Committee recommended the adoption of articles of impeachment. On June 19, 2009, Judge Kent was impeached on charges that he sexually abused court employees and obstructed a federal investigation into sexual abuse allegations against him. On March 11, 2010, the House impeached Judge Porteous for, among other things, accepting kickbacks, soliciting favors, and falsifying bankruptcy documents. While no judges are currently under investigation by the House of Representatives, it is certain that the House will be called on in the future to fulfill this weighty constitutional responsibility.

This report examines the history, practice, and procedures of the House of Representatives in fulfilling its constitutional obligation to impeach judges the House deems to be guilty of high crimes and misdemeanors.¹ This report also analyzes historical trends in House impeachment proceedings using empirical data collected by the authors.² Generally, the structure of the report parallels the practice of impeachment in the House. The first section provides a brief overview of the impeachment process. The second discusses methods of initiating impeachment in the House. Special attention is given to changes in this process over time and the modern involvement of the judiciary in identifying judges for whom impeachment may be appropriate. The third section presents the procedures of the House investigating committee, as well as changes in the structure and activities of those types of committees over time. The fourth section explores floor procedures for consideration of impeachment resolutions reported by the investigating committee. The fifth and final section examines the House's responsibilities in a subsequent Senate impeachment trial.

An Overview of the Impeachment Process

While the judiciary was designed by the framers to be independent of political influence when making decisions, the methods of judicial appointment and removal were designed to be political, in the sense that the process is accountable to the will of the people.³ The President and the Senate determine who is placed on the bench. The House of Representatives and the Senate determine

¹ More generally speaking, the House of Representatives is given the “sole power of impeachment” of the President, Vice President, and “all civil officers of the United States,” a category in which judges may properly be included.

² Data were collected from secondary sources, such as Warren S. Grimes, “The Role of the U.S. House of Representatives in Proceedings to Impeach and Remove Federal Judges,” in *Research Papers of the National Commission on Judicial Discipline and Removal*, vol. 1 (Washington, DC: 1993) (hereinafter Grimes, *The Role of the House of Representatives in Proceedings to Impeach and Remove Federal Judges*) and Charles Gardner Geyh, *When Courts and Congress Collide: The Struggle for Control of America's Judicial System* (Ann Arbor, MI: University of Michigan Press, 2006) (hereinafter, Geyh, *When Courts and Congress Collide*), as well as a variety of primary sources, such as the *Congressional Record*, *Congressional Globe*, *House Journal*, and *Annals of Congress*.

³ This process is political in at least three respects: “(1) it is political in the originalist sense of the term, insofar as it is a remedy for “political” crimes against the body politic; (2) it is political in the sense of being a process subject to resolution by popular or political majorities, through their representatives in one of the political branches; and (3) it can be political in the sense of being openly partisan.” See Geyh, *When Courts and Congress Collide*, p. 116.

who is removed. As both the President and Congress are subject to the will of the voters, the appointment and removal process is ultimately a political one.

The fundamental concept of impeachment is simple. Judges appointed under Article III of the U.S. Constitution “hold their Offices during good Behaviour.”⁴ Throughout history, participants in the process have also looked to Article II, Section 4, of the U.S. Constitution for guidance. This section indicates that the President, Vice President, and “all civil Officers of the United States,” including federal judges, may be removed for “Treason, Bribery, or other high Crimes and Misdemeanors.” These standards are not precisely defined in the Constitution itself, and, as a result, it is Congress’s responsibility to determine whether the actions of a judge constitute an “impeachable offense.”

While impeachment has been deemed a civil remedial process, the impeachment process as delineated in the U.S. Constitution draws obvious parallels to the criminal process.⁵ The House of Representatives possesses the “sole power of impeachment.”⁶ This has been interpreted to mean that the House has the discretion to begin impeachment inquiries, conduct investigations into questions of improper behavior that could lead to impeachment, and recommend a course of action in regard to the individual at hand. The House’s decision of whether to impeach a judge is analogous to an indictment, in which the House acts as a grand jury and requires only a majority vote.

Once a judge has been impeached, the Senate is notified. The Senate acts similarly to a petit jury and judge by determining whether to convict the judge on the articles of impeachment transmitted by the House.⁷ Unlike the House, however, the conviction of a judge by the Senate requires a two-thirds vote on any article of impeachment. A convicted judge can receive a maximum judgment of removal from his judicial office and disqualification from holding “any Office of honor, Trust, or Profit under the United States.”⁸ In modern practice, conviction on any article of impeachment results only in removal from office. The Senate must vote separately, by majority vote, to disqualify the convicted judge from holding future office.

Neither impeachment by the House nor conviction by the Senate precludes criminal indictment or conviction on charges related to behavior for which the judge was impeached. Moreover, unlike criminal trials in which the behavior of the judge is subject to procedural rules and review by appellate courts, the judiciary has shown a great deal of deference to Congress with respect to the methods by which impeachment investigations are conducted and tried.⁹

⁴ District court judges located in the 50 states, the District of Columbia, and Puerto Rico; appellate judges located in the 12 geographic circuits and the Federal Circuit; Supreme Court Justices; and judges on the Court of International Trade are all considered to be Article III judges.

⁵ CRS Report 98-186, *Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice*, by (name redacted), p. 5.

⁶ U.S. Constitution, Art. I, Sec. 2, cl. 5.

⁷ Geyh, *When Courts and Congress Collide*, p. 116.

⁸ U.S. Constitution, Art. I, Sec. 3.

⁹ See, e.g., *Nixon v. United States*, 113 S. Ct. 732 (1993), in which the Supreme Court ruled that a challenge to the procedures by which the Senate conducted the impeachment trial of a judge were not reviewable by the courts. In this case, the Supreme Court noted especially that the Constitution gave the Senate the “sole” power to try impeachments. As a result, only that institution could determine its rules and procedures. For an extended discussion of judicial decisions related to impeachment, see CRS Report 98-186, *Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice*, by (name redacted), pp. 8-11.

Initiating an Impeachment Investigation

In modern practice, Members typically introduce a simple resolution proposing an impeachment investigation or containing articles of impeachment. Since 1980, resolutions that have successfully initiated impeachment investigations and resulted in recommendations to impeach have also coincided with certification from the Judicial Conference of the United States that a judge's behavior may warrant impeachment. Historically, Members have introduced charges contained in a memorial, petition, letter, resolution, or other communication from a private citizen or another governmental actor. On rare occasions, impeachment investigations have also been initiated when a Member presents a resolution of impeachment offered as a question of privileges of the House.¹⁰ In total, Members have attempted to initiate impeachment investigations 98 times across the 222-year history of the House.¹¹

Introducing A Simple Resolution

In modern practice, Members have attempted to initiate impeachment inquiries with simple resolutions. This method has been employed in 53 (54.1%) of the 98 attempts throughout the history of the House and in 20 (83.3%) of the 24 impeachment attempts since 1950.

To initiate an impeachment investigation in this manner, a Member would introduce a simple resolution in the same way in which he or she would introduce a bill—by dropping the completed text into the “hopper,” a wooden container that sits in the well of the House.¹² Any Member of the House may introduce an impeachment resolution, as may Delegates and the Resident Commissioner from Puerto Rico.

Historically, simple resolutions seeking to initiate impeachment proceedings have contained a variety of provisions. Resolutions may contain either articles of impeachment, which enumerate charges against the judge, or a general statement of impeachment, indicating only that the judge should be impeached for “high crimes and misdemeanors.” Resolutions used to initiate an impeachment investigation may call for an inquiry into the behavior of a judge without delineating charges against a judge. This type of resolution was used to initiate the investigations into the conduct of Judges G. Thomas Porteous, Jr., of the Eastern District of Louisiana, and Samuel B. Kent, of the Southern District of Texas, in the 110th and 111th Congresses, respectively.¹³

¹⁰ For more information on questions of privileges of the House, see CRS Report 98-411, *Questions of Privilege in the House*, by (name redacted).

