


Memorandum

October 7, 1998

TO : House Committee on the Judiciary

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SUBJECT : Continuation of an Impeachment Proceeding or an Impeachment Investigation
from One Congress to the Next Congress

This memorandum is in response to the your request for an examination of the question of whether an impeachment proceeding or an impeachment inquiry legally may continue from one Congress to the next. Both *Jefferson's Manual* and past precedents suggest that either an impeachment proceeding or an impeachment inquiry may be continued from one Congress to the next. A brief discussion of the pertinent precedents is provided below.

Jefferson's Manual, H. Doc. 104-272, 104th Cong., 2d Sess., Sec. LIII, § 620, at 320 (1997), states, "Continuance. An impeachment is not discontinued by the dissolution of Parliament, but may be resumed by the new Parliament." The commentary on this section is as follows:

In Congress impeachment proceedings are not discontinued by a recess (III, 2299, 2304, 2344, 2375, 2407, 2505); and the Pickering impeachment was presented in the Senate on the last day of the Seventh Congress (III, 2320); and at the beginning of the Eighth Congress the proceedings went on from that point (III, 2321). The resolution and articles of impeachment against Judge Louderback were presented in the Senate on the last day of the 72nd Congress (VI, 515) and the Senate organized for and conducted the trial in the 73rd Congress (VI, 516). The resolution and articles of impeachment against Judge Hastings were presented in the Senate during the second session of the 100th Congress (Aug. 3, 1988, p. 20223) but were still pending trial by the Senate in the 101st Congress, for which the House reappointed managers (Jan. 3, 1989, p. 84). But an impeachment may proceed only when Congress is in session (III, 2006, 2462).

This passage from *Jefferson's Manual* indicates that continuation of an impeachment proceeding from one Congress to the next has occurred in three of the impeachments which have gone to Senate trial. In addition, in the House Judiciary Committee's impeachment inquiry with respect to Judge Halsted Ritter, the impeachment investigation and reporting out

of an impeachment resolution ran from the 73rd to the 74th Congress. In the latter Congress, the House impeached Judge Ritter and the matter went forward to trial and conviction before the Senate. A transition from one Congress to the next also impacted upon two impeachment inquiries that did not go to trial, the first impeachment attempt against President Andrew Johnson in 1867-68 and the impeachment inquiry with respect to Judge Mark H. Delahay in 1873. Each of these will be discussed briefly below.

In the impeachment of Judge John Pickering in 1803-04, the House received a message from the President accompanied by a number of letters and affidavits regarding the conduct of the judge on February 4, 1803. The matter was referred to a committee, which submitted its report to the House on February 18, 1803, stating:

That from the face of the said deposition it appears that the said John Pickering has been guilty of high misdemeanor in the exercise of his judicial functions, and recommend the adoption of the following resolution:

*“Resolved, That John Pickering, judge of the district court of the district of New Hampshire [sic], be impeached of high crimes and misdemeanors.”*¹

The committee’s report was considered and briefly debated in the Committee of the Whole. The main question during the debate “seems to have been the advisability of proceeding in the case at so late a period in the session. A proposition to postpone the resolution to the next session was disagreed to”² The House agreed to the impeachment resolution on March 2, 1803, and appointed two Members as a committee to appear before the bar of the Senate to impeach Judge Pickering “of high crimes and misdemeanors; and to acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him and make good the same.” The committee was also directed to “demand that the Senate take order for the appearance of the said John Pickering to answer to the said impeachment.”³ On March 3, 1803, the committee appeared before the bar of the Senate, carried out their instructions, then withdrew and reported back to the House. Later that day, the Senate agreed to a resolution which noted the House’s actions before the bar of the Senate, resolved that the Senate “would take proper order thereon, of which due notice shall be given to the House of Representatives,” and further resolved to give the House notice of this resolution. Later the same day, both the House and the Senate adjourned sine die, ending the 7th Congress.⁴ When the Eighth Congress met in its first session on October 17, 1803, the “proceedings against Judge Pickering were continued from the point where they had been interrupted by the expiration of the Seventh Congress.”⁵

¹ 3 *Hinds’ Precedents of the House of Representatives of the United States* § 2319 at 681-82 (1907) (hereinafter 3 *Hinds*’).

² *Id.* at 682.

³ *Id.*

⁴ *Id.* As noted in 3 *Deschler’s Precedents of the House of Representatives of the United States*, H. Doc. 94-661, 94th Cong., 2d Sess., Ch. 14, § 4, at 467 (1977) (hereinafter 3 *Deschler’s*), “The practice at the time of the Pickering impeachment was to present a resolution of impeachment to the Senate and then to prepare and adopt articles of impeachment for presentation to the Senate.”

