

A SOUTH DAKOTA FIRST: THE IMPEACHMENT CONVICTION OF ATTORNEY GENERAL JASON RAVNSBORG

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This article is intended as both a historical account of events surrounding South Dakota's first impeachment trial and as a guide for those in other states (hopefully not South Dakota again) that may have to deal with an impeachment.

I. INTRODUCTION

On the evening of Saturday, September 12, 2020, Attorney General Jason Ravnsborg was driving home from appearing at a Republican political function in Redfield, South Dakota.¹ Shortly after passing through Highmore, South Dakota (population 832),² he called 911 and reported: “I hit something . . . and it was in the middle of the road” and that his vehicle was now disabled.³ His words would come back to haunt him.

South Dakota is a small state, just one big community. On Sunday morning, September 13, my wife and I were driving separate vehicles to the Black Hills when we saw law enforcement controlling traffic just outside of Highmore. We saw the two disabled vehicles, noticed blood that we thought was from a deer strike, and drove on.

That afternoon a political friend called and said that he just heard that the Attorney General had been in an accident near Highmore the night before and that there was a death. I told him we had driven by the scene and that I knew how to find out the details. In Highmore, after Sunday mass, the community gathers in the old church for a brunch. I called my friend that belongs to the local parish, Nick Nemec, and asked him about it. After a little background on the night and day's activities, Nick ended it with: “I think the Attorney General may have killed my cousin, Joe Boever!” An hour later Nick got the call to identify the body.

In the days following the death, the public generally viewed the events as an accident that was a tragedy for both the Boever family and the Attorney General.⁴ As weeks passed, more details of the night's event, and the Attorney General's

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1. Hunter Dunteman, *Timeline: How Did a Fatal Crash Evolve into South Dakota's Historic Impeachment of Jason Ravnsborg?*, MITCHELL REPUBLIC (Apr. 30, 2022, 9:00 AM), <https://perma.cc/J6XR-NTHU>.

2. *Highmore, SD*, CENSUS REP., <https://perma.cc/HXX9-HXY8> (last visited Nov. 17, 2022).

3. Dunteman, *supra* note 1, at 911 Audio 0:13.

4. Stephen Groves, *South Dakota's Top Attorney Says Found Body Day After Crash*, CLAIMS J. (Sept. 16, 2020), <https://perma.cc/AK8H-9PA9>.

conduct in the days following, came into the public arena.⁵ Questions started to be asked.⁶ At some point it began to look like there may be a discussion about the South Dakota Constitution's never used Article XVI, Section 3:

Officers subject to impeachment—Grounds—Removal from office—Criminal prosecution. The Governor and other state and judicial officers, except county judges, justices of the peace and police magistrates, shall be liable to impeachment for drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanor in office, but judgment in such cases shall not extend further than to removal from office and disqualification to hold any office of trust or profit under the state. The person accused whether convicted or acquitted shall nevertheless be liable to indictment, trial, judgment and punishment according to law.⁷

II. THE EARLY TIMELINE

South Dakota had no experience with a Senate impeachment trial.⁸ How events evolve from a tragedy in the news to an impeachment probably vary depending on the case and the acts involved. For the first five months following the death of Joe Boever, no steps were taken or anticipated on the Senate side of the Capitol.⁹ Questions existed about the events of that night. The criminal case in Hyde County was creeping along slowly.¹⁰ The administration had released information that was damning to the Attorney General.¹¹ People speculated that the Attorney General might resign,¹² but mostly nothing happened.

In fact, one night after the legislative session started in January, I called the prosecutor, Emily Sovell, to see if she had some sense of a timeline for the criminal case to wrap up, as the cloud over the Attorney General was affecting work on issues in the Capitol. Emily was friendly but clearly distraught about the attention and demands of the high-profile case that had fallen on her plate. She made it clear she had no sense of a timeline for her office to make charging decisions. She had involved three experienced prosecutors: Beadle County States Attorney Mike Moore, Minnehaha County States Attorney Daniel Hagggar, and Pennington

5. Marie Fazio, *'I Discovered the Body': South Dakota's Attorney General Offers New Crash Details*, NY TIMES (Sept. 15, 2020), <https://perma.cc/4RKJ-LV4G>.

6. Dunteman, *supra* note 1.

7. S.D. CONST. art. XVI, § 3.

8. Dunteman, *supra* note 1.

9. *Id.*

10. Complaint, *South Dakota v. Ravnsborg*, No. MAG21-1, 2021 WL 651372 (S.D. 6th Cir. Feb. 17, 2021).

11. Danielle Ferguson et al., *'His Face Was in Your Windshield, Jason': Ravnsborg Videos Provide More Details About Fatal Crash*, ARGUS LEADER (Feb. 23, 2021, 7:26 PM), <https://perma.cc/2XPF-36GA>.

12. Rachel Treisman, *South Dakota AG Faces Impeachment, Calls to Resign Over New Evidence in Fatal Crash*, NAT'L PUB. RADIO (Feb. 24, 2021, 6:00 PM), <https://perma.cc/5D55-AXJN>.

County States Attorney Mark Vargo.¹³ At some point Daniel Hagggar withdrew from participation.¹⁴ Later there was a falling out within the prosecution team about the direction charges were going, and Mark Vargo withdrew from that team.¹⁵

After a five-month investigation, on February 18, 2021, Deputy Hyde County States Attorney Emily Sovell charged the Attorney General with three Class 2 misdemeanors: careless driving, illegal lane change, and driving while using his cell phone.¹⁶

During the following week, Representative Will Mortenson, an up-and-coming young House member in whose district the death occurred, attempted to negotiate a process for addressing the impeachment issue. Discussions were also had between me, the Governor's Chief of Staff, and the Director of the Attorney General's Division of Criminal Investigations to see if a smooth resignation and transition process was a possibility. The discussions were unsuccessful.