¹¹ Details could not be found regarding attempts to impeach Andrew Wylie (1875) and David Humphreys (1875), who both served as judges on the Superior Court of the District of Columbia. While the attempts to initiate impeachment proceedings against these judges are included in the total number of impeachment attempts referenced in this report, the methods of initiating the impeachment proceedings, the committee structure, and any action taken by the House are unknown.

¹² U.S. Congress, House, *Constitution, Jefferson's Manual and the Rules of the House of Representatives*, prepared by John V. Sullivan, parliamentarian, 109th Cong., 2nd sess., 2007, H. Doc. 109-157 (Washington: GPO, 2007), p. Sec. 603. (Hereinafter referred to as *House Manual*.) See also Wm. Holmes Brown and Charles Johnson, *House Practice, A Guide to the Rules, Precedents, and Procedures of the House* (Washington: GPO, 2003), p. 598. (Hereinafter referred to as *House Practice*.)

¹³ 110th Cong., H.Res. 1448, “Authorizing and directing the Committee on the Judiciary to inquire whether the House should impeach G. Thomas Porteous, a judge of the United States District Court for the Eastern District of Louisiana,” (continued...)

The text of the resolution determines the House committee to which it will be referred. If, for example, the resolution calls for an investigation into whether sufficient evidence exists to merit impeachment, it is referred to the House Committee on Rules. The Committee on Rules may choose not to act on the resolution. If the Rules Committee decides to act, they may report to the full House a resolution calling on the Judiciary Committee to launch an impeachment investigation. If the House adopts the resolution, the inquiry would begin.¹⁴ This was the process the House followed in the 110th Congress to begin impeachment proceedings against Judge G. Thomas Porteous, Jr.¹⁵

If an introduced resolution directly calls for the impeachment of an individual, it is referred to the House Committee on the Judiciary. As with most measures referred to committee, the committee is not required to act on an impeachment resolution. The Judiciary Committee may consider such a resolution and may report it to the full House. If the House approves the resolution, then the Judiciary Committee would launch an impeachment inquiry. In 2006, a House Judiciary subcommittee began an investigation into the conduct of district court Judge Manuel Real, of the Central District of California, after a resolution calling for his impeachment was introduced in the House and referred to the committee.¹⁶

Resolutions to investigate a judge's conduct may also be reported by the House Judiciary Committee after a broader investigation into a related area. For example, during the 51st Congress, investigation into the conduct of Aleck Boorman, district court judge for the Western District of Louisiana, began after the House Judiciary Committee completed a more general investigation of the "maladministration of corrupt official conduct of any of the officers connected with the judicial department of government" and concluded that Judge Boorman's conduct warranted further investigation.¹⁷

Certification by the Judicial Conference of the United States

Since 1980, resolutions that have successfully initiated impeachment investigations and resulted in recommendations to impeach have also coincided with certification from the Judicial Conference of the United States that a judge's behavior may warrant impeachment. The Judicial Conduct and Disability Act of 1980, as amended by the Judicial Improvements Act of 2002, provides a framework by which the judiciary may receive complaints about judges and take

(...continued)

introduced on September 17, 2008; 111th Cong., H.Res. 424, "Authorizing and directing the Committee on the Judiciary to inquire whether the House should impeach Samuel B. Kent, a judge of the United States District Court for the Southern District of Texas," introduced on May 12, 2009.

¹⁴ *House Practice*, pp. 598-599.

¹⁵ 110th Cong., H.Res. 1448, "Authorizing and directing the Committee on the Judiciary to inquire whether the House should impeach G. Thomas Porteous, a judge of the United States District Court for the Eastern District of Louisiana," introduced September 17, 2008.

¹⁶ Notably, this was the process followed in the 93rd Congress to launch an impeachment inquiry into the activities of President Richard M. Nixon. U.S. Congress, House Committee on the Judiciary, *Statement of Information, Hearings Before the Committee on the Judiciary, Book IX - Part I, Watergate Special Prosecutors, Judiciary Committee's Impeachment Inquiry*, Hearings pursuant to H.Res. 803, a resolution authorizing an impeachment inquiry by the Committee on the Judiciary, 93rd Cong., 2nd sess., 1974 (Washington: GPO, 1974), pp. III, IV, V.

¹⁷ Asher C. Hinds, LL.D., *Hinds' Precedents of the House of Representatives of the United States, Including References to Provisions of the Constitution, the Laws, and Decisions of the United States Senate* (Washington: GPO, 1907), Vol. III, §2517, p. 1028. (Hereinafter referred to as *Hinds' Precedents*.)

appropriate disciplinary action.¹⁸ In this process, a complaint against a judge may be filed with the clerk of the court of appeals for the circuit. This complaint is then referred to the chief judge, who may dismiss the complaint if appropriate action may be taken without a formal investigation or the charges are plainly untrue.¹⁹ If a formal investigation is found to be appropriate, the complaint is investigated and findings are reported to the judicial council of the circuit.²⁰

The judicial council may choose to take disciplinary action against the judge, refer the matter to the Judicial Conference of the United States, or both.²¹ After receiving a complaint forwarded by the circuit judicial council, the Judicial Conference of the United States²² may, by majority vote, certify to the House of Representatives that the impeachment of a judge may be warranted.²³

Since the passage of the Judicial Conduct and Disability Act of 1980, Members of the House of Representatives have attempted to initiate impeachment investigations into the conduct of 14 judges. In six of these attempts, resolutions to impeach or investigate a judge were accompanied by certification from the Judicial Conference of the United States that impeachment may have been warranted. No judge against whom the Judicial Conference certified a complaint has remained in office. In four cases, those of Harry E. Claiborne, of the District of Nevada (1986), Alcee L. Hastings, of the Southern District of Florida (1987), Walter L. Nixon, of the Southern District of Mississippi (1988), and G. Thomas Porteous, Jr., of the Eastern District of Louisiana (2010), the judge in question was impeached by the House and removed by the Senate following certification by the Judicial Conference. In one case, that of Robert F. Collins, of the Eastern District of Louisiana (1993), the Judicial Conference transmitted a certification that impeachment may have been warranted, and the judge resigned before the House could initiate an investigation. In another case, that of Samuel B. Kent, of the Southern District of Texas, the judge resigned after being impeached by the House but before the Senate began hearing evidence in his trial.

Historic Methods of Initiating an Impeachment Investigation

Referral of a Memorial, Petition, Resolution, or Other Communication

An impeachment investigation may be initiated through the referral of charges made by a third party to an investigating committee. This method, most heavily utilized between 1825 and 1860,

¹⁸ For a more extensive discussion of disciplinary procedures, see CRS Report RS22084, *Judicial Discipline Process: An Overview*, by (name redacted).

¹⁹ 28 U.S.C. § 352(a)(2).

²⁰ The judicial council of each circuit, comprising the chief judge and an even number of circuit and district court judges, is charged with making “all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit.” 28 U.S.C. § 332.

²¹ Specifically, “action by judicial council may include (i) ordering that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint; (ii) censuring or reprimanding such judge by means of private communication; and (iii) censuring or reprimanding such judge by means of public announcement.” Additionally, the council may certify the presence of a judicial disability and request that the judge voluntarily retire. 28 U.S.C. § 354 (2)(A-B).

²² The Judicial Conference of the United States, led by the Chief Justice of the United States and comprising “the chief judge of each circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit,” is charged with evaluating and making recommendations for the improvement of the administration of justice across the federal judicial system. 28 U.S.C. § 331.

