

SENATE IMPEACHMENT TRIAL PROCEDURE



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Basic Principles for a Full, Transparent, and Fair Impeachment Trial

Article I of the Constitution grants the House the sole power of impeachment, and if the House does impeach, the Senate the “sole power to try all impeachments.” It also provides that the Chief Justice of the U.S. Supreme Court will preside if the trial involves a president. The Constitution authorizes the Senate to “determine the rules of its proceedings,” including additional rules governing an impeachment trial by the Senate. The Senate has established and may modify its own rules supplementing these constitutional requirements.

Four principles for conducting a full, transparent, and fair impeachment trial:

1. Trial procedures should be established before the trial commences.

A trial can only be fair if the rules are agreed to in advance. For that reason, any supplemental rules or modifications to the existing rules should be agreed to before the trial commences.

2. The Senate should hear the full case before voting on the President’s removal.

The Senate must allow members of the House to present the case for the President’s removal and the President should be afforded an opportunity to respond. Both should occur before a vote to dispose of or approve an article of impeachment.

3. The trial should be open to the public.

An impeachment trial of a president is a matter of exceptional importance to the American people. They should be able to understand the case for the President’s removal and the President’s defense. The doors to the Senate chamber should be open and the American people permitted to witness the proceedings to the extent possible. Transparency should only be sacrificed to advance compelling interests such as the sanctity of Senate deliberations, the need to protect legitimately classified information, or the recognition of a whistleblower’s right to anonymity.

4. Each Senator should take seriously his or her oath to “do impartial justice” and to “support and defend the Constitution.”

The question is not whether to support the President. The question is whether the President has committed treason, bribery, or other high crimes and misdemeanors within the meaning of the Constitution.

Tell your Senator that if the House adopts articles of impeachment, the Senate must fulfill its responsibility under the Constitution to conduct a full, transparent, and fair impeachment trial.

Key Points

1. Existing constitutional requirements and standing Senate rules already provide basic guarantees for a full, transparent, and fair impeachment trial.

For instance, the rules already provide that the Senate must commence an impeachment trial within a day of receiving articles of impeachment from the House. Should the House decide to impeach the President, the Senate can modify or supplement the rules at any point.

2. Suspending, amending, or supplementing the standing Senate impeachment rules without unanimous consent requires a supermajority to overcome a filibuster.

Unless there is unanimous consent, or a “nuclear option” strategy is pursued, support of at least 67 Senators will be needed to change, supplement, or suspend existing Senate rules.

3. Although the Chief Justice of the Supreme Court presides over the trial, he may defer to, and his rulings can be overruled by, a vote of the Senate.

The Chief Justice’s role at trial is not comparable to a judge in a criminal or civil case. Instead, he may make initial rulings that can be appealed immediately to the full Senate.

4. Senators have understood their oath to “do impartial justice according to the Constitution and laws” to require recusal in certain circumstances.

Nevertheless, we are only aware of cases in which a Senator has voluntarily recused. Attempts to force them to do so have been unsuccessful—even where the reasons for doing so were compelling.

5. The Constitution requires removal from office upon conviction, but it also permits the Senate to disqualify an official from future office.

The Senate’s role is not just to determine whether the President has in fact committed treason, bribery, or a high crime and misdemeanor and whether he should be removed. It is also to determine whether he should be barred from holding federal office in the future.

6. The Senate should consider whether to adopt supplemental rules establishing:

a. Trial structure.

The rules do not specify the amount of time devoted to opening statements, the House’s presentation of its case, the presentation of the president’s defense, and opportunities for individual Senators to ask questions.

b. Appropriate evidentiary standards.

The Senate does not have clear rules for what evidence is permitted at trial. Because the Senate is not a court of law and the Senators are functionally serving as both judges and jurors, the evidentiary considerations are very different from a criminal jury trial.

c. Whether and when a motion to dismiss is in order.

Existing rules do not specifically permit a motion to dismiss an article of impeachment, and it is unclear what standards should govern such a motion and whether they would differ from simply voting on the articles.

d. Special procedures to protect whistleblower anonymity or classified information.

Senate rules provide for an open trial, but special consideration should be given to the handling of classified evidence and the strong public interest in full transparency.

Sources of Authority and Precedent

This discussion will refer to several sources of authority and precedent. In a few circumstances, it will refer to the [U.S. Constitution](#), which sets broad parameters for Congress's authority to impeach a president and the Senate's role. Constitutional rules cannot be modified or suspended by the Senate.