⁵ 3 *Hinds’* § 2321 at 683. By resolution, a committee was appointed in the House to prepare and report articles of impeachment against Judge Pickering, and was given power to send for
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The impeachment proceedings with respect to Judge Harold Louderback were carried over from the 72nd Congress to the 73rd Congress. On February 27, 1933, the House passed a resolution impeaching Judge Harold Louderback of misdemeanors in office, setting out five articles of impeachment, and indicating that these would be exhibited before the Senate.⁶ The House also agreed to a resolution appointing five managers, instructing them to appear before the bar of the Senate to impeach Judge Louderback and exhibit the articles against him, and directing them to demand that the Senate take order for the appearance of Judge Louderback to answer the impeachment, and also to demand that he be impeached, convicted, and removed from office.⁷ On February 28th, the House notified the Senate of the House actions. The Senate responded by transmitting to the House a message announcing the Senate's readiness to receive the Managers. On March 3, 1933, the Managers appeared before the Senate, presented the resolution of impeachment and the articles of impeachment, reserved the right to later exhibit any further articles, and demanded that the Senate take order for Judge Louderback's appearance to answer the impeachment and demanded further his impeachment, conviction, and removal from office.⁸

After the Vice President stated that the Senate would take proper order on the subject of impeachment and give due notice to the House, Senator Norris moved that the articles be printed for use by the Senate. He further noted that, while the Senate rules governing impeachment trials required the Senate the next day at 1 o'clock to organize itself into a court, take the necessary oath, and then proceed with the trial, the adjournment of the Congress at 12 noon on the day the trial would otherwise commence would foreclose this. The Senate agreed to a motion that the impeachment proceedings be made the special order for 2 o'clock on the first day of the first session of the Seventy-third Congress.⁹ On March 9, 1933, at 2 o'clock, the Senate sitting as a Court of Impeachment, met under its previous order. The oath was administered to all Senators except those who, for various reasons, asked to be excused from sitting on the impeachment trial, and a motion was passed to notify the House that the Senate was now organized for the trial of the impeachment and was ready to receive the House Managers.¹⁰ The House Managers appointed in the 72nd Congress and re-elected to House seats in the 73rd, appeared before the Senate sitting as a Court of impeachment on March 13th. On March 22nd, the House adopted a resolution appointing successors to those Managers who were no longer House Members and reappointing the former Managers who were.¹¹ That same day, the House also agreed to a resolution granting

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persons, papers, and records. *Id.* at 684. For further proceedings in the impeachment of Judge Pickering, see 3 *Hinds'* §§ 2322-2341 at 684-710.

⁶ 6 *Cannon's Precedents of the House of Representatives of the United States* § 514 at 712 (1936) (hereinafter 6 *Cannon's*).

⁷ H. Res. 402, 72nd Cong., 2nd Sess., reprinted in 3 *Deschler's*, Ch. 14, § 17.3 at 657.

⁸ 6 *Cannon's* § 515 at 713-17.

⁹ *Id.* at 717.

¹⁰ 6 *Cannon's* §§ 516 at 717-20.

¹¹ During the course of consideration of this resolution, the House discussed the power of the House to appoint managers who could continue in that capacity beyond the term for which they were elected to the House. There were differences of opinion on the matter. 6 *Cannon's* § 517 at 720-21.

the Managers powers and funds needed to prepare for and conduct the impeachment trial.¹² The Senate impeachment trial of Judge Louderback took place during the 73rd Congress.

In the impeachment proceedings regarding Judge Alcee L. Hastings, the House presented its impeachment resolution and exhibited articles of impeachment before the Senate during the 100th Congress, but the Senate trial did not begin until the 101st Congress. On August 3, 1988, the House adopted H. Res. 499, an impeachment resolution with respect to Judge Hastings. Also that day, the House also agreed to three other resolutions: H. Res. 511, appointing House Managers; H. Res. 512, providing that a message be sent to the Senate informing that body of the impeachment of Judge Hastings; and H. Res. 513, providing certain authorities for the House Managers in connection with the impeachment. On August 9, 1988, the House Managers appeared before the bar of the Senate to present the impeachment resolution and exhibit the articles of impeachment against Judge Hastings. That same day, the Senate agreed to S. Res. 456, which directed issuance of a summons commanding Judge Hastings to answer the articles of impeachment by September 8, 1988. In due course, the Senate received the reply to the summons and Judge Hastings' answer to the articles. On September 30, 1988, the Senate agreed to S. Res. 480, which carried the impeachment proceedings against Judge Hastings over to the 101st Congress. On January 3, 1989, three resolutions were adopted by the House: H. Res. 12 appointed Managers for the impeachment trial of Judge Hastings, all but one of whom were those so appointed in the previous Congress; H. Res. 13 provided for certain authorities for the House Managers in the matter of Judge Hastings' impeachment; and H. Res. 14 provided that a message be sent to the Senate advising that body of the identity the House Managers for the impeachment of Judge Hastings. After the Senate addressed various preliminary matters in connection with the impeachment trial, the trial proceeded in the 101st Congress.