²³ 28 U.S.C. § 355.

was used in 34 (34.7%) of the 98 attempts made by Members to initiate an impeachment. The last instance of a Member using the referral of a memorial, petition, or other communication to initiate an impeachment investigation was in 1884.²⁴

The very first impeachment inquiry, that of the House's investigation of George Turner of the Northwest Territory in 1796, was initiated by the referral of third party charges against the judge to a committee. A Member may learn of charges or grievances against a judge through the memorial or petition of an individual or group of individuals,²⁵ a federal executive official,²⁶ or state or territorial legislative body.²⁷ Petitions, memorials, or charges made by a third party, transmitted to a Member of Congress, and referred to an investigating committee need not explicitly call for the impeachment of a sitting judge.²⁸

Rarely, a third party will attempt to jumpstart an impeachment investigation against a judge by sending evidence, petitions, memorials, or other communications to the chair of the House Judiciary Committee directly.²⁹ In the past 100 years, however, this has only happened on five occasions. Only one of these attempts successfully initiated an impeachment investigation against a judge. In this lone successful attempt, the U.S. Attorney General transmitted a report to the House Judiciary Committee in August 1913 to determine whether the House should make an impeachment investigation into the conduct of Judge Emory Speer (Southern District of Georgia). Ten days after the receipt of the Attorney General's report, Representative Henry Clayton of the House Judiciary Committee brought to the House floor a resolution authorizing the Judiciary Committee to investigate Judge Speer, as well as providing for the creation of a special subcommittee to assist in that investigation, to which the House agreed.

²⁴ In 1884, the memorial of four private citizens accused Judge James Locke, of the Southern District of Florida, of "sundry irregularities, crimes, and misdemeanors." After investigation, the House Judiciary Committee determined that "the said charges against the Hon. James W. Locke are not sustained and furnish no grounds for his impeachment." See U.S. Congress, House Committee on the Judiciary, *Impeachment of James W. Locke*, committee print, prepared by Hon. Nathaniel Hammond, 48th Cong., 1st sess., May 7, 1884, H. Rpt. 48-1442 (Washington: GPO, 1884), pp. 1, 5.

²⁵ For example, in 1908, an attorney practicing before Judge Lebbeus Wilfley of the American court in Shanghai, China, charged that the judge "made all the [American] lawyers, some of whom had been established in [the United States] for many years before going East, take an examination in the rudiments of law, and then arbitrarily disbarred nearly all of them" when first assigned to the court in Shanghai. See "Seeks to Impeach Our Judge in China: Lawyer from Shanghai Brings a Petition Charging Judge Wilfley with Improper Conduct," *New York Times*, November 10, 1907.

²⁶ In 1803, for example, the House of Representatives received a communication from the President of the United States, which included a "letter and affidavits exhibiting matter of complaint against John Pickering, district judge of New Hampshire, which is not within executive cognizance." This communication and accompanying documents were referred directly to an ad hoc investigative committee comprising five Members of the House of Representatives. *Hinds' Precedents*, Vol. III, §682; Geyh, *When Courts and Congress Collide*, pp. 125-131.

²⁷ In 1825, the territorial legislature of Florida passed a resolution requesting that the House of Representatives investigate the conduct of Judge Joseph Smith (Florida Territory). This resolution was presented in the House by the territorial delegate and referred to the House Judiciary Committee. *Hinds' Precedents*, Vol. III, §2490.

²⁸ For example, in the second impeachment attempt of Judge Thomas B. Monroe, of the District of Kentucky, Rep. Richard French presented the memorial of S.F.B. Morse, Alfred Vail, and Amos Kendal, who prayed for an investigation of the charges made by another individual against the judge in a previous Congress. The memorial did not expressly call for the impeachment of the judge.

²⁹ For example, in 1986, three judges in the U.S. Court of Appeals for the 11th Circuit handed down a particularly controversial ruling that the trial of three men convicted of highly publicized and gruesome murders was tainted by "sensationalist publicity." The ruling sparked a grassroots movement to impeach the three judges involved by sending letters and petitions to Rep. Robert W. Kastenmeier, then-chairman of the House Judiciary Committee's subcommittee on courts. Tracy Thompson, "11th Circuit Judges Targeted: Ruling Sparks Impeachment Drive," *National Law Journal*, vol. 8, no. 35 (May, 12, 1986), col. 1.

A Question of Privileges of the House

As a constitutional matter, a Member also may offer a resolution of impeachment on the floor as a question of privileges of the House. Questions of the privileges of the House are defined in House Rule IX as those affecting the rights of the House and the safety, dignity, and integrity of its proceedings. Across the history of the House, Members have risen on a question of privilege as the primary means of initiating the investigation nine times (9.2% of the total 98 attempts).

The rules of the House provide that if a Member wishes to begin an impeachment inquiry in this manner, they must give notice on the House floor of their intention to offer a question of privileges of the House. If the Speaker determines that the matter is a question of privilege, under most circumstances, action will be scheduled on it within two legislative days.³⁰ The question must be presented in the form of a simple resolution.

Of the nine attempts to begin an investigation with this method, the Member rising on a question of privilege offered a resolution of impeachment, *not* investigation. In the one instance in which a Member attempted to use questions of privilege of the House to present a memorial containing charges against a judge without also offering a resolution of impeachment, the Speaker ruled that such an action was not privileged. The Member was not permitted to read the memorial without also presenting a resolution of impeachment, and the memorial was eventually referred to the House Judiciary Committee.³¹

Once the resolution comes up (at the time determined by the Speaker), if the Speaker determines that it is a question of privileges of the House, it is debated under the hour rule with time equally divided and controlled by the proponent and an opponent, as designated by the Speaker. If an opponent moves to table the resolution before debate begins, then the House would immediately vote on the motion to table. If a majority of House Members vote for the motion, it would dispose of the resolution immediately and adversely without debate. Alternatively, rather than tabling the resolution, a Member might offer a motion to refer the resolution to a committee. If a simple majority agreed to the motion, the resolution would be referred to the committee named in the motion. That committee would not be required to act on the resolution. Finally, the House also might vote on the resolution itself.

The procedure was last used to initiate an impeachment investigation in 1935. In this instance, Representative Everett Dirksen used a question of privileges of the House and offered House Resolution 214, which contained articles of impeachment against Judge Samuel Alschuler, judge on the U.S. Court of Appeals for the Seventh Circuit.³²

³⁰ If the question is raised by the majority or minority leader, has been reported from a committee, or concerns the House's right to originate revenue bills, the question must be considered immediately.

³¹ See the discussion of the topics for which a Member may rise to a question of privilege in "Judge Samuel B. Axtell," *Congressional Record*, vol. 15, part 1 (February 4, 1884), pp. 871-873.

³² U.S. Congress, House, *Deschler's Precedents of the United States House of Representatives*, prepared by Lewis Deschler, parliamentarian of the House, 94th Cong., 2nd sess., 1977, H. Doc. 94-661 (Washington: GPO, 1977), Ch. 14, §7. Notably, a Member used the procedures involved in questions of privileges of the House to bring up an impeachment resolution against President George W. Bush in the 110th Congress. The House voted 251-168 on June 11, 2008, to refer the resolution to the Judiciary Committee. The committee did not act on it.

Grounds for Impeachment

As “civil officers of the United States,”³³ judges appointed under Article III of the U.S. Constitution may be removed for “Treason, Bribery, or other high Crimes and Misdemeanors.” Although treason is defined in the U.S. Constitution³⁴ and bribery was codified as a criminal offense by the First Congress,³⁵ “high crimes and Misdemeanors” are comparatively less well defined.

During the Constitutional Convention of 1787, the framers, at one point, tentatively agreed to limit the offenses for which an officer should be impeached to “treason” or “bribery.” George Mason, a delegate from Virginia, argued that “Treason as defined in the Constitution [would] not reach many great and dangerous offenses,” particularly “attempts to subvert the constitution.”³⁶ Mason and others suggested that additional impeachable offenses be defined variously as “maladministration,” “misfeasance,” “misconduct,” “malpractice or neglect of duty,” “mal- and corrupt conduct,” and “incapacity, negligence, or perfidy.”³⁷

James Madison, also a delegate from Virginia and a future President of the United States, argued, however, that such language was too broad. The inclusion of such a term would be “equivalent to tenure during the pleasure of the Senate.”³⁸ Some argue that the rejection of such broad definitions of impeachment suggest the Framers viewed an impeachable offense as an act that must be “substantively more than a job badly done.”³⁹

If, to be impeachable, an offense must be more than poor performance in office or a disagreement with the dominant political regime, must an offense be criminally indictable to be considered impeachable? Notably, in England, the phrase “high crimes” was used to describe political offenses against the state.⁴⁰ In this sense, “political” did not mean “partisan” but rather as Alexander Hamilton argued, “those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of public trust ... [and] relate chiefly to injuries done immediately to society itself.”⁴¹ The addition of the word “misdemeanors” suggests that civil officers may also be charged with “minor breaches of ethical conduct, misuse of power, and

³³ U.S. Constitution, Art. II, Sec. 4. For a discussion of officials that fall within the category of “Civil Officers,” see CRS Report 98-186, *Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice*, by (name redacted).