On Wednesday, February 24, 2021, the waiting game changed. Representative Will Mortenson introduced House Resolution 7001 titled: "On the potential impeachment of Jason Ravnsborg, Attorney General of the State of South Dakota."¹⁷

On February 25, 2021, the circuit court handling the criminal matter issued an Order Precluding Disclosure of Criminal Investigation Information, which prohibited the administration from releasing any additional information about the investigation while the criminal case was proceeding.¹⁸

On March 3, the House leadership amended House Resolution 7001 to provide that the House would consider the impeachment issue after the criminal case was resolved.¹⁹

III. THE SENATE RESPONSE

An impeachment under the South Dakota Constitution begins in the House of Representatives pursuant to Article XVI, Section 1.²⁰ But, the Senate needed to be ready.

From the outset I asked the senators to refrain from public comment on the guilt or innocence of the Attorney General in the impeachment matter until and if

13. See Jonathan Ellis & Joe Sneve, *Ravnsborg Investigation: Minnehaha County No Longer Assisting in Fatal Crash*, ARGUS LEADER (Jan. 22, 2021, 3:00 PM), <https://perma.cc/H3XG-N7BR>.

14. *Minnehaha County Prosecutor Not Part of Ravnsborg Probe*, ARGUS LEADER (Jan. 23, 2021, 2:47 PM), <https://perma.cc/F8P4-DZGJ>.

15. Compare Ellis & Sneve, *supra* note 13 with *Prosecutors, Ravnsborg's Chief of Staff to Testify at Impeachment Hearing*, DAKOTA NEWS NOW (Feb. 22, 2022, 11:33 AM), <https://perma.cc/Z9EZ-U5AF> (showing that Mark Vargo had been a part of the prosecuting team but ultimately was not).

16. Complaint, *supra* note 10.

17. H. JOURNAL, 96th Legis., Reg. Sess., Twenty-Seventh Day 381 (S.D. 2021), <https://perma.cc/57BG-DH3Q>.

18. Order Precluding Disclosure of Criminal Investigation Information, *Ravnsborg*, No. MAG21-1.

19. H.R. Res. 7001, 96th Legis., Reg. Sess. (S.D. 2021), <https://perma.cc/FLU8-YYAG>.

20. S.D. CONST. art. XVI, § 1.

the Senate would receive articles of impeachment from the House. The Senate was comprised of thirty-two Republicans and three Democrats.²¹ The Senate President pro tempore has no ability to enforce this type of a request. But a testament to the character of the members of the body is that no senator publicly commented on the guilt or innocence of the Attorney General during the twenty-one months from the event to the trial.

I also asked Senator Dave Wheeler, an attorney, if he would be willing to study other states' impeachment processes and take a first run at developing the rules we would use in South Dakota. The bad news for South Dakota is we had no established set of rules. The good news is that we had not needed a set of impeachment rules in the 132 years of our existence.²² Senator Wheeler agreed to take on the task. He studied the rules of Arizona, Illinois, and North Dakota. He also sought out the assistance of the two senators who were retired circuit judges, Art Rusch and Tim Johns. Before the session ended in March of 2021, he had created a draft set of rules that I asked him to keep until we saw if we would need them.

IV. THE CRIMINAL CASE DISPOSITION

The Attorney General initially fought the charges, including apparent defenses that alleged the victim had jumped in front of the vehicle and was under the impairment of something.²³ On August 26, 2021, pursuant to a plea agreement, the Attorney General pled guilty to two of the misdemeanor charges.²⁴

V. CAUTION: THE MISUNDERSTOOD "TRIAL"

Section 2 of the impeachment article in the South Dakota Constitution provides: "All impeachments shall be tried by the senate."²⁵ The same section also references the party as being "on trial."²⁶ Because of the general understanding of the word "trial"—everybody has seen them on television shows—there is a mistaken default perception that this "trial" is just like one of those. While not a criminal matter, but because there is an accused, the default perception is to treat the proceeding as a criminal trial. This would be a serious misperception. One of the biggest challenges in preparing for an orderly proceeding was overcoming the pervasive nature of people involved viewing this matter as either a criminal or civil trial. It is neither.

21. Eric Mayer et al., *Ravnsborg Impeachment Trial: Senate Votes to Sustain Impeachment*, KELOLAND (June 23, 2022, 1:44 PM), <https://perma.cc/UGL8-E5LX>.

22. See Dunteman, *supra* note 1.

23. *An Attorney General Won't Serve Any Jail Time for a Crash That Killed a Pedestrian*, NAT'L PUB. RADIO (Aug. 27, 2021, 8:28 AM), <https://perma.cc/ZQ43-S9UB>.

24. Judgment of Conviction and Sentence, *South Dakota v. Ravnsborg*, No. MAG21-1 (S.D. 6th Cir. Sept. 2, 2021).

25. S.D. CONST. art. XVI, § 2.

26. *Id.*

An impeachment is a political trial. It is a creature of the political process that created it. It does not naturally exist. For example, in South Dakota, by the very language of Section 1 of the impeachment article, not all elected officials can be impeached.²⁷ When it comes to impeachment, the only required procedures are those set forth in either the state constitution, statutes enacted into law, or rules adopted by the legislature.

States vary greatly in this regard. Some have procedures set forth in either their state constitutions, state statutes, or rules the legislature has created.²⁸ The topics that this can affect are many.

A. SOUTH DAKOTA REQUIRED PROCEDURES

South Dakota has no statutes and no rules (before those adopted just for this proceeding) on impeachment. Article XVI of the South Dakota Constitution sets certain minimum requirements.²⁹

Section 1 gives the House the sole power to impeach and provides that it must be approved by a majority of the members elect.³⁰ An absent member is the same as a “no” vote when votes are determined by “members elect.”³¹

Section 2 provides that impeachments are tried in the Senate and require two-thirds of the members elect to vote favorably to convict.³² The only similarity to a burden of proof is reflected here, where the oath senators take requires them to “do justice according to law and evidence.”³³ Finally, if the Governor or Lieutenant Governor are the subject of the impeachment, the chief justice of the supreme court presides.³⁴ Implicit in that statement is that the President of the Senate, the Lieutenant Governor, presides in all other cases, unless absent.³⁵

Section 3 identifies which officials are subject to impeachment.³⁶ It provides that the basis for impeachment must be either “drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanor in office.”³⁷ It sets the penalties at removal from office and disqualification from holding any state office of “trust or profit.”³⁸ Finally, impeachment does not protect the individual from criminal proceedings.³⁹

27. *Id.* § 1.

