



www.lsc.ohio.gov

OHIO LEGISLATIVE SERVICE COMMISSION

Wendy Zhan, Director

Office of Research
and Drafting

Legislative Budget
Office

S. Ben Fogle, Attorney

R-133-3926

May 5, 2020

Impeaching the Governor under the Ohio Constitution

Summary

Impeachment in Ohio is governed by the Constitution and by one statutory section. There exists little legal guidance for what constitutes an impeachable offense. History suggests two views: an expansive view in which impeachable conduct includes certain misbehaviors and abuses of office, and a narrower one in which impeachment is only available for criminal conduct. In Ohio, there have been eight impeachments, all of them judges and all of them in the early 1800s. Only one was convicted. The procedures used in these early cases are summarized in the latter section of this memorandum, and serve as a potential outline to a modern impeachment.

The nature of impeachment in Ohio

Impeachment is governed by Ohio Constitution, Article II, Sections 23 and 24. As in the federal system, the House has the “sole power of impeachment,” while the Senate has the power to try impeachments.

The house of Representatives shall have the sole power of impeachment, but a majority of the members elected must concur therein. Impeachments shall be tried by the senate; and the senators, when sitting for that purpose, shall be upon oath or affirmation to do justice according to law and evidence. No person shall be convicted without the concurrence of two-thirds of the senators.¹

The governor, judges, and all state officers, may be impeached for any misdemeanor in office; but judgment shall not extend further

¹ Ohio Constitution, Article II, Section 23.

than removal from office, and disqualification to hold any office under the authority of this state. The party impeached, whether convicted or not, shall be liable to indictment, trial, and judgment, according to law.²

The House of Representatives acts analogously to a “grand jury,” and may impeach with a majority of elected members. The Senate acts as a trial court, “convicting” upon concurrence of two-thirds of the Senate. The House may impeach the Governor, and any state officer or judge, for any “misdemeanor in office.” The Ohio Constitution gives little other guidance as to what constitutes an impeachable offense, other than the mandate that Senators “do justice according to law and evidence.” Upon impeachment, the punishment may not “extend further than removal from office, and disqualification to hold any office under authority of this state.” The impeached official, however, may subsequently be indicted by a prosecutor for the same conduct that gave rise to impeachment, whether or not the impeachment was successful.

History as well gives little guidance as to what constitutes an impeachable offense, especially for the Governor. All eight Ohio impeachments were judges, and all in the early 1800s. The judges were impeached for being absent without leave, holding statutes unconstitutional and unenforceable, “judicial arrogance,” and judicial incompetence. All of the judges were acquitted except for the one who was absent without leave.³

Impeachment is unique, in that it is neither subject to judicial review nor executive veto. It begins and ends with the legislative branch. One view of impeachment is that it is essentially of a “political character,” and encompasses offenses beyond those which are criminal in nature, that “grow out of personal misconduct or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office.”⁴ Alexander Hamilton, in the Federalist Papers, said of federal impeachment that the “subjects of its jurisdiction are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.”⁵ Scholars sometimes articulate three broad categories of impeachable offense in the federal context: (1) abusing or exceeding the office’s lawful powers, (2) behaving officially or personally in a manner grossly incompatible with the office, and (3) using the power of the office for an improper purpose or for personal gain.⁶ The culpability justifying impeachment, under these categories, is independent of criminal liability for violation of a statute. The actions may be impeachable without being criminal, or may be both, in which case the offender could

² Ohio Const., art. II, sec. 24.

³ Please see the attached memorandum, “A Procedure for Impeaching State Officers.”

⁴ 1 Story, Commentaries on the Constitution of the United States § 764 (5th ed. 1891).

⁵ Federalist No. 65.

⁶ Deschler’s Precedents of the United States House of Representatives, ch. 14, H.R. Doc. No. 661, 94th Cong., 2d Sess. 389-729 (1977).

have a separate criminal trial after the impeachment proceedings. Ohio's historical record supports this expansive view, as none of the judges who were impeached were accused of violating a criminal statute, but rather of violating some public trust.

Another, narrower view is that impeachable offenses are only crimes already defined by statute. This view takes as its support the literal words that an official may be impeached for "misdemeanors in office," and that the Senate must "do justice according to *law* and evidence" (emphasis added). Additionally, the other parts of the Ohio Constitution that mention impeachment seem to emphasize its criminal nature. Ohio Constitution, Article I, Section 10 states that "no person shall be held to answer for a capital, or otherwise infamous, crime" unless certain criminal procedures are followed, *except for cases of impeachment*, cases in the army or navy, or cases where imprisonment is not a possible outcome. Putting impeachment in a category of criminal cases in which certain procedural rights do not apply may suggest that impeachment is itself a type of criminal case. In addition, Ohio Constitution, Article III, Section 11, which describes the governor's veto power, indicates the power extends to "all crimes and offenses, *except* treason and cases of impeachment." (emphasis added). This could imply that "cases of impeachment" falls under the umbrella of "all crimes and offenses."