³⁴ U.S. Constitution, Art. III, Sec. 3, cl. 1.

³⁵ For a broader discussion of both constitutional, common law, and statutory definitions of treason and bribery, see CRS Report 98-186, *Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice*, by (name redacted).

³⁶ Emily Field Van Tassel and Paul Finkleman, *Impeachable Offenses: A Documentary History from 1787 to the Present* (Washington, DC: CQ Press, 1999), p. 5. (Hereinafter, Van Tassel and Finkleman, *Impeachable Offenses*.)

³⁷ Van Tassel and Finkleman, *Impeachable Offenses*, p. 18.

³⁸ Van Tassel and Finkleman, *Impeachable Offenses*, p. 5.

³⁹ Van Tassel and Finkleman, *Impeachable Offenses*, p. 5. Peter Charles Hoffer and N.E.H. Hull, suggest however, that the 8-3 vote taken by the framers to include the phrase “other high Crimes and Misdemeanors” instead of “maladministration” suggested that “the delegates understood that the new terms included maladministration ... rather than excluding all but those offenses cognizable in regular courts of law.” Peter Charles Hoffer and N.E.H. Hull, *Impeachment in America, 1635-1805* (New Haven, CT: Yale University Press, 1984), pp.101-102. (Hereinafter Hoffer and Hull, *Impeachment in America*.)

⁴⁰ Geyh, *When Courts and Congress Collide*, p. 114.

⁴¹ Alexander Hamilton, *Federalist No. 65*.

neglect of duty, as well as more prolonged, egregious or financially rapacious misconduct.”⁴² This interpretation suggests that, in the eyes of the framers, a civil officer may be properly impeached for non-indictable conduct that violates the public trust.

The history of impeachments in the United States reflects the view that non-indictable conduct may constitute an impeachable offense. Since the first impeachment investigation began in 1796, charges levied against judges run the gamut from mental instability and intoxication on the bench⁴³ to accepting a position as a chief arbiter in disputes of baseball associations.⁴⁴ Offenses for which judges and Justices have been investigated can be categorized into 11 types of offenses:⁴⁵

- bench demeanor, including drunkenness;
- abuse of judicial power;
- extra-judicial misbehavior;
- favoritism or animus;
- nonperformance or incompetence;
- misuse of funds;
- accepting or soliciting bribes or favors;
- abuse of administrative power;
- misuse of office for financial advantage;
- other misbehavior, including general misconduct, perjury/false statements, moonlighting, disloyalty, insanity, and residency; and
- unknown causes.⁴⁶

Notably, the House has frequently investigated a single judge for multiple types of offenses. In 52 (56.5%) of the 92 attempted investigations, judges were accused of at least two types of offenses. For example, Judge Samuel Kent was impeached by the House in June 2009 on four articles of impeachment that can be categorized into two general offenses: abuse of administrative power,

⁴² Hoffer and Hull, *Impeachment in America*, p. 102.

⁴³ Judge John Pickering of the District of New Hampshire was eventually impeached and convicted, in part, for his intemperate habits, although some scholars also attribute his impeachment to mental instability. Judge Pickering was also accused of abuse of his judicial power in a case involving the seizure of a ship and its goods, in which he allegedly acted against the interests of the United States. Geyh, *When Court and Congress Collide*, p. 125; *Hinds' Precedents*, Vol. III, §682.

⁴⁴ Judge Kenesaw Mountain Landis, against whom other baseball-related charges were made, became the first commissioner of organized baseball after resigning from his judgeship in the Northern District of Illinois in 1922.

⁴⁵ Geyh, *When Courts and Congress Collide*, pp. 118-119.

⁴⁶ In three cases, charges for the attempted initiation of impeachment proceedings against a judge are unknown. Two instances involve attempts to initiate impeachment proceedings against D.C. Superior Court judges David Humphreys and Andrew Wylie in 1875 or 1876. As indicated in footnote 11, details regarding impeachment proceedings against these two judges could not be found. In the third instance, the House authorized an investigation into the official conduct of Judge William Stephens, of the District of Georgia, in 1818 by adding his name to an existing resolution investigating Judges William Van Ness and Mathias Tallmadge. The reasons for the investigation of Judge Stephens were not included in the House Journal (15th Cong., 1st sess., p. 447).

which occurred in the course of sexual abuse of court employees, and perjury/false statements, which led to a plea bargain on a charge of obstruction of justice in a federal criminal court.⁴⁷

In 28 (30.4%) of the 92 attempted impeachment inquiries, judges were accused of three or more types of offenses. G. Thomas Porteous, Jr., impeached by the House and removed by the Senate in 2010, was charged with three types of offenses. The first, accepting or soliciting bribes or favors, stemmed from Judge Porteous's "corrupt relationship" with a bail bondsman and his sister, through which the judge "solicited and accepted numerous things of value, including means, trips, home repairs, and car repairs."⁴⁸ The second, misusing his office for financial advantage, related to a relationship with the law firm of Amato & Creely in which he appointed law partner Robert Creely to be the curator in over 200 cases and, in return, received a kickback from the fees associated with the curatorships.⁴⁹ Finally, the third type of offense, false statements, resulted from Judge Porteous's intentional falsification of his own bankruptcy documents, among other bankruptcy-related offenses, as well as false statements made to the White House, the Federal Bureau of Investigation, and Senate Judiciary Committee during the nomination and confirmation process.⁵⁰

⁴⁷ U.S. Congress, House Committee on the Judiciary, *Impeachment of Judge Samuel B. Kent*, committee print, prepared by Hon. John Conyers, 111th Cong., 1st sess., June 17, 2009, H.Rept. 111-159 (Washington: GPO, 2010), p. 17. (Court employee and sexual abuse survivor Donna Wilkinson discusses Judge Kent's views of his own power.) (Hereinafter *Kent Impeachment*.)

⁴⁸ U.S. Congress, House Committee on the Judiciary, *Impeachment of Judge G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana*, committee print, prepared by Hon. John Conyers, 111th Cong., 2nd sess., March 4, 2010, H.Rept. 111-427 (Washington: GPO, 2010), p. 3. (Hereinafter *Porteous Impeachment*.)

⁴⁹ Ibid.

⁵⁰ *Porteous Impeachment*, pp. 3-4.

Figure 1. Types of Offenses Allegedly Committed by Judges
1796-2010



Source: Geyh, *When Courts and Congress Collide*, pp. 118-124; Library of Congress's *American Memory Project: A Century of Law Making for a New Nation*, *U.S. Congressional Documents and Debates, 1774-1875*, <http://lcweb2.loc.gov/ammem/amlaw/lawhome.html>; *Hinds' Precedents*, vol. III, §§2486-2520; *Cannon's Precedents*, vol. VI, §§525-542; *Deschler's Precedents*, Ch. 14, §§14-18.

As displayed in **Figure 1**, by far, the most common charge levied against judges was *abuse of judicial power*. Judges were accused of this offence in 42 (45.6%) of the 92 attempts to initiate an impeachment investigation. Behavior falling into this category stemmed from judges' decisions on the bench. For example, John Pickering, the first federal judge impeached by the House, was charged with abuse of his judicial power in relation to the seizure of a ship called the *Eliza*, in which he was accused of releasing the contents of the ship back to the owner contrary to the interests of the United States.⁵¹ In another instance, John C. Watrous, judge in the U.S. District Court for Texas, was investigated on four separate occasions between 1852 and 1861 due, in part, to his reported abuse of judicial power in the form of "judicial oppression and tyranny in connection with [a contempt order and] irregularities in summonizing jurors."⁵²

Abuse of administrative power was the next most common type of charge, appearing in 23 (24.5%) of the 92 attempted impeachment investigations. Charges of abuse of administrative power may take the form of an improper appointment of court officers (as it did in the investigation of Albert W. Johnson (Middle District of Pennsylvania) in 1944 or corrupt appointment of receivers in bankruptcy cases (as in the investigation of Joseph Molyneaux, District of Minnesota) in 1934. Most recently, as discussed above, Judge Samuel B. Kent was charged with abuse of his administrative power in connection with his sexual assault of court employees.