28. See Timothy D. Lanzendorfer, *When Local Elected Officials Behave Badly: An Analysis and Recommendation to Empower State Intervention*, 82 OHIO ST. L. J. 654, 663 (2021).

29. See generally S.D. CONST. art. XVI (establishing the minimum requirements for the impeachment and removal of public officers).

30. *Id.* § 1.

31. *Id.*

32. *Id.* § 2.

33. *Id.*

34. *Id.*

35. *Id.* See also S.D. CONST. art. IV, § 5 (establishing that the Lieutenant Governor is the President of the Senate).

36. S.D. CONST. art. XVI, § 3.

37. *Id.*

38. *Id.*

39. *Id.*

Section 4 provides standards for removal and penalties for officers not subject to impeachment.⁴⁰

Section 5 suspends an impeached official from exercising the powers of that office, pending the outcome of the trial.⁴¹

Section 6 excludes the Lieutenant Governor from participating in the trial if the Governor was the subject of the impeachment.⁴² It is not clear that this could happen in light of the Lieutenant Governor's limited role in the Senate pursuant to Article IV, Section 5, and the abrogation of that role by Article XVI, Section 2.

Section 7 requires that the House's impeachment papers be served on the subject official at least twenty days before the Senate trial.⁴³

Section 8 prohibits a second impeachment for the same offense.⁴⁴

B. MINIMUM REQUIREMENTS

In reviewing South Dakota's minimal requirement, and especially when weighed against the substantial procedures many states have, I concluded early on that our state would be best served with the fewest rules and restrictions possible. The necessary requirements appeared to be a public trial, an opportunity to be heard, and the ability to challenge the evidence. Adding additional rules and procedures, like the burden of proof issue discussed immediately below, encourages, or may create the opportunity for, appellate review (an impeached official asking: "Were the standards followed?"). Unless bobbled by the rule creation process, the resolution of an impeachment trial is solely the purview of the South Dakota Senate.⁴⁵

C. LEGAL CONCEPTS AND ROLES TO CONFRONT

1. *Burden of Proof*

"Burden of Proof" is the legal concept about how strong the evidence must be for the juror or judge to rule in the favor of the party advocating before him.⁴⁶ In criminal cases the public understands that the standard is "beyond a reasonable doubt."⁴⁷ In civil cases usually it is "by a preponderance of the evidence."⁴⁸ There is no such thing as a "burden of proof" in a South Dakota impeachment proceeding. There is no provision in statute, rule, or article of the constitution that

40. *Id.* § 4.

41. *Id.* § 5.

42. *Id.* § 6.

43. *Id.* § 7.

44. *Id.* § 8.

45. *Id.* § 2.

46. David L. Schwartz & Christopher B. Seaman, *Standards of Proof in Civil Litigation: An Experiment from Patent Law*, 26 HARV. J. L. & TECH. 429, 433-34 (2013).

47. *Id.* at 436.

48. *Id.* at 435.

requires any unique burden of proof for a senator to weigh in reaching their individual decision.

There are states that have burdens of proof in their impeachment law.⁴⁹ The South Dakota Senate could have chosen to add a rule on burden of proof. I specifically removed it from the proposed rules.

Senators cast over a thousand votes a term. Each one understands that they have taken an oath to follow the law in casting those votes. In the impeachment trial, Section 2 required the additional oath referred to above.⁵⁰ Any other rule creating a burden of proof would fall victim to the procedural quagmire created by misunderstanding that the impeachment trial is a political trial—not a civil or criminal proceeding.

The language I shared with the senators on the floor in the proceeding approving the rules and at the trial is:

A vote to sustain an article of impeachment is a vote that the article is true and that the article constitutes an impeachable offense. . . . Each Senator should make the decision on the impeachment questions based upon how they view the evidence in the performance of their duties as a State Senator and with regard to the oath of office they took to perform those duties. This is neither a criminal nor a civil legal proceeding. It is a constitutionally prescribed impeachment trial that you serve on and decide, pursuant to your election to the office of State Senate, and you should decide it as you see appropriate in fulfilling the duties of your office.⁵¹

At the trial, Mike Butler and Ross Garber served as co-counsel to the Attorney General.⁵² Mr. Garber had extensive experience in other states with impeachment proceedings and teaches classes on political investigations and impeachments at Tulane Law School.⁵³ His role was to argue the impeachment process to the Senate in opening and closing. Oddly, even though South Dakota has no burden of proof, which he admitted, he continued to argue that the senators should use a burden of proof he described and preferred.⁵⁴

The House was free to choose whether or not they wanted to utilize a burden of proof in their process. While they are guided by the same constitution and the

49. See, e.g., NEB. CONST. art. III, § 14 (mandating that “[n]o person shall be convicted . . . of impeachment [unless] clear and convincing evidence exists indicating that such person is guilty of one or more impeachable offenses”).

50. See discussion *supra* note 32 (describing the oath).

51. Digital Audio Recording: Motion to Approve S. Res. 702, held by the 96th Legis., Spec. Sess., beginning at 12:28 (Apr. 26, 2021), <https://perma.cc/C8KE-A5WB>; see also Transcript of Proceedings at 244-45, *In re* Impeachment of Attorney General Jason Ravnsborg, 96th Legis., Spec. Sess. (June 21, 2022), <https://perma.cc/CAU6-3Z9A> (stating much of the same at the trial proceeding).

52. Transcript of Proceedings, *supra* note 51, at 1.

53. Ross Garber, TULANE EXPERTS, <https://perma.cc/85MV-MDKQ> (last visited Nov. 9, 2022).

54. Transcript of Proceedings, *supra* note **Error! Bookmark not defined.**, at 39-40.

same lack of a required burden of proof, they chose to use “clear, satisfactory and convincing” evidence as their burden of proof.⁵⁵

2. *Who Prosecutes the Case?*

Several possibly unique factors made this issue time consuming in the early stages. First, President Trump had just been through two very public impeachment proceedings.⁵⁶ In those matters, the United States House of Representatives very publicly chose “House Managers” to prosecute the trial.⁵⁷ Those public displays included marching across the Capitol to “present” the articles of impeachment to the United States Senate.⁵⁸ None of this type of pageantry or grandstanding is required in South Dakota, and I did not believe we should have a process that encouraged or promoted it. The Senate was determined to de-politicize the process.