Thus, before the end of the first pertinent Congress in the three impeachment proceedings discussed above, the House had completed its investigation and had adopted resolutions impeaching the judges involved and setting out articles of impeachment against them. In addition, the respective House Managers had appeared before the bar of the Senate, had advised that body of the actions taken by the House, and had presented the impeachment resolution and exhibited the articles of impeachment. As a result, the continuation of the impeachment proceedings in each of these cases rested both upon the procedures and precedents of the House and Senate, and upon the fact that the Senate is a continuing body.

In the impeachment of Judge Halsted Ritter, the change of Congresses intersected the impeachment at a different point in the process. A subcommittee of the House Judiciary Committee began its inquiry into allegations of misconduct by Judge Halsted L. Ritter under the authority of H. Res. 163 in the 73rd Congress.¹³ While the investigation seems to have been completed during the 73rd Congress, no resolution or articles of impeachment were reported out by the committee before the end of that Congress.¹⁴ In the 74th Congress, the

¹² *Id.* at 721.

¹³ 3 *Deschler's*, Ch. 14, § 18.1 at 659-61.

¹⁴ According to a Parliamentarian's Note in 3 *Deschler's*, Ch. 14, § 4.4 at 471,

No resolution was adopted in the 74th Congress to specifically authorize an investigation in that Congress by the Committee on the Judiciary of charges of impeachment against

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House Judiciary Committee was unable report resolutions and charges referred in the 73rd Congress, because all business expired in the House with the end of the Congress.¹⁵ It was necessary that the matter be brought before the committee in the 74th Congress for the committee to take further action upon it.

On January 14, 1936, Representative Robert A. Green, a member of the Judiciary Committee,

rose to a question of constitutional privilege and on his own responsibility impeached Judge Halsted Ritter for high crimes and misdemeanors. Although he presented no resolution, he delivered lengthy and specific charges against the accused. . . .¹⁶

In so doing, he referenced and inserted the text of a report submitted to the House Judiciary Committee by the past Chairman of the subcommittee of the Committee on the Judiciary which had investigated the charges against Judge Ritter under H. Res. 163 in the 73rd Congress. At the conclusion of Representative Green's remarks, the House agreed to a motion by Representative O'Connor that "the proceedings be referred to the Committee on the Judiciary."¹⁷ On February 20, 1936, Representative Hatton W. Sumners introduced H. Res. 422, impeaching Judge Ritter, and the resolution was referred to the House Judiciary Committee. That same day, the House Judiciary Committee reported out H. Rept. 74-2025, a privileged report on the charges of official misconduct against Judge Ritter, which made reference to the evidence taken by the subcommittee in the 73rd Congress. The report accompanied a resolution of impeachment and articles of impeachment, and it recommended that they be adopted by the House and presented to the Senate.¹⁸ H. Res. 422, impeaching Judge Ritter and setting forth articles of impeachment against him, was adopted by the House on March 2, 1936.¹⁹ On March 6th, the House agreed to three resolutions: H. Res. 439, appointing Managers to conduct the impeachment and instructing them to appear before the bar of the Senate to impeach Judge Ritter, to exhibit the articles of impeachment against him, to demand that the Senate take order for the appearance of Halsted Ritter to answer the impeachment, and to demand his impeachment, conviction, and removal from office; H. Res. 440, directing that a message be sent to the Senate to inform them that the House had impeached Judge Ritter, adopted articles of impeachment, appointed Managers, and directed the Managers to carry these to the Senate; and H. Res 441, providing for certain authorities for the Managers in connection with the impeachment.²⁰ The House's message was laid before the Senate on March 9, 1936, and the Managers appeared before the bar of the Senate to impeach Judge Ritter; to exhibit the articles against him, reserving the right to amend or

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Judge Ritter, the investigation apparently having been completed in the 73rd Congress but not reported on to the House. . . .

¹⁵ *Id.*

¹⁶ 3 *Deschler's*, Ch. 14, § 18.3 at 661-63.

