§ 599. Treaties abrogated by law.

Treaties being declared, equally with the laws of the United States, to be the supreme law of the land, it is understood that an act of the legislature alone can declare them infringed and rescinded. This was accordingly the process adopted in the case of France in 1798.

Notice to a foreign government of the abrogation of a treaty is authorized by a joint resolution (V, 6270).

§ 600. Procedure of the Senate as to treaties.

It has been the usage for the Executive, when it communicates a treaty to the Senate for their ratification, to communicate also the correspondence of the negotiators. This having been omitted in the case of the Prussian treaty, was asked by a vote of the House of February 12, 1800, and was obtained. And in December, 1800, the convention of that year between the United States and France, with the report of the negotiations by the envoys, but not their instructions, being laid before the Senate, the instructions were asked for and communicated by the President.

The mode of voting on questions of ratification is by nominal call.

The Senate now has rules governing its procedure on treaties.

SEC. LIII—IMPEACHMENT

* * * * *

§ 601. Jurisdiction of Lords and Commons as to impeachments.

These are the provisions of the Constitution of the United States on the subject of impeachments. The following is a sketch of some of the principles and practices of England on the same subject:

Jurisdiction. The Lords can not impeach any to themselves, nor join in the accusation, because they are the judges. *Seld. Judic. in Parl., 12, 63.* Nor can they proceed against a commoner but on complaint of the Commons. *Ib., 84.* The Lords may not, by the law, try a commoner for a capital offense, on the information of the King or a private person, because the accused is entitled to a trial by his peers generally; but on accusation by the House of Commons, they may proceed against the delinquent, of whatsoever degree, and whatsoever be the nature of the offense; for there they do not assume to themselves trial at common law. The Commons are then instead of a jury, and the judgment is given on their demand, which is instead of a verdict. So the Lords do only judge, but not try the delinquent. *Ib., 6, 7.* But Wooddeson denies that a commoner can now be charged capitally before the Lords, even by the Commons; and cites Fitzharris's case, 1681, impeached of high treason, where the Lords remitted the prosecution to the inferior court. *8 Grey's Deb., 325–7; 2 Wooddeson, 576, 601; 3 Seld., 1604, 1610, 1618, 1619, 1641; 4 Blackst., 25; 9 Seld., 1656; 73 Seld., 1604–18.*

§ 602. Parliamentary law as to accusation in impeachment.

Accusation. The Commons, as the grand inquest of the nation, becomes suitors for penal justice. *2 Wood., 597; 6 Grey, 356.* The general course is to pass a resolution containing a criminal charge against the supposed delinquent, and then to direct some member to impeach him by oral accu-

sation, at the bar of the House of Lords, in the name of the Commons. The person signifies that the articles will be exhibited, and desires that the delinquent may be sequestered from his seat, or be committed, or that the peers will take order for his appearance. *Sachev. Trial, 325; 2 Wood., 602, 605; Lords' Journ., 3 June, 1701; 1 Wms., 616; 6 Grey, 324.*

§ 603. Inception of impeachment proceedings in the House.

In the House there are various methods of setting an impeachment in motion: by charges made on the floor on the responsibility of a Member or Delegate (II, 1303; III, 2342, 2400, 2469; VI, 525, 526, 528, 535, 536); by charges preferred by a memorial, which is usually referred to a committee for examination (III, 2364, 2491, 2494, 2496, 2499, 2515; VI, 543); by a resolution dropped in the hopper by a Member and referred to a committee (Apr. 15, 1970, p. 11941; Oct. 23, 1973, p. 34873); by a message from the President (III, 2294, 2319; VI, 498); by charges transmitted from the legislature of a State (III, 2469) or territory (III, 2487) or from a grand jury (III, 2488); or from facts developed and reported by an investigating committee of the House (III, 2399, 2444). In the 93d Congress, the Vice President sought to initiate an investigation by the House of charges against him of possibly impeachable offenses. The Speaker and the House took no action on the request since the matter was pending in the courts and the offenses did not relate to activities during the Vice President's term of office (Sept. 25, 1973, p. 31368; III, 2510 (wherein the Committee on the Judiciary, to which the matter had been referred by privileged resolution, reported that the Vice President could not be impeached for acts or omissions committed prior to his term of office)). On the other hand, in 1826 the Vice President's request that the House investigate charges against his prior official conduct as Secretary of War was referred, on motion, to a select committee (III, 1736). On September 9, 1998, an independent counsel transmitted to the House under 28 U.S.C. 595(c) a communication containing evidence of alleged impeachable offenses by the President. The House adopted a privileged resolution reported by the Committee on Rules referring the communication to the Committee on the Judiciary, restricting Members' access to the communication, and restricting access to committee meetings and hearings on the communication (H. Res. 525, Sept. 11, 1998, p. ——). Later, the House adopted a privileged resolution reported by the Committee on the Judiciary authorizing an impeachment inquiry by that committee (H. Res. 581, Oct. 8, 1998, p. ——).