A second reality was the very divided nature of the South Dakota House of Representatives on the issue of impeachment. The leadership-chosen House Select Committee on Investigation (“Select Committee”) recommended against impeachment by a vote of 6 to 2.⁵⁹ On the House floor, the leadership’s recommendation was rejected, and the articles were adopted by a vote of 36 to 31.⁶⁰ Given that a majority of members elected were required to issue articles of impeachment, which would be 36 in the 70-member House, the division was obvious.⁶¹

The Speaker of the House and his political allies were at war with the Governor, and the impeachment process had become one of the battlefields. The former Speaker, Steve Haugaard, was in the House, running for Governor, and a close ally of the current Speaker, Spencer Gosch. Both Speaker Gosch and former Speaker Haugaard had been vocal in their opposition to the impeachment. There was no interest in allowing the Speaker to choose who would prosecute on behalf of the articles in the Senate. While House Resolution 7001 provided that the Select Committee would provide the “manner in which the House should manage its impeachment case in the Senate in this matter, should the House vote to impeach,”⁶² the House had no ability to require the Senate to comply with the

55. *Id.* at 234-35.

56. *The Second Impeachment of Donald Trump*, PBS, <https://perma.cc/D6ZP-R8XX> (last visited Nov. 9, 2022).

57. Nicholas Fandos & Sheryl Gay Stolberg, *House Delivers Impeachment Charges to Senate, Paving the Way for a Trial*, NY TIMES (Feb. 4, 2020), <https://perma.cc/7SG7-Z5PE>.

58. *Id.*

59. H.R. SELECT COMM. ON INVESTIGATION, MAJORITY REPORT OF THE HOUSE SELECT COMMITTEE ON INVESTIGATION, H.R. 96th Legis., 2d Spec. Sess. (S.D. 2022), <https://perma.cc/7Z4Z-C244>.

60. H. JOURNAL, 96th Legis., 2d Spec. Sess., Second Day 33 (S.D. 2022), <https://perma.cc/YGP4-A87C>; Hunter Dunteman, *South Dakota AG Ravnsborg Impeached on 36-31 Vote, Immediately Suspended from Duties*, MITCHELL REPUBLIC (Apr. 12, 2022, 12:44 PM), <https://perma.cc/C78N-E4FS> [hereinafter Dunteman II].

61. S.D. CONST. art. XVI, § 1.

62. H.R. Res. 7001, 96th Legis., 2d Spec. Sess. (S.D. 2021), <https://perma.cc/FZL3-8VDY>.

House resolution. The Speaker was advised early on who the Senate chose to prosecute the case, and the Speaker made no effort then to appoint House trial managers.

To prosecute the Senate trial, I contacted Pennington County States Attorney Mark Vargo. He had been on the criminal prosecution team and knew the details of the case.⁶³ When I asked, it was with no conditions saved that he refrain from commenting in the media about the matter. Vargo accepted, but he had a few conditions of his own. He advised that since he was paid by Pennington County, there would be no charge for his time. He asked to have a paralegal assist him and that we reimburse Pennington County for her time. Finally, he asked to be assisted by Clay County States Attorney Alexis Tracy. My recollection is that we made the deal in one phone call, and the Senate now had a skilled and informed prosecutor at little cost to the taxpayers.

3. *The Senate Jury*

As with every other phase of an impeachment, there is misunderstanding about the senators as jurors. They do vote to decide the impeachment questions, and the constitution requires that they make those votes based upon the “law and evidence,”⁶⁴ but they do not carry the responsibility of remaining unbiased throughout the process.

To expedite the trial, and recognizing the reality that all of the information was public after the House proceedings, the senators were expected to review relevant documents before the trial began. Rule 3-1 was created to facilitate senators reviewing materials and submitting questions before the trial began.⁶⁵

At the end of the trial, there was no closed jury deliberation—but it was suggested. In a civil or criminal trial, a jury is expected to work together towards a common verdict. They are instructed by the court to do so. Such is not the case in the deliberation of senators. They each are to come to their own individual conclusion. “Jury deliberation” is the debate on the Senate floor after the impeachment proceeding is submitted to the Senate.

Also, there were no caucus meetings by the two political parties’ caucuses concerning the evidence or how to vote at an impeachment trial. The decision of each senator being uniquely personal in the performance of their duties of office, the decision was made that caucusing on the issue was inappropriate.

4. *The Judge*

Under the South Dakota Constitution it is clear that the Lieutenant Governor presides over the South Dakota Senate as its President.⁶⁶ In his absence, by rule

63. *Minnehaha County Prosecutor Not Part of Ravnsborg Probe*, *supra* note 14.

64. S.D. CONST. art. XVI, § 2.

65. S. Res. 702, 96th Legis., 2d Spec. Sess., at R. 3-1 (S.D. 2022), <https://perma.cc/BF28-Y4SJ>.

66. S.D. CONST. art. IV, § 5.

the President pro tempore presides, or any other senator designated by the President or the President pro tempore.⁶⁷ But this impeachment proceeding presented unique questions during the planning phase in 2021.

Governor Kristi Noem had been vocal in her belief that the Attorney General should be impeached.⁶⁸ This created a concern that the appearance of impartiality might require her running mate Lieutenant Governor Larry Rhoden, the Senate President, to step aside. Additionally, if the impeachment trial was conducted like a criminal or civil trial, with many rulings pursuant to the rules of evidence and an extensive motion practice, the process could be challenging for a nonlawyer like Rhoden to preside over. Planning took place, subject to what decision the Senate President might make about presiding.

Discussions were had with the chief justice; and it was determined that the supreme court should not be involved at that level. Retired circuit judges were polled for interest and lack of conflict. In fact, eventually Retired Circuit Judge Robert Timm agreed to serve, if needed.

In the meantime, as we pondered how to proceed, the Legislative Research Council staff and I concluded that the constitution did not allow a non-senator to preside over the Senate if the President chose not to preside.