¹⁷ *Id.* at 661-62.

¹⁸ *Id.* at 663.

¹⁹ 3 *Deschler's*, Ch. 14, § 18.4 at 663-64.

²⁰ 3 *Deschler's*, Ch. 14, § 18.5, at 665-66.

supplement the articles; to demand that the Senate take order for Judge Ritter's appearance to answer the articles; and to demand his impeachment, conviction, and removal from office. The impeachment then proceeded to trial in the Senate.

In the 39th Congress, on January 7, 1867, an impeachment inquiry with respect to President Andrew Johnson was referred to the House Committee on the Judiciary. On March 2, 1867, one day before the end of the Congress, the House Judiciary Committee reported to the full House that its impeachment inquiry was not yet complete. The report reflected the view of the committee that the evidence gathered to date indicated that it would be desirable to continue the inquiry in the following Congress.²¹ On March 7, 1867, in the 40th Congress, the House adopted a resolution which provided:

Whereas the House of Representatives of the Thirty-ninth Congress adopted on the 7th of January, 1867, a resolution authorizing an inquiry into certain charges preferred against the President of the United States; and

Whereas the Judiciary Committee, to whom said resolution and charges were referred, with authority to investigate the same, were unable for want of time to complete said investigation before the expiration of the Thirty-ninth Congress; and

Whereas in the report submitted by said Judiciary Committee on the 2d of March, they declare that the evidence taken is of such a character as to justify and demand a continuation of the investigation by this Congress: Therefore, be it

Resolved by the House of Representatives. That the Judiciary Committee when appointed be, and they are hereby, instructed to continue the investigation authorized in said resolution of January 7, 1867, and that they have power to send for persons and papers, and to administer the customary oath to witnesses; and that the committee have authority to sit during the sessions of the House, and during any recess which Congress or this House may take.

Resolved, That the Speaker of the House be requested to appoint the Committee on the Judiciary forthwith, and that the committee so appointed be directed to take charge of the testimony taken by the committee of the last Congress; and that said committee have power to appoint a clerk at a compensation not to exceed \$6 per day, and employ the necessary stenographer.

Resolved further, That the clerk of the House of Representatives be directed to pay, out of the contingent fund of the House, on the order of the Committee on the Judiciary, such sum or sums of money as may be required to enable the said committee to prosecute the investigation above directed, and such other investigations as it may be ordered to make.²²

²¹ 3 *Hinds* ' § 2401 at 825.

²² 3 *Hinds* ' § 2401 at 825, citing *Cong. Globe*, 40th Cong. 1st Sess. at 18-25 (March 7, 1867).

The first impeachment investigation with respect to President Andrew Johnson continued in the 40th Congress.²³ On December 7, 1867, the House rejected a resolution impeaching President Johnson of high crimes and misdemeanors, thereby ending the first effort to impeach him.²⁴

On February 28, 1873, the House Judiciary Committee reported out a resolution with respect to Judge Mark H. Delahay which provided:

Resolved, That a committee of three be appointed to go to the Senate, and at the bar thereof, in the name of the House of Representatives, and of all the people of the United States, to impeach Mark H. Delahay, judge of the United States district court for the district of Kansas, of high crimes and misdemeanors in office, and acquaint the Senate that the House of Representatives will, in due time, exhibit particular articles of impeachment against him and make good the same, and that the committee do demand that the Senate take order for the appearance of said Mark H. Delahay to answer to said impeachment.²⁵

Representative Dawes raised a question whether, in light of the fact that the Congress was nearing its end, the Judiciary Committee had resolved the question of whether the House of Representatives in the next Congress could present the articles of impeachment of which the previous Congress might advise them. Representative Butler of the House Judiciary Committee responded to the question:

The Committee on the Judiciary do not expect to prepare articles of impeachment against Judge Delahay and present them for trial this session. In the earliest case of impeachment of a judge in this country, in 1803, the case of Judge Pickering, which was in all respects like this, this exact question arose and was settled. One House presented articles of impeachment to the Senate and another House at the next session prosecuted those articles, as will be done in this case. We do not expect any other action except the formal presentation of the articles of impeachment to the Senate. The Senate is a perpetual court of impeachment, and in presenting these articles we act only as a grand jury.²⁶

As with Judge Pickering's impeachment, at the time of the Delahay inquiry, the House's decision whether or not to impeach was usually considered separately from the drafting and consideration of articles of impeachment. It was the practice of the House first to vote to impeach if it deemed such a course advisable and to notify the Senate of that action and of the fact that the House would, in due course, report articles against the impeached individual, and then to draft and consider articles of impeachment. As reflected in the resolution quoted above, the House, on February 28, 1873, voted to impeach Judge Delahay, and to so advise

²³ See, 3 *Hinds* ' §§ 2401-2407.