§ 604. A proposition to impeach a question of privilege.

A direct proposition to impeach is a question of high privilege in the House and at once supersedes business otherwise in order under the rules governing the order of business (III, 2045–2048, 2051, 2398; VI, 468, 469; July 22, 1986, p. 17294; Aug. 3, 1988, p. 20206; May 10, 1989, p. 8814; Sept. 23, 1998, p. ——; see Procedure, ch. 14, sec. 1–5). It may not even be superseded by an election case, which is also a matter of high privilege (III, 2581). It does not lose its privilege from the fact that a similar proposition has been made at a previous time during the same session of Congress (III, 2408), previous action of the House not affecting it (III, 2053). As such, a report of the Committee on the Judiciary accompanying an impeachment resolution is filed from the floor as privileged (Dec. 17, 1998, p. ——), and is called up as privileged (Dec. 18, 1998, p. ——). The addition of new articles of impeachment offered by the managers but not reported by committee are also privileged (III, 2401), as is a proposition to refer to committee the papers and testimony in an impeachment of the preceding Congress (V, 7261). To a privileged resolution of impeachment, an amendment proposing instead censure, which is not privileged, was held not germane (Dec. 19, 1998, p. ——). On several occasions the Committee on the Judiciary, having been referred a question of impeachment, reported a recommendation that impeachment was not warranted and, thereafter, called up the report as a question of privilege (Deschler's Precedents, vol. 3, ch. 14, sec. 1.3). Under 28 U.S.C. 596(a) an independent counsel appointed to investigate the President may be impeached; and a resolution impeaching such independent counsel constitutes a question of the privileges of the House under rule IX (Sept. 23, 1998, p. ——).

Propositions relating to an impeachment already made also are privileged (III, 2400, 2402, 2410; July 22, 1986, p. 17294; Dec. 2, 1987, p. 33720; Aug. 3, 1988, p. 20206), such as resolutions providing for selection of managers of an impeachment (VI, 517; Dec. 19, 1998, p. ——), proposing abatement of impeachment proceedings (VI, 514), reappointing managers for impeachment proceedings continued in the Senate from the previous Congress (Jan. 3, 1989, p. 84; Jan. 6, 1999, p. ——), empowering managers to hire special legal and clerical personnel and providing for their pay, and to carry out other responsibilities (Jan. 3, 1989, p. 84; Dec. 19, 1998, p. ——; Jan. 6, 1999, p. ——), and replacing an excused manager (Feb. 7, 1989, p. 1726); but a resolution simply proposing an investigation, even though impeachment may be a possible consequence, is not privileged (III, 2050, 2546; VI, 463).