Eventually Lieutenant Governor Rhoden chose to preside, and he did so ably. He was an experienced legislator and had presided over the Senate for two sessions already by the time of the trial.⁶⁹ His work was aided by two developments. First, Rule 3-2 prohibited pre-trial motions,⁷⁰ and Rule 4-2 made it clear that the rules of evidence did not apply.⁷¹ Secondly, former Lieutenant Governor Matt Michels agreed to serve as the advisor to the President of the Senate. Matt Michels is an attorney, former Speaker of the House, former President of the Senate, and a respected individual in political circles.⁷² He and the President were able to work together to make the President successful in the role of presiding over a trial, which is not part of the normal day-to-day work of a cattle rancher.

5. Motion Practice

In other states, pre-trial motions are a substantial part of the proceeding. Motions to dismiss are made to challenge the appropriateness of the articles of impeachment being issued. Through Rule 3-2, the Senate decided that there would

67. S. R. 1-1 to -2 (S.D. 2022), <https://perma.cc/FE7A-J74J>.

68. Zoë Richards, *Kristi Noem Ramps Up Pressure to Impeach South Dakota GOP Official Involved in Pedestrian's Death*, NBC NEWS (Mar. 29, 2022), <https://perma.cc/C44B-JG9C>.

69. See S.D. CONST. art. IV, § 5; *Larry Rhoden*, BALLOTPEDIA, <https://perma.cc/35KL-ERL9> (last visited Nov. 16, 2022).

70. S.D. S. Res. 702, at R. 3-2.

71. *Id.* at R. 4-2.

72. *Matthew J.W. Michels*, S.D. LEGIS. RSCH. COUNCIL, <https://perma.cc/R5VY-BCV5> (last visited Nov. 16, 2022); *Matthew Michels*, BALLOTPEDIA, <https://perma.cc/DEX6-66W4> (last visited Nov. 16, 2022).

be no pre-trial motions and that there would be no motion to challenge the sufficiency of the article of impeachment.⁷³

6. *Evidence and Objections*

The rules of evidence, utilized in civil and criminal courtrooms across America, did not apply pursuant to Senate Rule 4-2.⁷⁴ A Senate-specific rule was created that allowed any evidence that was “relevant, material and not redundant.”⁷⁵

7. *The Fourth Estate*

The media presence is an easily missed dimension in the early substantive stages of planning an impeachment, but by its nature it will not be forgotten or ignored for long. The House had a strained relationship with the media, and the Senate was determined to do better. All information that the senators saw was also available to the media and public—with the exception of certain gruesome photos of the victim’s body at the crime scene.

Early on we met with the media and involved them in how to best accommodate the public’s right to know. The actual logistics meeting was held in the Senate chamber with myself, media representatives, and legislative staff. In a meeting that took about a half hour, most of the logistics of gallery reserved seating, floor access for a pool photographer, and related issues were resolved. In hindsight, accommodating the media may be one of the wiser moves a senate can make. Based on the varied people that commented after the fact, anecdotally, it is clear that many South Dakotans took advantage of the television and internet coverage to watch the proceedings live and the follow-up reporting. Probably because of the level of cooperation from the outset, there were no issues with unruly or inappropriate behavior with the media during the conduct of the trial.

8. *Public Attendance*

There will be requests for seats in the gallery, and the seating is limited. Hindsight has proven that more people think they would make the trip to the State Capitol to watch an impeachment trial than actually will make the time commitment to do so when those trial dates arrive. When senators inquired about seating for their spouses, the idea of reserved seating was born. Each senator received two gallery passes for reserved seating. As the trial proceeded, it was clear that only a few had guests that actually used their passes.

73. S.D. S. Res. 702, at R. 3-2.

74. *Id.* at R. 4-2.

75. *Id.*

Reserved seating was provided for the media. With the proliferation of media across a broad political spectrum, it was unclear how many may attend that were not part of the usual South Dakota media core. In the end, very few “extra” media were present.

The family of the victim and the family of the Attorney General were both provided with reserved seating areas. A few of these seats were used.

Overflow areas were created with closed circuit TV playing. These areas were not needed. Interestingly, the largest group of the public to watch the proceedings were House members that had voted not to impeach.

9. *Plea Agreements*

Both defense counsel and the media inquired about the possibility of the disposition of the articles of impeachment by some form of an agreement before trial. Once the Senate receives the articles, the constitution is very clear on what the Senate is to do. Absent the elected official admitting to the charges and accepting the removal and ban from holding public office, the constitution directs the Senate to try the matter—and the Senate was prepared to do its duty.

10. *All Senators Present*

The House passed the articles of impeachment on April 12, 2022.⁷⁶ In messaging with the senators, the consensus was reached almost immediately to find the soonest practicable dates for the impeachment trial when all senators could be present. With the Republican convention addressing the Attorney General nomination beginning on June 23,⁷⁷ time appeared to be of the essence. The constitution provides that the accused is to receive twenty days’ notice. The Senate would be coming back into session to adopt impeachment rules on April 26.⁷⁸ Consequently, the earliest date, after documents were prepared and approved and service made, could have been about May 23, a mere fifteen days before 11 of 35 senators were occupied running for election in the primary on June 7. Immediately after the primary there were senators with conflicts, including one on a trip until June 18. Monday, June 20 appeared to be the best option to start until we realized that this was the first annual Juneteenth state holiday. So, the trial was set for June 21 and 22, with a timetable to force resolution within that period.⁷⁹

Despite the best efforts, not everything could be controlled. One senator had a close family member die, and the funeral was during the impeachment. Another

76. Dunteman II, *supra* note 60.

77. Lee Strubinger, *Attorney General and Other Nominations Up for Grabs at State Republican Convention*, S.D. PUB. BROAD. (June 23, 2022, 1:12 PM), <https://perma.cc/WZN6-M2NR>.