As a practical point, without any legal checks, it seems the legislature can make an "impeachable offense" whatever the House and Senate consider appropriate. They set the rules and make the decision, to which there is no appeal. The legislature may wish to establish guidelines at least similar to criminal standards, including establishing a burden of evidentiary proof, such as preponderance of the evidence or reasonable suspicion for the "indictment" phase in the House, and perhaps beyond a reasonable doubt clear or clear and convincing evidence for the "trial" phase in the Senate.

Potential impeachment procedures

The following paragraphs summarize the constitutional and statutory requirements for impeachment, which are few. The next two sections detail possible House procedures, and then possible Senate procedures, taken from Ohio's historical record. They are by no means mandatory; they may be taken as guidance or entirely ignored, at the legislature's discretion.

The procedures for impeachment are adopted by the House and then the Senate. The Constitution specifies only a few requirements; the House initiates the proceedings and, if the House chooses to move forward, it drafts and delivers a special legislative instrument called articles of impeachment. The House has a choice of whether or not to impeach but, once it has delivered the articles of impeachment, the Senate must hold a trial.

The Revised Code

The Revised Code has only one section regarding impeachment.⁷ It allows any person to present to the House a complaint that requests "an investigation of the official conduct of an

⁷ R.C. 101.47.

officer liable to impeachment.” The “person preferring the complaint”⁸ may take depositions of witnesses to “substantiate” the complaint. This statute, when read literally, seems to mean that any person who wanted to submit a complaint to the House of Representatives has the power to depose any person they wish. The rules of Civil Procedure, however, specify that only a *party* to the proceedings may take a deposition.⁹ It can be argued that the complainant in an impeachment proceeding is not a *party*. Rather, given that the House has the “sole power of impeachment,” the parties to an impeachment proceeding are the House of Representatives and the impeached official. The practices surrounding impeachment, such as the House’s responsibility to investigate the allegations and subsequently argue for conviction in the Senate, support the view that the power to take depositions resides solely in the House.

Other than these limited constitutional and statutory requirements, the rules regarding “pretrial” impeachment processes – such as investigatory powers, committee formation and responsibilities, the standard of proof for submitting the impeachment, and other such things – are created by the House. The rules for trial, such as evidentiary rules, and the standard of proof for conviction, are created by the Senate. The rules for Ohio’s eight impeachments were made on a more or less ad hoc basis. In the modern era, or for someone other than a judge, the rules could be different if the legislature so decides. What follows is a more detailed outline of the procedures that have been used in the past.

House procedures

A complaint is delivered, and a committee may be formed to investigate

First, a complaint is delivered to the House by any person, the complaint being addressed to the Speaker of the House. The House, if it wishes to move forward on the complaint, then passes a resolution assigning an existing committee, or appointing a select committee, to investigate the allegations of wrongdoing by the public official. This committee would be empowered to issue subpoenas, question witnesses, and hold hearings. Once their investigation is over, the committee would present their evidence and findings in a report to the House. The Ohio House, like Congress, could appoint two committees, one to investigate the allegations and determine the facts, and a second to determine whether such facts establish an impeachable offense.¹⁰

The committee reports to the House

If the committee has found insufficient evidence of wrongdoing, or if the committee finds that the conduct is not impeachable, and the House accepts this report, the inquiry ends there. If the committee has determined that the offenses occurred and are impeachable, the

⁸ “Prefer” here is an antiquated legal term meaning “to submit.” This statute was originally passed in 1844.

⁹ Ohio Rules of Civil Procedure R. 30(A).

¹⁰ See “The Impeachment Process in the House of Representatives,” Congressional Research Service, November 14, 2019.

report will include articles of impeachment. This is a special legislative instrument that consists of a title, one or more numbered articles setting forth grounds for the impeachment, and a savings clause reserving the right to bring additional articles of impeachment should they be discovered. The House may choose to accept the committee's findings and the articles of impeachment.

The House votes to impeach, and appoints managers

At that point, the House will vote separately on each article; if it adopts one or more articles, the official is impeached. The House then must appoint impeachment "managers," who essentially will act as prosecutors in the Senate trial. These managers can be House members or, if no member has prosecutorial experience, can be outside counsel.

The Senate then informs the House of its readiness to receive the articles. The Speaker directs the managers to proceed to the Senate to present the articles, along with a demand that the Senate summon the impeached officer to appear and answer. The House would then send two messages to the Senate; the first informing them that the House has adopted the articles and appointed managers, and the second stating that the Speaker has instructed the managers to proceed to the Senate and present the articles as described in this paragraph.

Senate procedures

The managers present the articles to the Senate

Upon receiving the messages from the House, the Senate sends a message informing the House of the time at which it will receive the managers and the Articles of Impeachment. The managers appear before the Senate and the Chief Prosecutor presents the articles.¹¹ The Senate issues a summons to the impeached officer, directing the impeached officer to appear before the Senate at a specified time to answer the articles. The Sergeant-at-Arms serves the summons on the impeached officer and returns to the Senate with a certificate stating that the summons has been served, and makes an oath to that effect. The Senate then sends a message to the House stating that it is ready to proceed with trial.