Where a resolution of investigation positively proposes impeachment or suggests that end, it has been admitted as of privilege (III, 2051, 2052, 2401, 2402), such as a resolution reported by the Committee on the Judiciary authorizing an impeachment inquiry by that committee and investing the committee with special investigative authorities to facilitate the inquiry (III, 2029; VI, 498, 528, 549; Deschler's Precedents, vol. 3, ch. 14, secs. 5.8, 6.2; H. Res. 581, Oct. 8, 1998, p. ——). A committee to which has

been referred privileged resolutions for the impeachment of an officer may call up as privileged resolutions incidental to consideration of the impeachment question, including conferral of subpoena authority and funding of the investigation from the contingent fund (now referred to as "applicable accounts of the House described in clause 1(i)(1) of rule X") (VI, 549; Feb. 6, 1974, p. 2349). Similarly, a resolution authorizing depositions by committee counsel in an impeachment inquiry is privileged under rule IX as incidental to impeachment (Speaker Wright, Oct. 3, 1988, p. 27781).

§ 605. Investigation of impeachment charges.

The impeachment having been made on the floor by a Member (III, 2342, 2400; VI, 525, 526, 528, 535, 536), or charges suggesting impeachment having been made by memorial (III, 2495, 2516, 2520; VI, 552), or even appearing through common fame (III, 2385, 2506), the House has at times ordered an investigation at once. At other times it has refrained from ordering investigation until the charges had been examined by a committee (III, 2364, 2488, 2491, 2492, 2494, 2504, 2513). Under the later practice, resolutions introduced through the hopper that directly call for the impeachment of an officer have been referred to the Committee on the Judiciary, while resolutions calling for an investigation by that committee or by a select committee with a view toward impeachment have been referred to the Committee on Rules (Oct. 23, 1973, p. 34873). Upon receipt of a communication from an independent counsel transmitting to the House under 28 U.S.C. 595(c) a communication containing evidence of alleged impeachable offenses by the President, the House adopted a resolution reported by the Committee on Rules referring the communication to the Committee on the Judiciary to conduct a review (H. Res. 525, Sept. 11, 1998, p. ——). Later, the House adopted a privileged resolution reported by the Committee on the Judiciary authorizing an impeachment inquiry by that committee (H. Res. 581, Oct. 8, 1998, p. ——).

§ 606. Procedure of committee in investigating.

The House has always examined the charges by its own committee before it has voted to impeach (III, 2294, 2487, 2501). This committee has sometimes been a select committee (III, 2342, 2487, 2494), sometimes a standing committee (III, 2400, 2409). In some instances the committee has made its inquiry ex parte (III, 2319, 2343, 2366, 2385, 2403, 2496, 2511); but in the later practice the sentiment of committees has been in favor of permitting the accused to explain, present witnesses, cross-examine (III, 2445, 2471, 2518), and be represented by counsel (III, 2470, 2501, 2511, 2516; 93d Cong., Aug. 20, 1974, p. 29219; H. Rept. 105–830, Dec. 16, 1998). The Committee on the Judiciary having been directed by the House to investigate whether sufficient grounds existed for the impeachment of President Nixon, and the President having resigned following the decision of that committee to recommend his impeachment to the House, the chairman of the committee submitted from the floor as privileged the committee's report containing the articles of impeachment approved by the committee but without an accompanying resolution of impeachment. The

House thereupon adopted a resolution (1) taking notice of the committee's action on a resolution and Articles of Impeachment and of the President's resignation; (2) accepting the report and authorizing its printing, with additional views; and (3) commending the chairman and members of the committee for their efforts (Aug. 20, 1974, p. 29361).

§ 606a. Procedure of House in considering.

During the pendency of an impeachment resolution, remarks in debate may include references to personal misconduct on the part of the President but may not include language generally abusive toward the President and may not include comparisons to the personal conduct of sitting Members of the House or Senate (Dec. 18, 1998, p. ——). A resolution setting forth four separate articles of impeachment may be divided among the articles (Dec. 19, 1998, p. ——).

§ 607. Impeachment carried to the Senate.