78. See S.D. S. Res. 702.

79. *South Dakota AG's Impeachment Trial Set for June 21-22*, AP NEWS (Apr. 13, 2022), <https://perma.cc/328S-7BJV>.

senator's mother, whom she cared for, suffered a serious fall and injury. Thirty-three of the thirty-five senators were going to be present. Because the vote is based upon members elect, each missing senator was the equivalent of a no vote on impeachment.⁸⁰

11. Staff Involvement is Critical

No state senate in America has done enough impeachments to have a staff and system ready to go when these events occur. An impeachment will always be a “one-off.” Engaging the staff and empowering the staff is critical. They have to think through scenarios that are not regularly present in the legislative process. For example, the impeachment trial was in June. The South Dakota Senate is not air conditioned, and Pierre, South Dakota, regularly plays with temperatures north of 90 degrees in June. Exhibits are not permitted during Senate debate, and so there are no means to publish them to the body or any witnesses. The Senate chamber does not usually have witnesses. There are not counsel tables or room for them in the Senate chamber. In this instance, they were borrowed from the South Dakota Supreme Court's courtroom.

Senate leadership has to give the staff the power to search out and solve these situations in advance and be quickly responsive as situations arise. The impeachment trial is an expedited process into a new adventure for a Senate—and their staff. In South Dakota, our staff met all of the challenges presented.

VI. HOUSE OF REPRESENTATIVES VOTES FOR ARTICLES OF IMPEACHMENT

The House of Representatives met in special session on November 9, 2021, and the Speaker of the House announced the appointment of the nine-member Select Committee.⁸¹ The Select Committee held eight meetings to investigate the issues of impeachment. The Select Committee was made up of nine representatives, which included the Speaker, Speaker pro tempore, former Speaker, and Majority Leader.⁸² The political makeup was seven Republicans and two Democrats.⁸³

Ultimately the Committee adopted Select Committee's Majority Report and Recommendations by a vote of 6 to 2, with all Republicans voting for the report (Speaker Gosch did not vote) and both Democrats opposing it.⁸⁴ The twelve-page report summarized the committee's work and then recommended that the Attorney

80. S.D. CONST. art. XVI, § 1.

81. S.D. H.R. Res. 7001, 96th Legis., 2d Spec. Sess.

82. *House Select Committee on Investigation – 2021 Second Special Session*, S.D. LEGIS. RSCH. COUNCIL, <https://perma.cc/T2SF-7FP5> (last visited Nov. 16, 2022).

83. *Id.*

84. H.R. SELECT COMM. ON INVESTIGATION, MAJORITY REPORT OF THE HOUSE SELECT COMMITTEE ON INVESTIGATION, H.R. 96th Legis., 2d Spec. Sess. (S.D. 2022), <https://perma.cc/7Z4Z-C244>.

General had not committed an impeachable offense.⁸⁵ Oddly, and probably useful to understand the divergence in the final outcome between the House and Senate, the Select Committee then proceeded for three pages to berate the law enforcement investigation and the activities of the administration related to the investigation.⁸⁶ The two Democrats on the Select Committee filed a minority report that was complimentary towards the law enforcement investigation and critical of the Attorney General's conduct.⁸⁷

On April 12, 2022, the House of Representatives took up the Select Committee report.⁸⁸ Contrary to the recommendation of the Select Committee, Representative Will Mortenson introduced House Resolution 7002 recommending impeachment and asked the body to immediately calendar it.⁸⁹ The calendaring vote, a critical procedural vote to allow impeachment to proceed, was 51 for and 16 against.⁹⁰ Resolution 7002 was therefore calendared, and the debate ensued.⁹¹

The entire House session took 46 minutes and 56 seconds.⁹² No representative rose to speak in support of the Attorney General. The final vote was 36 for the resolution to issue 2 articles of impeachment and 31 against.⁹³ Since passage required a majority of the members elect, Resolution 7002 was adopted by a single vote.

On April 13, this mechanic's kid cleared the calendar in his law office for the day and set about revising and reworking what became South Dakota's rules for an impeachment trial.

House Resolution 7002 approved the two following articles of impeachment:

Article I: Crimes Causing the Death of Joseph Boever

S.D. Const., Art. XVI, § 3 provides that the House of Representatives may impeach "state and judicial officers," for "drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanors in office."

Attorney General Jason Ravensborg committed crimes causing the death of Joseph Boever, specifically:

- (1) On the evening of September 12, 2020, Attorney General Ravensborg failed to operate his vehicle within its proper lane,

85. *Id.*

86. *Id.*

87. H.R. SELECT COMM. ON INVESTIGATION, MINORITY REPORT OF THE HOUSE SELECT COMMITTEE ON INVESTIGATION, H.R. 96th Legis., 2d Spec. Sess. (S.D. 2022), <https://perma.cc/CM8X-UY82>.

88. *See* H. JOURNAL, 96th Legis., 2d Spec. Sess., Second Day (S.D. 2022), <https://perma.cc/YGP4-A87C>.

89. *Id.*; H.R. SELECT COMM. ON INVESTIGATION, MAJORITY REPORT OF THE HOUSE SELECT COMMITTEE ON INVESTIGATION, H.R. 96th Legis., 2d Spec. Sess. (S.D. 2022), <https://perma.cc/7Z4Z-C244>.

90. H. JOURNAL, 96th Legis., 2d Spec. Sess., Second Day 31 (S.D. 2022), <https://perma.cc/YGP4-A87C>.

91. *Id.*

92. Digital Audio Recording: Legislative Session of the Vote to Issue two Articles of Impeachment, held by the 2d Spec. Sess. of the 96th Legis. (Apr. 12, 2022), <https://perma.cc/9EQM-Z8TP>.

93. Dunteman II, *supra* note 60.

crossed outside such lane, diverted his attention from the road, and struck pedestrian and Highmore, South Dakota, resident Joseph Boever;

- (2) Joseph Boever died immediately from the collision; and
- (3) Attorney General Ravensborg pleaded no contest and was found guilty of two separate crimes, including illegal lane change, the crime that caused the death of Joseph Boever.

Article II: Malfeasance in Office Following the Death of Joseph Boever

S.D. Const., Art. XVI, § 3 provides that the House of Representatives may impeach “state and judicial officers,” for “drunkenness, crimes, corrupt conduct, or malfeasance or misdemeanors in office.” Attorney General Jason Ravensborg committed malfeasance in office following the death of Joseph Boever.