Within the Constitution's parameters, the Senate's impeachment trial process is guided by the [Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials](#) (hereinafter the "Senate Impeachment Rules"), which have been in place since the late 1800's and were most recently amended in 1986. The [Standing Rules of the Senate](#) are also binding unless modified or suspended.

In the most recent presidential impeachment trial, that of President Clinton, the Senate unanimously adopted a set of [modifications](#) to the Senate Impeachment Rules at the beginning of the trial. Where these modifications bear on the questions discussed in this document, this precedent will also be noted, although those rules are not currently in effect and would need to be passed in the current Senate. In addition, the Chief Justice and the Senate Parliamentarian are likely to consult the August 15, 1986 [Report on Procedure and Guidelines for Impeachment Trials in the United States Senate](#) (henceforth "Report on Impeachment Procedure") for additional, relevant precedent. Finally, they may consult other sources of Senate precedent, including: [Hinds' Precedents](#) (1907), [Cannon's Precedents](#) (1936), [Deschler's Precedents](#) (1994) and [Precedents of the U.S. House of Representatives](#) (2017).

Pretrial

What existing rules govern impeachment?

- [U.S. Constitution](#): Article I, Section 3 and Article II, Section 4
- [Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials](#)
- The [Standing Rules of the Senate](#), which are applicable when the Senate Impeachment Rules are silent. (Report on Impeachment Procedure at 8)

How can the Senate amend, suspend, or supplement its rules?

Like any Senate rules, the Senate Impeachment Rules can be amended. A motion to amend them is debatable, subject to the legislative filibuster, and therefore, in the current Senate, would require at least 67 votes (unless there was unanimous consent or the majority invokes the so-called "nuclear option" to do away with the legislative filibuster altogether). For example, the Senate unanimously adopted a set of [modifications](#) to the Senate Impeachment Rules at the beginning of the trial relating to the impeachment of President Clinton. A motion "to suspend, modify, or amend any rule, or any part thereof," is not in order without "one day's notice in writing, specifying precisely the rule or part proposed to be suspended, modified, or amended, and the purpose thereof." Standing Rule V.1.

In addition, "[a]ny rule may be suspended without notice by the unanimous consent of the Senate, except as otherwise provided by the rules." Id. Unanimous consent is an ordinary feature of Senate procedure and was employed [frequently](#) during the impeachment trial of President Clinton.

Must the Senate hold a trial on articles of impeachment adopted by the House, and if so, when?

The Senate Impeachment Rules require the Senate to hold a trial on articles of impeachment adopted by the House. The Senate trial must commence no later than 1 pm on the day after the articles of impeachment have been presented to the Senate, and the Senate must “continue in session from day to day (Sundays excepted) after the trial shall commence (unless otherwise ordered by the Senate) until final judgment shall be rendered, and so much longer as may, in its judgment, be needful.” (Rule 3.)

Can the Senate limit which articles are part of the trial?

The Senate Impeachment Rules require the Senate to consider all articles of impeachment adopted by the House. (Rule 1.) The Senate Impeachment Rules also provide that “[o]nce voting has commenced on an article of impeachment, voting shall be continued until voting has been completed on all articles of impeachment unless the Senate adjourns for a period not to exceed one day or adjourns sine die.” (Rule 23.) The rules also provide that “if the person impeached shall be convicted upon any such article by the votes of two-thirds of the Members present, the Senate shall proceed to the consideration of such other matters as may be determined to be appropriate prior to pronouncing judgment.” (Rule 23)(emphasis added). These other matters would include, for example, whether, in addition to removing the convicted person from office, the person should be barred from holding federal office in the future. (U.S. Const., Art. 1, Section 3; see also Report on Impeachment Procedure at 96-97.)

Trial

Who participates in the trial and how is it structured?

The House of Representatives, having voted on articles of impeachment, appoints impeachment managers to transmit the articles to the Senate. (In the Clinton impeachment trial, the House appointed thirteen impeachment managers.) In order to begin consideration of the articles impeaching a president, the current Presiding Officer vacates the chair, officially transferring power as Presiding Officer to the Chief Justice of the Supreme Court. The President can appear personally or can be represented by counsel. (Rule 10.) The Senate Impeachment Rules provide for opening arguments, the presentation of evidence, and then closing arguments, followed by voting. (Rule 17, Rule 22.)