Its committee on investigation having reported, the House may vote the impeachment (III, 2367, 2412; VI, 500, 514; Mar. 2, 1936, pp. 3067–91), and, after having notified the Senate by message (III, 2413, 2446), may direct the impeachment to be presented at the bar of the Senate by a single Member (III, 2294), or by two (III, 2319, 2343, 2367), or five Members (III, 2445) or nine (July 22, 1986, p. 17306) or 13 (Dec. 19, 1998, p. ——). These Members in two notable cases represented the majority party alone (*e.g.,* Dec. 19, 1998, p. ——), but ordinarily include representation of the minority party (III, 2445, 2472, 2505). Under early practice the House elected managers by ballot (III, 2300, 2323, 2345, 2368, 2417). In two instances the Speaker appointed the managers on behalf of the House pursuant to an order of the House (III, 2388, 2475). Since 1912 the House has adopted a resolution appointing managers. In the later practice the House considers together the resolution and articles of impeachment (VI, 499, 500, 514; Mar. 2, 1936, pp. 3067–91) and following their adoption adopts resolutions electing managers to present the articles before the Senate, notifying the Senate of the adoption of articles and election of managers, and authorizing the managers to prepare for and to conduct the trial in the Senate (VI, 500, 514, 517; Mar. 6, 1936, pp. 3393, 3394; July 22, 1986, p. 17306; Aug. 3, 1988, p. 20206). These privileged incidental resolutions may be merged into a single indivisible privileged resolution (H. Res. 614, Dec. 19, 1998, p. ——; H. Res. 10, Jan. 6, 1999, p.——).

§ 608. Impeachment process in the Senate.

Process. If the party do not appear, proclamations are to be issued, giving him a day to appear. On their return they are strictly examined. If any error be found in them, a new proclamation issues, giving a short day. If he appear not, his goods may be arrested, and they may proceed. *Seld. Jud. 98, 99.*

§ 608a. Senate impeachment proceedings against President Clinton.

Under an order of the Senate, the Secretary of the Senate informed the House and the Chief Justice that it was ready to receive the House managers for the purpose of exhibiting articles of impeachment against President Clinton (Jan. 6, 1999, p. ——). At the appointed hour the House managers were announced and escorted into the Senate chamber by the Senate Sergeant-at-Arms (Jan. 7, 1999, p. ——). The managers presented the articles of impeachment by reading two resolutions as follows: (1) the appointment of managers (H. Res. 10, Jan. 7, 1999, p. ——); and (2) the two articles of impeachment (H. Res. 611, Jan. 7, 1999, p. ——). Thereupon, the managers requested the Senate take order for trial (Jan. 7, 1999, p. ——).

The Senate adopted a resolution governing the initial impeachment proceedings of President Clinton (S. Res. 16, Jan. 8, 1999, p. ——). Later it adopted a second resolution governing the remaining proceedings (S. Res. 30, Jan. 28, 1999, p. ——). The first resolution issued the summons in the usual form. It also provided a timetable for (1) the filing of an answer by the President; (2) the filing of a reply by the House, together with the record consisting of publicly available materials that had been submitted to or produced by the House Judiciary Committee (the resolution further directed that the record be admitted into evidence, printed, and made available to Senators); (3) the filing of a trial brief by the House; (4) the filing of any motions permitted under the rules of impeachment (except for motions to subpoena witnesses or to present evidence not in the record); (5) the filing of responses to any such motions; (6) the filing of a trial brief by the President; (7) the filing of a rebuttal brief by the House; and (8) arguments on such motions. The resolution then directed the Senate to dispose of any such motions and established a further timetable for (1) the House to make its presentation in support of the articles of impeachment (such argument to be confined to the record); (2) the President to make his presentation in opposition to the articles of impeachment; and (3) the Senators to question the parties. The resolution directed the Senate, upon completion of that phase of the proceedings, to dispose of a motion to dismiss, and if defeated, to dispose of a motion to subpoena witnesses or to present any evidence not in the record. The resolution further provided that, if the motion to call witnesses were adopted, the witnesses would first be deposed and then the Senate would decide which witnesses should testify. It further provided that if the Senate failed to dismiss the case, the parties would proceed to present evidence. Finally, the resolution directed the Senate to vote on each article of impeachment at the conclusion of the deliberations. The evidentiary record (summons, answer, replies, and trial briefs) was printed in the Record by unanimous consent (Jan. 14, 1999, p. ——). Pursuant to the previous order of the Senate (S. Res. 16, Jan. 8, 1999, p. ——), the House managers were recognized for 24 hours to present their case in support of conviction and removal of President Clinton (Jan. 14, 1999, p. ——); counsel for the President was then