Attorney General Jason Ravensborg committed the following wrongful deeds:

- (1) Immediately following the collision, Attorney General Ravensborg identified himself by his official title and made a direct misrepresentation to the dispatch officer, misleading first responders as to the crime he had just committed;
- (2) During the investigation, Attorney General Ravensborg made numerous misrepresentations and misstatements of fact to law enforcement and to the public regarding his conduct surrounding his criminal acts; and
- (3) Attorney General Ravensborg used assets of the Office of the Attorney General to benefit himself personally with respect to the investigation into his criminal activity.⁹⁴

VII. THE SENATE’S ROLE BEGINS—RULES ADOPTED

On April 26, the Senate came back into session to adopt the rules and procedures for the impeachment trial.⁹⁵ The rules are contained in Senate Resolution 702 and are only five pages long.⁹⁶ The Senate resolved into a Court of Impeachment. It recessed until the start of the trial on June 21.⁹⁷ Recessing allowed time for the parties to compile information for the senators’ consideration. It probably also resulted in the longest “day” in legislative history.

The rules contain five chapters, which establish the following rules:

94. H.R. Res. 7002, 96th Legis., 2d Spec. Sess. (S.D. 2022), <https://perma.cc/K5M2-U2LN>.

95. See S.D. S. Res. 702.

96. *Id.*

97. See *id.*

Chapter 1 sets the trial date and provides for service of the articles of impeachment and a time to answer.⁹⁸

Chapter 2 is entitled “Organization” and deals with several unique issues.⁹⁹ Only senators can challenge a ruling by the presiding officer.¹⁰⁰ The oath for the senator-jurors does not require that they be unbiased.¹⁰¹ Normally the Senate debates are not transcribed, but because of the historic nature of this proceeding, a court reporter was employed to create a transcript.¹⁰² The President pro tempore was given the authority to employ individuals to prosecute the case, which diverges from the federal format of the House managers doing so.¹⁰³ Under normal Senate procedures and rules, House members and former legislators are allowed on the Senate floor. Because of the space demands a trial put on the floor space, the rules for this proceeding did not extend those floor privileges to House members or former legislators.¹⁰⁴

Chapter 3 is entitled “Pre-Trial Procedure” and is most distinguishable from other states’ rules in the manner in which it limits pre-trial procedures.¹⁰⁵ This chapter provides the process for information to be made available for the senators to study prior to the commencement of the trial.¹⁰⁶

Chapter 4 is “Trial Procedure” and is particularly noteworthy for the time limits it imposes to avoid the drawn-out proceedings that have happened in impeachments elsewhere.¹⁰⁷ Opening and closing were each allotted one hour per side.¹⁰⁸ If the Attorney General chose to testify, no time limits were imposed on either side in examining him.¹⁰⁹ For all other witnesses, each party was allowed four hours, which could be spent on direct or cross-examination.¹¹⁰ Because late night legislative sessions do not produce the best work product, no day would be allowed to proceed past 8 PM.¹¹¹

Finally, Chapter 5, entitled “Verdict and Judgement,” sets forth the questions and votes the constitution requires.¹¹² For each article there is a bifurcated decision.¹¹³ The Senate had to decide whether the Attorney General should be impeached and removed from office, then the Senate voted on each article as to

98. *See id.* at ch. 1.

99. *Id.* at ch. 2.

100. *Id.* at R. 2-5.

101. *Id.* at R. 2-9.

102. *Id.* at R. 2-10.

103. *Id.* at R. 2-11. *See, e.g.,* Clare Foran et al., *Meet the House Impeachment Managers*, CNN (Feb. 9, 2021), <https://perma.cc/R48D-4ESG> (explaining that the “House impeachment managers” will serve as prosecutors in the impeachment trial of former President Donald Trump).

104. S.D. S. Res. 702, at R. 12-2.

105. *Id.* at R. 3-2, 3-4 to -5.

106. *Id.* at R. 3-1.

107. *Id.* at ch. 4.

108. *Id.* at R. 4-3(2)-(3), 4-3(9).

109. *Id.* at R. 4-3(6).

110. *Id.* at R. 4-3(5).

111. *Id.* at R. 4-3(7).

112. *Id.* at ch. 5.

113. *See id.* at ch. 5.

whether the Attorney General would be disqualified from holding future office. The constitution provides that both issues be addressed.¹¹⁴ I split them into two questions to avoid the harsher long-term penalty from distracting from the more immediate issue at hand. In the end, the questions would not have needed to be split (the value of hindsight). If a senate decides to remove an official, it is pretty clear that they would not then allow that person to again hold a position of public trust in the state.

VIII. THE TRIAL

The trial was anticipated to take two days under the timetable incorporated into the rules. On the morning of trial, the Attorney General's counsel advised the President that they would not be calling witnesses, which made it very likely that the trial would be completed in one day.¹¹⁵ The Senate prosecutor called the following witnesses: Sergeant Kevin Kinney, Special Agent Joe Arenz, Special Agent Cassidy Halseth, Special Agent Brent Gromer, and Supervisory Special Agent Arnie Rummel.¹¹⁶

The Attorney General called no witnesses.¹¹⁷

There was an opportunity for the senators to submit questions pursuant to Rule 4-3(8).¹¹⁸ The questions were to be submitted through the chair to avoid the speech disguised as a "question." The President abandoned the rule after a few questions and allowed senators to state their questions on the Senate floor. As could be expected, two "questions" came that were really speeches, and the value of the rule was reaffirmed.

When the Senate moved to the deliberation phase, they took the articles individually. On Article I about whether the Attorney General had committed an impeachable offense, the first three senators spoke in favor of impeachment: Senate President pro tempore Schoenbeck,¹¹⁹ Senate Minority Leader Heinert,¹²⁰ and then Senate Majority Leader Cammack.¹²¹ The two senators who were retired judges spoke against impeachment on this article: Senator Johns¹²² and Senator Rusch.¹²³ Senator Wheeler gave a compelling speech walking through the elements of second degree manslaughter and their application.¹²⁴

114. S.D. CONST. art. XVI, § 3.

115. Transcript of Proceedings, *supra* note 51, at 188.

116. *Id.* at 49-188.