²⁴ 3 *Hinds* ' § 2407 at 843.

²⁵ 3 *Hinds* ' § 2505 at 1009, citing *Cong. Globe*, 42nd Cong., 3rd Sess. at 1899 (February 28, 1873).

²⁶ 3 *Hinds* ' § 2505 at 1009, citing *Cong. Globe*, *supra*, at 1900.

the Senate. However, Judge Delahay appears to have resigned, and no further action on the impeachment was taken.²⁷

Conclusion

As reflected in the Pickering, Louderback, and Hastings precedents reviewed in this memorandum, an impeachment proceeding may be continued from one Congress to the next. The Senate, as a continuing body, may proceed with a trial commenced in one Congress and continued in the following Congress. In the House, on the other hand, the business of the body expires at the end of each Congress. Although *Jefferson's Manual* indicates that an impeachment proceeding begun in one Congress continues in the next, the House in the later Congress in each case has taken particular steps to facilitate that continuation. Where appropriate in these circumstances, the House has passed resolutions in the later Congress to reappoint Managers or, where necessary, to appoint successors to those appointed in the earlier Congress. Also, the House in each case has passed a resolution providing the Managers in the later Congress with certain powers and authorities in connection with the impeachment. In the impeachment with respect to Judge Hastings, a third resolution was adopted, directing that the Senate be given notice of the identity of the House Managers for the impeachment of Judge Hastings. The House does not appear to have found it necessary in the later Congress to vote anew on a resolution of impeachment and articles of impeachment.

In the Ritter impeachment, the House Judiciary Committee carried out an impeachment inquiry in the 73rd Congress, pursuant to a resolution authorizing it to do so, but did not report out an impeachment resolution or articles of impeachment before the end of that Congress. In the following Congress, the committee could not rely upon a resolution authorizing an investigation in the 73rd Congress as a basis for reporting out a resolution impeaching Judge Ritter or setting forth articles of impeachment in the 74th Congress. Certain steps were taken by the House in order to proceed with the impeachment of Judge Ritter in the later Congress. The impeachment had to be once again brought before the House so that the matter could again be referred to the House Judiciary Committee. In the Ritter case this was done both by a Member rising to a question of constitutional privilege and presenting charges from the floor which were referred to the House Judiciary Committee and by a resolution introduced impeaching Judge Ritter which was also referred to the Committee. The Committee on the Judiciary then reported out the resolution and articles of impeachment, relying upon the evidence taken in the previous Congress, and recommended that the resolution be adopted and presented to the Senate. The House also considered and agreed to the resolution and articles of impeachment; it appointed Managers, and, through those Managers, presented the case in a trial before the Senate. Again, the transition from one Congress to the next did not foreclose the continuation of the impeachment once the necessary procedural steps needed to do so were completed.

In the first impeachment inquiry with respect to President Andrew Johnson, an investigation was referred to the House Judiciary Committee in the 39th Congress, but not completed before the end of that Congress. The committee reported this to the House, and expressed its opinion that the inquiry should continue in the next Congress. In the 40th

²⁷ See, 3 *Hinds* ' § 2505 at 1010.

Congress, the House adopted a resolution reflecting the fact that the investigation begun in the 39th Congress had not been completed by the end of that Congress, and that the committee had viewed the evidence gleaned up to that point as justifying continuation of the investigation in the 40th Congress. The resolution, among other things, authorized continuation of the investigation by the House Judiciary Committee in the 40th Congress, granted the committee powers to carry out its inquiry, requested that the Speaker of the House appoint the House Judiciary Committee quickly, and directed that the committee so appointed take charge of the evidence taken in the previous Congress. The investigation continued in the 40th Congress. The House did not adopt an impeachment resolution against President Johnson as a result of this impeachment effort. Again, the change of Congresses did not prevent the continuation of the impeachment inquiry in the new Congress, once the necessary procedural steps were taken.

Finally, in the impeachment investigation of Judge Delahay, near the end of the 42nd Congress, the House voted to impeach, notified the Senate of its action, and advised the Senate that the House would, in due course, report articles of impeachment against him. Relying upon the Pickering precedent, Representative Butler of the House Committee on the Judiciary addressed a question raised by Representative Dawes on the impact of the end of the Congress upon the investigation, finding that the matter could be pursued in the next Congress.

We hope that this will be of assistance to you.