recognized for 24 hours to present the President's defense (Jan. 19, 1999, p. ——); and Senators submitted questions in writing of either the House managers or the President's counsel (which were read by the Chief Justice, alternating between parties) for a period not to exceed 16 hours (Jan. 22, 1999, p. ——). The Chief Justice ruled that a House manager could not object to a question although he could object to an answer (Jan. 22, 1999, p. ——; Jan. 23, 1999, p. ——). The Senate adopted a motion to consider a motion to dismiss in executive session (Jan. 25, 1999, p. ——), and the motion to dismiss was defeated (Jan. 27, 1999, p. ——). The Senate adopted a motion to consider a motion of the House managers to subpoena witnesses in executive session (Jan. 26, 1999, p. ——). The Senate adopted that motion, which: (1) authorized the issuance of subpoenas for depositions of three witnesses; (2) admitted miscellaneous documents into the trial record; and (3) petitioned the Senate to request the appearance of President Clinton at a deposition (Jan. 26, 1999, p. ——).

The Senate subsequently adopted a resolution governing the remaining impeachment proceedings as follows: (1) establishment of a timetable for conducting and reviewing depositions, resolving any objections made during the depositions, and considering motions to admit any portions of the depositions into evidence; (2) consideration of motions for additional discovery (if made by the two Leaders jointly); (3) disposition of motions governing the presentation of evidence or witnesses before the Senate and motions by the President's counsel (specifically precluding a motion to reopen the record and specifically permitting a motion to allow final deliberations in open session); (4) establishment of a timetable to vote on the articles of impeachment; and (5) authorization to issue subpoenas to take certain depositions and to establish procedures for conducting depositions (S. Res. 30, Jan. 28, 1999, p. ——). The Senate adopted two parts of a divided motion as follows: (1) permitting the House managers to admit transcripts and videotapes of oral depositions into evidence (Feb. 4, 1999, p. ——); and (2) permitting the parties to present before the Senate for an equally divided specified period of time portions of videotapes or oral depositions admitted into evidence, having first rejected a preemptive motion to restrict the House managers' presentation of evidence to written transcripts (Feb. 4, 1999, p. ——). The Senate rejected the portion of the divided motion that would have authorized a subpoena for the appearance of a named witness (Feb. 4, 1999, p. ——). During debate on the motion, the Senate, by unanimous consent, permitted the House managers and counsel for the President to make references to videotaped oral depositions (Feb. 4, 1999, p. ——). The Senate rejected two additional motions as follows: (1) a motion to proceed directly to closing arguments and an immediate vote on the articles of impeachment (Feb. 4, 1999, p. ——); and (2) a motion that the House managers provide written notice to counsel for the President by a time certain of those portions of videotaped deposition testimony they planned to use during their evidentiary presentation or during closing arguments (Feb. 4, 1999, p. ——). By unanimous consent the Senate printed

certain deposition transcripts in the Record and transmitted to the House managers and the counsel for the President deposition transcripts and videotapes (Feb. 4, 1999, p. ——). The Chief Justice held inadmissible a portion of a videotaped deposition not entered as evidence into the Senate record (other portions of which were admitted under an order of the Senate), and a unanimous consent request nevertheless to admit that portion of a deposition was objected to (Feb. 6, 1999, p. ——). After closing arguments, the Senate adopted a motion to consider the articles of impeachment in closed session (Feb. 9, 1999, p. ——). After closed deliberations the Senate Clerk read the articles of impeachment against President Clinton in open session, and each Senator voted "guilty" or "not guilty" on each article (Feb. 12, 1999, p. ——). By votes of 45–55 and 50–50 respectively, the Senate adjudged President Clinton not guilty on each article of impeachment (Feb. 12, 1999, p. ——). The Senate communicated to the House and the Secretary of State the judgment of the Senate (Feb. 12, 1999, p. ——).