117. *See generally* Transcript of Proceedings, *supra* note 51 (providing a complete transcription of the proceedings and evidencing the Attorney General offered no witnesses).

118. S.D. S. Res. 702, at R. 4-3(8).

119. *See* Transcript of Proceedings, *supra* note 51, at 242-46.

120. *See id.* at 246-48.

121. *See id.* at 248.

122. *See id.* at 256-58.

123. *See id.* at 249-54.

124. *See id.* at 258-63.

The Senate voted to impeach the Attorney General on Article I by a vote of 24 to 9, which is exactly the 2/3 of members elect requirement.¹²⁵ On Article II the vote to impeach was 31 to 2.¹²⁶ On the votes on whether to bar the Attorney General from holding a future office of public trust in South Dakota, as to each article, the vote was 33 to 0.¹²⁷

A. OVERWHELMING EVIDENCE OF GUILT

The science of accident reconstruction is well developed. This particular accident was investigated and studied thoroughly. No facts were in doubt. The Select Committee's report had grossly misrepresented the objective facts law enforcement and the investigating agencies had reported.

The Attorney General of South Dakota was speeding down the shoulder of a highway, at night, accelerating beyond the legal speed limit, and ran down a pedestrian walking along the edge of the shoulder—carrying a flashlight. The victim's head came through the Attorney General's windshield and rode there—almost within reach of the Attorney General—for several seconds.

The Attorney General then did not stop. He slowed, eventually decided to stop, saw the dead body, and made the conscious decision to call 911 and lie about the events that had just transpired.

1. *Objective Facts*

The science of reconstruction produced the following evidence that was not refuted.

The Attorney General drove first his passenger side tires over the rumble strips and white line, then his driver side tires over the white line and loud rumble strips. He had all four tires driving down the shoulder of the road.

The Attorney General was not on his phone immediately before nor when he struck Joe Boever.

The Attorney General had just passed through a forty-five miles per hour Highmore speed zone and was accelerating as he drove down the highway shoulder. The Attorney General reached the speed of sixty-eight miles per hour before striking Joe Boever. Due to an error in the operation of his speedometer, at the time of impact it would have read speeds in excess of seventy miles per hour.

Joe Boever's head went through the passenger side front windshield so far that his glasses ended up in the Attorney General's vehicle. Joe Boever's body rode on the hood of the vehicle, with his head through the windshield for at least two seconds.

125. *Id.* at 266-69.

126. *Id.* at 277-80

127. *Id.* at 281-88.

While the perception–reaction time to stop the Attorney General’s vehicle was less than four seconds, he continued to drive, slow down, and drive for eighteen seconds as he contemplated his next move.

A normal person would have panic-braked when the head came through their windshield and stopped within 160 feet. The Attorney General did not stop until he travelled 614 feet from impact.

The Attorney General took his phone with him and walked to the dead body along the road. The Attorney General called 911 and lied that he hit something “in the middle of the road.”¹²⁸

The Attorney General used his office and staff to perpetuate the lie over the next several weeks and months.

2. *Second Degree Manslaughter*

South Dakota Codified Law section 22-16-20 provides that:

[a]ny reckless killing of one human being . . . by the act . . . of another which, under the provisions of this chapter, is neither murder nor manslaughter in the first degree, nor excusable nor justifiable homicide, is manslaughter in the second degree. Manslaughter in the second degree is a Class 4 felony.¹²⁹

A fair review of the evidence of the Attorney General’s conduct in killing Joe Boever is that he committed second degree manslaughter by recklessly killing Mr. Boever. Even the legal authority contained in the Select Committee report screams that conclusion on these facts:

[F]or someone’s conduct to be deemed reckless, they must consciously disregard a substantial risk.” “Recklessness requires more than ordinary negligent conduct.” “The difference between reckless behavior and negligent behavior is primarily measured by the state of mind of the individual.” “The difference between the terms ‘recklessly’ and ‘negligently,’ as usually defined, is one of kind, rather than degree. Each actor creates a risk of harm. The reckless actor is aware of the risk and disregards it; the negligent actor is not aware of the risk but should have been aware of it.”¹³⁰

128. Dunteman, *supra* note 1, at 911 Audio 0:13.

129. SDCL § 22-16-20 (2020).

130. H.R. SELECT COMM. ON INVESTIGATION, MAJORITY REPORT OF THE HOUSE SELECT COMMITTEE ON INVESTIGATION, H.R. 96th Legis., 2d Spec. Sess. (S.D. 2022), 11-12, <https://perma.cc/7Z4Z-C244> (citations omitted).

IX. LESSONS LEARNED

A. BOTH HOUSES NEED TO BE FULLY ENGAGED

Even though the process starts in the House of Representatives, the Senate needs to engage immediately. There are decisions that need to be made or monitored jointly. For example, the Senate expended \$3,271.18 on legal services.¹³¹ Because the Senate took a hands-off approach to House activity, there was no check on the House spending. The House spent \$132,611.35 on legal services, with no trial.¹³²

The legislature was sued by the media over the House attempting to restrict access to votes made by House members on the petition for a special session.¹³³ The Senate stopped the litigation by releasing the votes, but conflict could have been avoided by the Senate being fully engaged in all decisions—even before articles of impeachment reached the Senate. The legislative process is owned by both bodies, and both need to be fully engaged.

B. KEEP IT SIMPLE

In writing the rules for the Senate trial, keep it very simple. The more rules, the more opportunity to distract from the responsibility at hand.

C. FULL SUNLIGHT

At every step, the more the information and processes are public, the better the end product. The public has to know what is happening with their elected officials, especially when the serious allegations of an impeachment are involved. There will be less doubt and misunderstanding of the end result and more respect for the integrity of the process if it is conducted in full sunlight.

131. Memorandum from Reed Holwegner, HR Director, S.D. Legislature Legis. Rsch. Council, to The Executive Board, S.D. Legislature Legis. Rsch. Council (Aug. 24, 2022) (on file with author).

132. *Id.*

133. Austin Goss, *South Dakota House Speaker Sued Over Release of Special Session Vote on AG Impeachment*, DAKOTA NEWS (Oct. 13, 2021, 2:19 PM), <https://perma.cc/2MBK-2EBL>.