Committee Action

Structure of Investigating Committees

Of the 92 attempts made by Members to initiate an impeachment investigation into the conduct of a federal judge, 75 (81.5%) were successful. Historically, the referral of third-party communications, impeachment resolutions presented on a question of privilege, and simple resolutions proposing impeachment or authorizing an impeachment inquiry have been investigated by the House Judiciary Committee or a subcommittee thereof.

Before the creation of the House Judiciary Committee in 1813, impeachment inquiries were directed to ad hoc committees—a practice that continued until 1818.⁵³ Ten (11.5%) of the 75 impeachment investigations initiated by the House were conducted by these types of committees. Ad hoc committees were chosen from the membership of the House at large and usually consisted of five to seven Members. Often, though not always, the Member presenting the charges against the judge also served on the committee, occasionally as the committee's chair. Once the investigation was completed, the ad hoc committee was dissolved.

⁵¹ *Hinds' Precedents*, Vol. III, §2328, pp. 690-691.

⁵² Wallace Hawkins, *The Case of John C. Watrous, United States Judge for Texas: A Political Story of High Crimes and Misdemeanors*, (Dallas, TX: University Press, 1950), p. 37. (Hereinafter Hawkins, *The Case of John C. Watrous*.)

⁵³ There was one additional instance in which the House charged an ad hoc committee with an impeachment investigation following the designation of the Judiciary Committee as a standing committee in 1813. In 1839, Judge Phillip K. Lawrence, of the Eastern District of Louisiana, was investigated by an ad hoc committee on charges relating to his bench demeanor, nonperformance of or incompetence in his official duties, and abuse of his administrative power. His investigation was the last to be referred to such a committee.

Under modern practice, the House Judiciary Committee is charged with investigating any impeachment questions. The committee chair could undertake such an activity either on his or her own, in response to an introduced and referred resolution, or in response to a vote of the full House. A special subcommittee also may be charged by the House with conducting the investigation for the full committee in full or in part.

In earlier impeachment investigations, subcommittees and the available number of permanent staff were relatively small. Often these subcommittees consisted of two or three Members who would travel to destinations such as Shreveport, LA, or Scranton, PA, to conduct the committee's investigation. This practice was more common in the time of bad roads and slow travel, which made both the interviewing of witness and review of pertinent documents difficult for a committee based in Washington, DC. Such subcommittees were especially useful also if the full committee was having difficulty maintaining quorum.

Modern subcommittees charged with conducting an impeachment investigation are generally much larger. For example, the House Impeachment Task Force, the special subcommittee of the Judiciary Committee charged with investigating the Kent and Porteous impeachments, consisted of 12 Members (six Democrats and six Republicans). Unlike the smaller subcommittees utilized in earlier impeachment inquiries, this task force conducted the entirety of the investigation for the full committee.

Both smaller and larger special subcommittees were routinely granted the power of the full committee in their investigation. These powers included, but were not limited to, the power to subpoena persons or papers, administer oaths and take testimony, hold hearings in Washington, DC, and other places, employ clerical and administrative help, sit when Congress is not in session, and obtain additional counsel.

Investigating the Charges

House committees are authorized to conduct investigations into virtually any matter under the committee's jurisdiction. House rules, particularly House Rule XI, specify how committees may conduct these investigations. An impeachment inquiry would generally be required to follow those rules. If a subcommittee were to run the investigation, it would be required to follow both House rules and any additional rules the full committee has agreed to.⁵⁴

The rules govern such things as how much notice must be given to committee members about when hearings and other activities would take place, the rights of witnesses at hearings, and how long Members may have to question witnesses. If, however, the House has authorized the impeachment inquiry by adopting a resolution, that resolution may also include specific procedures the committee must use in conducting its inquiry. So, for example, while Rule XI typically requires that two members of a committee be present for the taking of depositions, the House has waived this portion of the rule in at least two instances during impeachment investigations, allowing a counsel for the committee to conduct the deposition of witnesses without Members present.⁵⁵

⁵⁴ *House Manual*, sec. 787, House Rule XI, clause 1.

⁵⁵ *House Practice*, p. 599.

While the investigating committee and subcommittee are subject to House rules and any specific rules included in the authorizing resolution, impeachment investigations are not governed by a precise set of constitutional procedures or requirements.⁵⁶ Across the history of the House, impeachment investigations have taken a variety of forms. In some cases, the committee conducted *ex parte* investigations, meaning that the accused judge did not participate in the investigation. In some cases, these *ex parte* investigations took the form of simply reviewing the documents or materials submitted with a memorial against a judge.⁵⁷ In other cases, the committee also interviewed witnesses,⁵⁸ occasionally traveling to the judge's district to conduct their investigation.⁵⁹ Over time, as one scholar notes, "committee investigators began permitting the accused to appear, explain, present witnesses, and cross-examine." This practice gradually evolved into the "right to be represented by counsel during the House committee hearings."⁶⁰

Since 1980, the House Judiciary Committee or a subcommittee thereof has conducted an impeachment investigation into the conduct of six judges and reported articles of impeachment for five.⁶¹ In four of the five cases in which the committee reported articles of impeachment, the accused judge had either been subject to a federal criminal trial or pled guilty to a federal criminal charge prior to the initiation of impeachment proceedings in the House.⁶² In the 1980s, district court judges Harry Claiborne, of the District of Nevada, and Walter Nixon, of the Southern District of Mississippi, were convicted of criminal offenses in federal court. Claiborne was convicted on two counts of tax evasion; Nixon was found guilty of making false statements to a grand jury. District court judge Alcee Hastings, of the Southern District of Florida, was tried for conspiracy to obtain a \$150,000 bribe and was acquitted. In 2009, district court judge Samuel B. Kent, of the Southern District of Texas, pled guilty to obstruction of justice charges after lying to federal investigators during an inquiry into allegations that he sexually abused his employees. Most recently, district court judge G. Thomas Porteous, Jr., against whom the House Judiciary Committee reported articles of impeachment on March 4, 2010, was investigated by the

⁵⁶ Grimes, *The Role of the United States House of Representatives in Proceedings to Impeach and Remove Federal Judges*, pp. 52-53.

⁵⁷ This occurred during in the case of the House's investigation of Judge Watrous in 1856. *Hinds' Precedents*, Vol. III, §2496, p. 995.

⁵⁸ In the case of Judge West Humphries, accused of disloyalty by joining the Confederate cause, the committee investigated four witnesses, including a Member of the House from the judge's home state of Tennessee. *Hinds' Precedents*, Vol. III, §2386, pp. 805-806.

⁵⁹ For example, in the 1940s, much of the investigation into the conduct of Judge Albert Johnson, district court judge for the Middle District of Pennsylvania, was conducted in Scranton, Pennsylvania, where the judge held court. For a discussion of the investigation, see *Deschler's Precedents*, Ch. 14, §10; Editorial, "Scandals on the Bench," *Washington Post*, July 12, 1945, p. 6; "Pay Roll Office Gets Ex-Judge's Pension Forfeit: Report on Impeachment Inquiry Prepared," *Chicago Daily Tribune*, July 17, 1945, p. 9; "Not to Impeach Jurists: House Group Won't Press Action Against Watson or Johnson," *New York Times*, September 20, 1945, p. 16.

⁶⁰ Grimes, *The Role of the United States House of Representatives in Proceedings to Impeach and Remove Federal Judges*, p. 52.

⁶¹ No resolution was reported by the Judiciary committee following an investigation into the conduct of Judge Manuel Real, district court judge for the Central District of California. This inquiry was initiated on July 17, 2006, with the introduction of H.Res. 916 (109th Congress) in the House after a complaint was filed against Judge Real and investigated by the chief judge of the circuit. The House Judiciary Subcommittee on the Courts, the Internet, and Intellectual Property held hearings on September 21, 2006, but a report was never submitted to the full House.