The [modifications](#) to the Senate Impeachment Rules adopted for the Clinton impeachment trial specified times and dates for arguments on initial motions, then adopted limitations on the presentations from the House and the defense: each would have a maximum of 24 hours (in other words, three days) to make its case, and each would be limited to arguing from the record received from the House, so no additional evidence was introduced, and no witnesses testified. The modifications then provided that Senators collectively would have a maximum of 16 hours to question the parties. The modifications to the rules provided that only after this period of Senators questioning the parties would a motion to dismiss be in order, and if one was made and it failed, the Senate could then seek and hear additional evidence including from subpoenaed witnesses, move to deliberations and ultimately, a vote.

Is the trial open to the public?

The Senate Impeachment Rules provide that the trial should be open to the public, except if the Senate decides to close them during deliberations. (Rule 20.) However, the rules also provide an expedited process for voting to close the doors. (Rule 20.)

What power does the Senate have to compel the appearance of witnesses, including for deposition?

The Senate Impeachment Rules provide that the Senate can make any “lawful order[]” that “it may deem essential or conducive to the ends of justice”, including compelling testimony, punishing contempt, and others. (Rule 6.) The Sergeant at Arms of the Senate is authorized to enforce the orders. (Rule 6.) For example, prior to the Clinton impeachment trial, the Senate voted to authorize subpoenas for deposition testimony from three fact witnesses.

Who presides over the trial, and how are disputes about the application of rules resolved?

The Chief Justice of the United States Supreme Court presides over the trial. (U.S. Const., Art. 1, Section 3.) In particular, the Presiding Officer is expected to rule on questions of evidence “including, but not limited to, questions of relevancy, materiality, and redundancy.” (Rule 7). Because the Chief Justice is acting as the “Presiding Officer” of the Senate in these circumstances, not as a judge or justice in a court of law, his decisions are subject to being overruled by the Senate itself. (Rule 7.)

Only a Senator—not a Manager or a representative of the President—may appeal the decision of a presiding officer. (Report on Impeachment Procedure at 35-36.)

What evidentiary rules govern impeachment trials?

The answer is unclear. Neither the Senate rules nor precedent lay out clear standards for what evidence is relevant and permissible. While the Senate Impeachment Rules imply that there may be questions of “relevancy, materiality, and redundancy” (Rule 7) regarding evidentiary submissions, there is not a particularly strong case that the Senate should adopt the evidentiary practices of a court of law. An impeachment trial is a unique feature of our constitutional structure and requires different considerations from a criminal or civil trial. Most critically, the Senate serves as both the judge and the jury: it gets to decide what evidence is in order and how to weigh that evidence when deciding whether a president has committed an impeachable offense, whether to remove him, and whether to disqualify him from future office. Additionally, the [Federal Rules of Evidence](#), “apply to proceedings in United States courts” but omit impeachment trials. (Rule 101.)

During the impeachment of President Johnson, the Senate decided that it sat for impeachment trials as the Senate and not as a court. (Hinds’ Precedents, at § 2057). The Senate also considered but did not adopt a motion to entertain “all evidence offered on either side not trivial or obviously irrelevant . . . be received without objection.” (Hinds’ Precedents, at § 2219.)

Can the Senate modify or dismiss an article of impeachment?

The Senate Impeachment Rules do not provide any mechanism for modifying or dismissing an article of impeachment, and in fact they explicitly state that an article may not be divided for purposes of the impeachment vote. (Rule 23.) Prior to the implementation of Rule 23, the Senate had, on occasion, allowed dismissal of impeachment articles for some judges.

The [modifications](#) adopted for the Clinton impeachment trial provided the ability for any Senator to move to dismiss the articles only after the opening arguments by the House managers and the President, and a period of time for Senators to question each side. For a more detailed discussion of this process, see the appendix at the end of this document.

How do Senators deliberate and reach a verdict?

The Senate Impeachment Rules provide that during deliberations, “no member shall speak more than once on one question, and for not more than ten minutes on an interlocutory question, and for not more than fifteen minutes on the final question, unless by consent of the Senate, to be had without debate...” (Rule 24.) The rules clarify that the fifteen minutes each Senator may take is to address the verdict on all the articles. The Senate Impeachment Rules also set a threshold to require a roll call vote to end the deliberations: “a motion to adjourn may be decided without the yeas and nays, unless they be demanded by one-fifth of the members present.” (Rule 24.) The Senate Impeachment Rules provide that, when voting, the Chief Justice will conduct a roll call vote, reading each article and then calling the name of each Senator, who will vote either guilty or not guilty. (Rule 23.)