The impeached officer may file a demurrer

The impeached officer, now called the "respondent," may choose to enter a "demurrer" – a statement asserting that the Articles of Impeachment are legally insufficient to warrant impeachment. By challenging the legal sufficiency of the Articles of Impeachment, a demurrer raises the question of whether the impeached officer's conduct constitutes an impeachable misdemeanor in office, as discussed above. If a demurrer is presented, matters proceed as follows: The Senate hands a copy of the demurrer to the managers, who take it back to the House, which then prepares and adopts an answer (called a "replication") to the demurrer and serves a copy on the respondent. The managers present the replication to the

¹¹ It appears customary, both in the ancient Ohio impeachments, as well as in modern day impeachments before Congress, for the managers to actually read the Articles of Impeachment, aloud and in full, to the Senate.

Senate. The Senate then hears the demurrer by giving the respondent (or the respondent's counsel) time to argue for, and the managers time to argue against, the demurrer. At the conclusion of the arguments, the Senate votes on the demurrer. If a majority of the members elected to the Senate vote in favor of the demurrer, the impeachment ends there, and the respondent is entitled to a judgment of acquittal. If a majority vote against the demurrer, the impeachment proceeds where it left off.

The respondent answers the articles, and the House responds

Before the day set for the respondent's appearance and answer, each Senator takes the following oath as required by Ohio Constitution, Article II, Section 23: "You solemnly swear [or affirm] that in all things pertaining to the impeachment of [insert respondent's name] you will do justice according to law and evidence." On the day set for the respondent to appear, the respondent is called by the Clerk and permitted to present the answer to the Articles of Impeachment. The managers then take the respondent's answer back to the House, which prepares and adopts a response, also called a "replication," then present the replication to the Senate.

The Senate holds a trial

The Senate then takes evidence, presented similarly to a courtroom trial, with witnesses, documents, and exhibits. The managers go first, presenting evidence in support of the impeachment, which the respondent (or counsel) may cross-examine or otherwise question. When the managers have completed their case, the respondent may offer evidence in defense, which the managers may cross-examine or otherwise question.

When both sides have presented their evidence, the Senate hears closing arguments, the respondent going first and the managers last. Apparently, the closing arguments, unlike the replications, are not prepared and adopted by the House, but rather are solely the responsibility of the managers.

The Senators vote

The Senators then proceed to vote, by public roll call, on each Article of Impeachment, the question being put to each Senator, "What say you, is the respondent, [insert respondent's name here], guilty or not guilty of a misdemeanor in office, as charged in the [first] [second] Article of Impeachment?" As the vote is taken on each Article, the Senate President declares the result. If, on any Article, two-thirds of the Senators have not voted "guilty," the respondent is declared acquitted on that Article. If, however, on any Article, two-thirds of the Senators have voted "guilty," the respondent is declared convicted on that Article.¹²

¹² Ohio Const., art. II, sec. 23 states that "No person shall be convicted without the concurrence of two-thirds of the Senators." It does not specify "two-thirds of the members elected to the Senate." The Senate seems to have assumed, however, as demonstrated in prior impeachments, that conviction requires a two-thirds vote of the members elected to the Senate. Contrast this with federal impeachment, which requires two-thirds of members present.

The Senate renders a judgment

If the respondent is convicted, the Senate proceeds to determine the judgment. Ohio Constitution, Article II, Section 24 provides that judgment in impeachments “shall not extend further than removal from office, and disqualification to hold any office under the authority of this state.” In commenting upon a similar provision in the U.S. Constitution, Justice Story states that while conviction upon an Article of Impeachment automatically entails removal from office, the Senate has discretion whether to also disqualify the person impeached from holding any other office.¹³ Accordingly, the following question is put to each Senator, “[insert respondent’s name here], having been convicted and removed from office, shall [respondent] also be disqualified from holding any office under the authority of this state?” If (presumably two-thirds of) the Senators vote “yes,” the impeached officer is not only removed from office, but also prohibited from ever again holding state office.

In the Irvin impeachment trial, the only Ohio impeachment to result in a conviction, the Senate initially considered, as a punishment, merely reprimanding Irvin, suspending him from office for a period of time, and warning him to behave himself when he returned to the bench. The Senate apparently had seized upon the literal wording of the Constitution, which provides that judgment in cases of impeachment “shall not extend further than removal from office, and disqualification to hold any office under authority of this state.” Upon consideration, however, the Senate decided to go ahead and remove Irvin from office. It is possible then, in Ohio, that removal from office is not automatic. This would have to be determined by the Senate upon conviction.

Attachment: “A Procedure for Impeaching State Officers” (R2563-117)

R-133-3926/ar

¹³ Story, *supra* § 803.