⁶² "Claiborne Impeached, Stripped of Judgeship," *CQ Almanac* (Washington, DC: CQ Press, 1986), p. 75; "Two U.S. Judges Removed From Bench," *CQ Almanac* (Washington, DC: CQ Press, 1989), pp. 229-235; Stewart M. Powell, "Kent starts his prison sentence: Federal judge reports in Massachusetts while still refusing to resign," *Houston Chronicle*, June 15, 2009, <http://www.webcitation.org/5hYwoxtwc>, accessed on March 6, 2010.

Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) prior to the initiation of the House's impeachment inquiry, but failed to be indicted.⁶³

In each of these five cases, the committee utilized evidence collected by executive agencies, such as the DOJ or the FBI, or compiled throughout the course of criminal proceedings, in its investigation.⁶⁴ Impeachment charges against each of these judges were informed by previously collected evidence. Throughout the course of each investigation, the committee took the testimony of witnesses, whom the judge's attorney was invited to examine.⁶⁵ Witnesses included individuals implicated in the misbehavior of the accused judge,⁶⁶ victims of the judge's criminal conduct,⁶⁷ and experts on judicial ethics.⁶⁸

Reporting to the Full House

Committee Procedure

At the conclusion of the committee's investigation, if a majority determines that an impeachment should proceed, the committee will hold a business meeting, referred to as a markup, for Members to review the language proposed to be reported to the full House. The committee typically will consider a draft impeachment resolution with accompanying articles of impeachment, or the committee may consider a resolution introduced and referred to the committee with articles of impeachment.⁶⁹ In the 111th Congress, for example, the chair of the Judiciary Committee introduced a simple resolution (H.Res. 520) to impeach Judge Samuel B. Kent on June 9, 2009, and it was referred to the Judiciary Committee. That committee held a markup of the resolution and ordered it reported to the full House on June 10.⁷⁰

⁶³ *Porteous Impeachment*, pp. 5-7.

⁶⁴ Grimes, *The Role of the United States House of Representatives In Proceedings to Impeach and Remove Federal Judges*, p. 54; *Porteous Impeachment*, pp. 7-11.

⁶⁵ Grimes, *The Role of the United States House of Representatives In Proceedings to Impeach and Remove Federal Judges*, p. 54; *Kent Impeachment*, p. 13; *Porteous Impeachment*, pp. 11-12.

⁶⁶ For example, at one hearing during the Porteous investigation, the committee took the testimony of Robert Creely, an attorney from whom Judge Porteous requested cash gifts during his tenure as a state judge. Judge Porteous also allegedly concocted a curatorship kickback scheme, in which he would assign receiverships to Creely's law firm in return for a portion of the fees. *Porteous Impeachment*, pp. 26-30.

⁶⁷ During the June 3, 2009, hearing on the possible impeachment of Judge Kent, the committee heard testimony by Cathy McBroom and Donna Wilkerson, court employees whom the judge sexually assaulted. U.S. Congress, House of Representatives Committee on the Judiciary, "Hearing to Consider the Possible Impeachment of United States District Judge Samuel Kent of the Southern District of Texas," Committee Hearing, June 3, 2009, <http://judiciary.house.gov/hearings/pdf/transcript090603.pdf>, accessed on March 6, 2010.

⁶⁸ At the June 3, 2009, hearing to consider the impeachment of Judge Kent, Professor Arthur Hellman, an expert on judicial ethics testified as to whether Judge Kent's sexual assault of his employees was an impeachable offense. *Kent Impeachment*, p. 18.

⁶⁹ *Deschler's Precedents*, Ch. 14, §7.1.

⁷⁰ U.S. Congress, House of Representatives Committee on the Judiciary, "Markup of H.R. 2765, to Amend Title 28, United States Code, to Prohibit Recognition and Enforcement of Foreign Defamation Judgments and Certain Foreign Judgments Against Providers of Interactive Computer Services; and H.Res. 520, Resolution Impeaching Samuel B. Kent, Judge of the United States District Court for the Southern District of Texas, for High Crimes and Misdemeanors," Committee Markup Transcript, June 10, 2009. <http://judiciary.house.gov/hearings/transcripts/transcript090610.pdf>. Accessed on March 4, 2010.

Unless otherwise agreed to by the committee or specified in the resolution authorizing the impeachment investigations, the committee would follow regular House and committee rules during the conduct of the markup. So, for example, Members would be recognized for debate and amendment purposes under the five-minute rule (allowing each Member to speak for up to five minutes when recognized).⁷¹

A simple majority is required for the committee to report the resolution to the full House. As with all other votes to report measures or matters to the full House, a majority of committee members must be physically present to vote in order for the resolution to be reported. The committee could favorably report the resolution, indicating to the House that committee members recommend the House adopt the articles of impeachment. This action was taken by the committee in the case of the impeachment of Judge G. Thomas Porteous, Jr., on March 4, 2010.⁷²

The committee has also reported resolutions that impeachment was not warranted.⁷³ In some cases, the committee's investigation cleared the judge of all charges.⁷⁴ In other cases, the committee found that the judge may have acted inappropriately or irresponsibly, but the judge's conduct was ultimately determined to fall short of the standard for impeachment.⁷⁵ Additionally, the investigating committee may not recommend impeachment if the judge has resigned during the course of the investigation.⁷⁶

Length of Committee Investigations

Of those instances in which the committee has reported the findings of its investigation, the length of the investigation has varied widely. **Table 1** provides summary statistics for the length of impeachment investigations, measured from the first attempt to initiate charges in the House to the date the investigating committee reported their findings, across the history of the House. The first column indicates the period of time during which the length of committee investigations are measured; the next column indicates the number of investigations conducted during that period. The fourth and fifth columns list the mean and median number of days of committee investigations during each period. The mean is the sum of the days elapsed from the date the issue was first raised to the date the committee reported their findings for each investigation, divided by the number of investigations. An alternate indicator of investigation length, the median, is calculated as the number falling in exactly the middle of a list of investigation lengths, ordered from shortest to longest.⁷⁷ Thus, exactly half of the investigations fall below the median and half fall above. Both summary statistics are presented to provide a fuller understanding of the length of committee investigations.⁷⁸

⁷¹ *Deschler's Precedents*, Ch. 14, §7.

⁷² *Porteous Impeachment*.

⁷³ *Deschler's Precedents*, Ch. 14, §7.10.

⁷⁴ *Hinds' Precedents*, Vol. III, §§2319-2341.

⁷⁵ *Hinds' Precedents*, Vol. III, §2489; *Annals of Congress*, 15th Cong., 1st sess., vol. 31, pp. 711-712.

⁷⁶ This has happened in seven (10.6%) of the 66 instances in which the investigating committee has submitted a report. Clarence Cannon, *Cannon's Precedents of the House of Representatives of the United States* (Washington: GPO, 1936), Vol. VI, §527. (Hereinafter *Cannon's Precedents*.)

⁷⁷ If the number of nominees is even, then the median is the average of days elapsed of the two nominees in the middle of the list.

⁷⁸ For most readers, the mean is probably the most familiar form of statistical average. However, the mean may not always accurately reflect the length of investigations for the majority of investigations that occurred if there are (continued...)

Table 1. Length of Committee Impeachment Investigations

(In Days, 1796-2010)

Years	Number	Mean	Median	Minimum	Maximum
1796-1900	45	144.0	95	7	449
1901-2010	23	301.8	286	26	997
1796-2010	67	202.9	140	7	997

Source: Library of Congress's *American Memory Project: A Century of Law Making for a New Nation, U.S. Congressional Documents and Debates, 1774-1875*, <http://lcweb2.loc.gov/ammem/amlaw/lawhome.html>; *Hinds' Precedents*, vol. III, §§2486-2520; *Cannon's Precedents*, vol. VI, §§525-542; *Deschler's Precedents*, Ch. 14, §§14-18; various sections of the *Congressional Record*; LIS bill searches.