A Senator’s Role and Obligations

What responsibilities does a Senator have at an impeachment trial?

The Constitution provides that when Senators are sitting in an impeachment trial, “they shall be on Oath or Affirmation.” (Article I, Section 3.) The Senate Impeachment Rules provide that the Chief Justice and the Senators each must take an oath to “do impartial justice according to the Constitution and laws.” (Rule 25) (emphasis added). This differs from the oath Senators take before they undertake their legislative duties, in which they promise to “support and defend” the U.S. Constitution and to “bear true faith and allegiance” to it. The separate oath emphasizes the independent role of a Senator in an impeachment trial: the question is not whether to support the President. The question is whether the President has engaged in impeachable conduct that warrants removal from office, and a Senator’s duty is to make that decision in good faith irrespective of party.

Can a Senator be made to recuse from an impeachment trial?

Whether the Constitution allows the Senate to force a Senator to recuse remains an open question of constitutional interpretation. Because the Senate Impeachment Rules provide that Senators each must take an oath to “do impartial justice according to the Constitution and laws,” (Rule 25) an argument has been made that the Senate can force a Senator to recuse if they cannot “do impartial justice.” However, during the trial of President Johnson, when a potentially conflicted Senator was asked to recuse, the body debated whether it was his “constitutional right” as a member of the Senate to sit in impeachment (citing Article I Sec. 3). The Senator was ultimately allowed to vote in the trial. (Report on Impeachment Procedure at 76-77)

During the trial of Judge Pickering, a resolution was introduced to disqualify three Senators from “sit[ting] and act[ing]” on impeachment because they had previously been members of the House and had voted on the articles of impeachment. (Hinds’ Precedents at § 2327). The Senate did not adopt the resolution and the three Senators voted in the trial. (Report on Impeachment Procedure at 76)

On at least 30 occasions, a Senator has voluntarily recused from an impeachment trial. For example, Senators Overton and Lonergan recused from the impeachment of Judge Louderback in 1933 because they had been members of the House during the impeachment. Numerous others have not participated in other trials for other reasons. In each of these cases the Senate has allowed the recusal without dissent. (Report on Impeachment Procedure at 77-78).

What standard must be met for conviction? (i.e., What should each Senator be asking her/himself?)

The Constitution provides that the president (like the vice president and other civil officers) “shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.” The Senate Impeachment Rules provide that the “final question [is] whether the impeachment is sustained,” and “if the person impeached shall be convicted upon any . . . article by the votes of two-thirds of the Members present, the Senate shall proceed to the consideration of such other matters as may be determined to be appropriate prior to pronouncing judgment.” (Rule 23.) Each Senator will vote either guilty or not guilty. (Rule 23.)

The question before a Senator is not, therefore, whether the president should or should not be removed from office; the Constitution provides that a president shall be removed if a sufficient number of Senators conclude that he has committed treason, bribery, or other high crimes and misdemeanors within the meaning of the Constitution. Neither the Constitution nor the Senate rules specify how a Senator should determine whether the President has committed an impeachable offense.

Appendix I

Specifics relating to the Motion to Dismiss in the Clinton impeachment

Following President Bill Clinton's impeachment, the Senate voted to adopt additional or "supplemental" impeachment rules. There was some substantial debate about exactly how the Senate would choose to deal with the impeachment. What followed was a negotiated settlement to pass a resolution supplementing the Senate rules to outline the timing of the debate and, significantly, to allow Senators to offer a motion to dismiss the articles in their entirety following the arguments of the House and the President — prior to calling any witnesses or presenting evidence.

1. The House was required to submit all evidence from its investigation and a trial brief to the Senate.
2. Both parties would then file any preliminary motions, except motions to subpoena witnesses or present evidence outside of the record.
3. At this point, the President was allowed to file a trial brief and the House allowed to rebut.
4. Both sides would then argue the preliminary motions and the Senate would deliberate and vote on the motions in closed session.
5. Following the disposition of the motions, each side was entitled to present its case based only on the record from the House, without witnesses.
 - a. The House would begin the proceeding and was granted 24 hours for its presentation.
 - b. The President was then granted 24 hours to make his response.
6. At this point, Senators were allowed to question the parties for no more than 16 hours.
7. Following the questioning, the Senate could consider and debate a motion to dismiss all the articles. During that debate Senators would be allowed to submit a motion to subpoena witnesses, but those subpoenas would only be voted on if the motion to dismiss was defeated.
8. If the motion to dismiss was defeated, the Senate would proceed with the normal rules.