From the first impeachment investigation in 1796 through 1900, the average time from initiating the investigation to reporting was 144 days, or about 4 months and 3 weeks. During this time, House committees reported the findings of 42 investigations. From 1901 through 2010, the House Judiciary Committee reported the findings of 23 investigations, taking, on average, 302 days, or about 9 months and 4 weeks, to complete its investigation. In other words, modern impeachment investigations have taken, on average, 109.7% longer to complete than investigations conducted prior to the turn of the 20th century.

Since 1980, the House Judiciary Committee has reported findings in five impeachment investigations. On average, investigations have lasted 304 days, or about 10 months.⁷⁹ As listed in **Table 2**, the shortest investigation conducted was that of Judge Samuel Kent, which began on May 12, 2009, and ended a little more than a month later on June 17, 2009. The longest was the Impeachment Task Force's Investigation of G. Thomas Porteous, Jr., which lasted 533 days, or about one year, five months, and three weeks.⁸⁰

Throughout the course of these investigations, committees held, on average, 4.6 days of hearings during each investigation. The Claiborne investigation warranted the smallest number of hearings. Harry Claiborne, as mentioned above, was convicted of tax evasion prior to the initiation of impeachment proceedings in the House. On the opposite end of the spectrum, the committee held nine hearings to investigate Alcee Hastings, who had been acquitted of federal bribery charges before impeachment proceedings commenced.

(...continued)

investigations which took a much longer or shorter period of time to complete than other investigations in the group. In such instances, the median is not affected by investigations in which the time elapsed from the date when the issue was first raised until the date of reporting was unusually long or short.

⁷⁹ The first resolution to investigate whether impeachment would be appropriate for G. Thomas Porteous passed the House on September 17, 2008, at the end of the 110th Congress. The length of the Porteous investigation was calculated as beginning on this day. A second resolution passed the House on January 9, 2009, at the beginning of the 111th Congress. If the investigation is calculated as starting on this day, the length of the Porteous investigation falls from 533 days to 422 days, which reduces the mean to 282 days.

⁸⁰ If the length of the Impeachment Task Force's investigation of Judge Porteous is counted as beginning on January 9, 2009, instead of September 17, 2008, the House Judiciary Committee's investigation of Alcee Hastings emerges as the longest of this time period at 503 days.

Table 2. Number of Hearings and Length of Impeachment Investigations
(1980-2010)

Accused Judge	Hearings	Length of Investigation
Claiborne, Harry (NV)	1	43 days
Hastings, Alcee (S. FL)	9	503 days
Nixon, Walter (S. MS)	7	406 days
Kent, Samuel (S. TX)	2	36 days
Porteous, Jr., G. Thomas (E. LA)	4	533 days ^a

Source: Grimes, *The Role of the United States House of Representatives in Proceedings to Impeach and Remove Federal Judges*, p. 53; *Kent Impeachment*; *Porteous Impeachment*.

Notes: The length of investigation is calculated as the number of days elapsed from the first attempt to initiate charges in the House to the date the investigating committee reported their findings.

- a. This measure of days elapsed counts from September 17, 2008, when the first resolution to investigate Judge Porteous was agreed to in the House, to the date the House Judiciary Committee reported its recommendations on March 4, 2010. If one counts from the passage of the resolution to investigate Porteous submitted in the 111th Congress (January 9, 2009), the length of the investigation falls to 422 days.

House Floor Consideration

Impeachment resolutions are highly privileged under House rules, and, as such, it is in order to move that they be considered by the House at any time. Unlike legislation, where House rules require that legislation reported from committee be available to House Members for three days before the chamber may consider it, an impeachment resolution may come up on the House floor the same day the committee reports it.⁸¹

In most recent cases, an impeachment resolution is debated on the House floor under the hour rule, the default debate procedure in the House. Under this procedure, the Member calling up the resolution for consideration would be recognized for one hour. Typically, when the House acts under this procedure, the Member recognized for one hour would yield 30 minutes of that time to the other party for debate only. After the hour it would be in order for a Member to move the previous question, and if that were adopted, further consideration would be ended. Members would then vote on the issue.⁸²

Because, however, Members usually want to debate the merits of impeachment for more than one hour, this process may be modified by the use of a unanimous consent agreement among all Members of the House. A unanimous consent agreement, which requires that all Members agree to setting different ground rules for debate, may be used to modify the hour rule debate procedure by adding more debate time for Members.⁸³

⁸¹ *Deschler's Precedents*, Ch. 14, §8.2

⁸² *Ibid.*, Ch. 14, §8. For more information on the hour rule, see CRS Report 98-427, *Considering Measures in the House Under the One-Hour Rule*, by (name redacted).

⁸³ *Ibid.*, Ch. 14, §8.1.

So, for example, when the House debated the impeachment resolution concerning President William J. Clinton in 1998, Members agreed to a unanimous consent request extending the debate to 10 hours. The unanimous consent agreement also specified the next steps in the process: that after all time was used or yielded back, the previous question would be ordered on the resolution. Following the previous question, there would be one motion to recommit the resolution to committee in order, which could include instructions for the committee concerning further consideration of the resolution.⁸⁴

An impeachment debate could also come to the House floor through the use of a special rule reported by the House Rules Committee. Under that procedure, the House would debate the special rule for one hour, as described above. If the House adopted the special rule by majority vote, then the impeachment resolution would be considered by the House. The terms for consideration of the impeachment resolution would be spelled out in the special rule: how much time there would be for debate, and any other issues the Rules Committee felt it needed to include, such as appointing House managers. In this way, the special rule can be used in the same manner as the unanimous consent agreement in the first scenario. The major difference is that while a unanimous consent agreement needs the approval of all House Members, the special rule would go into effect if a majority of the House voted for it.

After debate is largely complete and the previous question has been ordered on the impeachment resolution and the articles of impeachment, but before the final vote or votes on the question, those opposed to the impeachment have an opportunity to offer a motion to recommit, with or without instructions. A motion to recommit without instructions is an effort to send the resolution back to the committee of jurisdiction, and with no instructions concerning further consideration, it is, in effect, an attempt to end the process. A motion to recommit with instructions is a last attempt to amend or change the language in the impeachment resolution or the articles of impeachment. As in regular House procedure, any instructions in a motion to recommit offered to an impeachment resolution or the accompanying articles must be germane to the resolution, meaning they must be on the same subject matter. A motion to recommit with instructions that the impeachment resolution be re-written to censure the individual in question has been ruled out of order, because censure is not considered germane to impeachment.⁸⁵

After the motion to recommit is offered and disposed of, it is then in order to vote on the question of impeachment. Under either scenario described above, each article of impeachment in the resolution can be voted upon separately. This was the process used in the Clinton impeachment and the Kent impeachment. A simple majority vote is all that is required for an article to be approved by the House.⁸⁶ Of the 75 impeachment inquiries conducted, the investigating committee has reported the findings of its investigation to the full House in 67 (89.3%). In 21 of these 67, the committee recommended resolutions of impeachment. Impeachments resulted from 14 of these 21 recommendations. In one of the 47 instances in which the committee did not recommend impeachment, a smaller contingent of the investigating committee, of which the chairman of the House Judiciary Committee was a member, reported a minority view in favor of

⁸⁴ Rep. Henry Hyde, "Privileges of the House - Impeaching William Jefferson Clinton, President of the United States, for High Crimes and Misdemeanors," House debate, *Congressional Record*, daily edition, December 18, 1998, p. H11792.

⁸⁵ *House Practice*, p. 602. For more on motions to recommit, see CRS Report RL34757, *The Motion to Recommit in the House of Representatives: Effects and Recent Trends*, by Megan Suzanne Lynch.

⁸⁶ *Deschler's Precedents*, Ch. 14, §8.10.

the impeachment of Judge Harold Louderback, of the Northern District of California. During debate on the report, however, the resolution reported by the committee was amended to reflect the minority preference. The amended resolution was subsequently confirmed, and Judge Louderback was impeached by a 183-142 vote.⁸⁷

House Responsibilities in the Senate Trial

Appointing House Managers and Informing the Senate

Following action on the impeachment resolution, if at least one article is agreed to, then the House, by resolution, appoints managers to present the case for impeachment to the Senate, sends notice to the Senate that they have adopted impeachment article(s)⁸⁸ and appointed managers to try the case in the Senate,⁸⁹ and grants the managers the authority and funds to carry out their duties.

Traditionally, this has been accomplished through the passage of three separate resolutions. For example, in 1988, the first resolution passed by the House after approving articles of impeachment against Judge Alcee Hastings was H.Res. 511, which appointed House managers to prosecute the House's case before the Senate. The second resolution passed by the House, H.Res. 512, provided that a "message be sent to the Senate informing the Senate of the impeachment of Alcee Hastings." The third and final resolution passed by the House, H.Res. 513, gave "certain authorities" to the House managers in the exercise of their duties during the Senate impeachment trial.⁹⁰

In the two most recent impeachment proceedings, these three elements were included in a single resolution and considered by the House following the impeachment vote.⁹¹ For example, after the impeachment of Judge G. Thomas Porteous, Jr., the House passed H.Res. 1165, which included provisions to appoint specific Members to serve as House managers, to send notice to the Senate that managers had been appointed by the House, and to authorize the expenditure of funds for personnel or other expenses "necessary in connection with preparation for, and conduct of, the trial."⁹² In these two cases, unlike in previous impeachments, the House did not send a formal notice to the Senate that an impeachment had occurred. This resolution, like the impeachment resolution, is highly privileged, and would be considered under the hour rule, if there were desire for debate on it from Members of the House.

⁸⁷ *Cannon's Precedents*, Vol. VI, §515.

⁸⁸ As discussed below, in the last two impeachments, the House has not sent a formal notice to the Senate that an impeachment has occurred.

⁸⁹ Historically, the House has also selected managers by election in the House or appointment by the Speaker.

⁹⁰ "Public Bills and Resolutions," *Congressional Record*, August 3, 1988, p. 20331.

⁹¹ In the March 11, 2010, impeachment of Judge G. Thomas Porteous, however, the House did not immediately move to appoint House managers.

⁹² "Appointing and Authorizing Managers for the Impeachment of Judge G. Thomas Porteous, Jr.," *Congressional Record*, March 11, 2010, p. H1340; For a similar resolution passed after the impeachment of Judge Samuel B. Kent, see "Appointing and Authorizing Managers for the Impeachment of Samuel B. Kent, A Judge of the United States District Court for the Southern District of Texas," *Congressional Record*, June 19, 2009, p. H7067.

Responsibilities of House Managers

House managers are charged with prosecuting the House's case against the judge during the impeachment trial in the Senate. This prosecutorial role is exemplified in the report submitted by the committee investigating Judge Robert W. Archbald in 1912, in which the committee's report recommended the presentation of the articles of impeachment to the Senate "with a *demand* for the conviction [of Judge Archbald] and removal from office."⁹³

Most frequently, the House has appointed five Members to argue the House's case before the Senate, although the number of managers appointed by the House ranges from three⁹⁴ to nine⁹⁵ across the 15 impeachments that have been agreed to by the House.⁹⁶ The first responsibility of House managers is to impeach the judge orally before the Senate and demand that the Senate order the judge to appear and face the charges against him.⁹⁷

The House managers are also charged with filing a replication.⁹⁸ A replication is the House's response to the judge's answer to the articles of impeachment. As noted by two scholars, a "replication by the House managers usually consists of a general denial of all allegations set forth in the respondent's answer"⁹⁹ and serve to narrow the issues to be addressed in the impeachment trial. The use of replications to achieve this objective, however, has waned with the Senate's adoption of modern civil practice procedures, such as pre-trial motions, pre-trial conferences, and discovery.¹⁰⁰ Historically, the replication has been submitted to the Senate only after a vote in the House. Modern practice suggests, however, that replications may be filed without express approval of the House.¹⁰¹

In modern impeachment cases, House managers have been substantially assisted by outside counsel. Outside counsel are attorneys specifically hired to help the committee with the impeachment investigation. They are neither Members of Congress nor permanent staff. For example, in the 1986 Senate trial of Harry Claiborne, although managers conducted the direct examination of witnesses, one scholar noted that "outside counsel performed much of the bread and butter litigation work, including the conduct of depositions, the drafting of briefs and motions

⁹³ *Cannon's Precedents*, Vol. VI, §499, p. 686.

⁹⁴ Representatives Hatton Sumners (chairman of the House Judiciary Committee), Randolph Perkins, and Sam Hobbs were appointed by resolution to act as House managers in the impeachment trial of Halsted Ritter in 1936. *Deschler's Precedents*, Ch. 14, §18.5.

⁹⁵ Representatives Peter W. Rodino (chairman of the House Judiciary Committee), Robert W. Kastenmeier, William J. Hughes, Romano Mazzoli, Dan Glickman, Hamilton Fish, Henry Hyde, Thomas Kindness, and Michael DeWine were appointed by resolution to be House managers in the impeachment trial of Harry Claiborne in 1986. "Claiborne Impeached, Stripped of Judgeship," *CQ Almanac* (Washington, DC: CQ Press, 1986), pp. 77-78.

⁹⁶ H.Res. 1165, approved by the House on March 11, 2010, appointed Representatives Adam Schiff, Zoe Lofgren, Henry C. "Hank" Johnson, Jr., Bob Goodlatte, and James Sensenbrenner to be House managers in Senate impeachment trial of G. Thomas Porteous.

⁹⁷ Grimes, *The Role of the United States House of Representatives In Proceedings to Impeach Federal Judges*, p. 64.

⁹⁸ *Ibid.*

⁹⁹ Edwin Brown Firmage and R. Collin Mangrum, "Removal of the President: Resignation and the Procedural Law of Impeachment," *Duke Law Journal*, vol. 1974, pp. 1055.

¹⁰⁰ Grimes, *The Role of the United States House of Representatives In Proceedings to Impeach Federal Judges*, p. 65.

¹⁰¹ *Deschler's Precedents*, Ch. 14, §10.

(subject to the approval of managers), the interviewing of witnesses and, in some cases, even the cross examination of witnesses during the trial itself.”¹⁰²

Summary Observations

Over the past 222 years, the House’s methods of identifying judges whose conduct may warrant impeachment, as well as the structures and procedures used to investigate those individuals, have evolved considerably. Historically, impeachment charges originated from a plethora of third-party sources, including private individuals and state and federal government bodies. In modern practice, however, the judiciary itself plays a large role through statutory disciplinary procedures enacted in the Judicial Conduct and Disability Act of 1980, as amended by the Judicial Improvements Act of 2002, in identifying judges whose behavior may warrant impeachment. Thus, what was once a highly idiosyncratic process predicated on the transmittal of charges from an aggrieved third-party has become much more institutionalized through the statutory involvement of the Judicial Conference of the United States.

Similarly, the methods of investigating charges against a judge have changed over time. Between 1796 and 1818, the House employed ad hoc committees to conduct impeachment investigations. The creation of the Judiciary Committee as a standing committee transferred, for the most part, responsibility for impeachment investigations to the Judiciary Committee or a subcommittee thereof. Changes in technology, transportation, and committee staffing levels have enabled committees to conduct increasingly more in-depth investigations, resulting in increasingly long investigations since the turn of the 20th century.

Finally, House managers charged with prosecuting impeached judges in Senate trials have permitted greater involvement by outside counsel. Although House managers continue to maintain control over the process, the role of outside counsel has evolved from a minor role in assisting the preparations of the House managers to becoming a major participant in pre-trial and trial proceedings. This may be the product of heavier legislative workloads experienced by modern House managers or the escalating complexity of Senate impeachment trials.¹⁰³

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¹⁰² Grimes, *The Role of the United States House of Representatives In Proceedings to Impeach Federal Judges*, p. 65.

¹⁰³ *Ibid.*; Michael J. Gerhardt, *The Federal Impeachment Process* (Princeton, NJ: Princeton University Press, 1996), pp. 30-31.

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