See S. Doc. 93–102, "Procedure and Guidelines for Impeachment Trials in the United States Senate," for precedents relating to the conduct of Senate impeachments.

§ 609. Exhibition and form of articles.

Articles. The accusation (articles) of the Commons is substituted in place of an indictment. Thus, by the usage of Parliament, in impeachment for writing or speaking, the particular words need not be specified. *Sach. Tr., 325; 2 Wood., 602, 605; Lords' Journ., 3 June, 1701; 1 Wms., 616.*

Having delivered the impeachment, the committee returns to the House and reports verbally (III, 2413, 2446; VI, 501). Formerly, the House exhibited its articles after the impeachment had been carried to the bar of the Senate; in the later practice, the resolution and articles of impeachment have been considered together and exhibited simultaneously in the Senate by the managers (VI, 501, 515; Mar. 10, 1936, pp. 3485–88; Oct. 7, 1986, p. 29126; Jan. 7, 1999, p. ——). The managers, who are elected by the House (III, 2300, 2345, 2417, 2448; VI, 500, 514, 517; Mar. 2, 1936, pp. 3393, 3394) or appointed by the Speaker (III, 2388, 2475), carry the articles in obedience to a resolution of the House (III, 2417, 2419, 2448) to the bar of the Senate (III, 2420, 2449, 2476), the House having previously informed the Senate (III, 2419, 2448) and received a message informing them of the readiness of the latter body to receive the articles (III, 2078, 2325, 2345; Aug. 6, 1986, p. 19335; Jan. 6, 1999, p. ——). Having exhibited the articles the managers return and report verbally to the House (III, 2449, 2476).

The articles in the Belknap impeachment were held sufficient, although attacked for not describing the respondent as one subject to impeachment

(III, 2123). In the proceedings against Judge Ritter, objections to the articles of impeachment, on the ground that they duplicated and accumulated separate offenses, were overruled (Apr. 3, 1936, p. 4898; Apr. 17, 1936, p. 5606). These articles are signed by the Speaker and attested by the Clerk (III, 2302, 2449), and in form approved by the practice of the House (III, 2420, 2449, 2476).

Articles of impeachment which have been exhibited to the Senate may be subsequently modified or amended by the House (VI, 520; Mar. 30, 1936, pp. 4597–99), and a resolution proposing to amend articles of impeachment previously adopted by the House is privileged for consideration when reported by the managers on the part of the House (VI, 520; Mar. 30, 1936, p. 4597).

For discussion of substantive charges contained in articles of impeachment and the constitutional grounds for impeachment, see § 175, *supra* (accompanying Const., art. II, sec. 4). For a discussion of the presentation of the House managers in support of the impeachment of President Clinton, and related matters, see § 608a, *supra*.

§ 610. Parliamentary law as to appearance of respondent.

Appearance. If he appear, and the case be capital, he answers in custody; though not if the accusation be general. He is not to be committed but on special accusations. If it be for a misdemeanor only, he answers, a lord in his place, a commoner at the bar, and not in custody, unless, on the answer, the Lords find cause to commit him, till he finds sureties to attend, and lest he should fly. *Seld. Jud., 98, 99.* A copy of the articles is given him, and a day fixed for his answer. *T. Ray.; 1 Rushw., 268; Fost., 232; 1 Clar. Hist. of the Reb., 379.* On a misdemeanor, his appearance may be in person, or he may answer in writing, or by attorney. *Seld. Jud., 100.* The general rule on accusation for a misdemeanor is, that in such a state of liberty or restraint as the party is when the Commons complain of him, in such he is to answer. *Ib., 101.* If previously committed by the commons, he answers as a prisoner. But this

may be called in some sort judicium parium suorum. *Ib.* In misdemeanors the party has a right to counsel by the common law, but not in capital cases. *Seld. Jud., 102, 105.*

§ 611. Requirements of the Senate as to appearance of respondent.

This paragraph of the parliamentary law is largely obsolete so far as the practice of the House and the Senate are concerned. The accused may appear in person or by attorney (III, 2127, 2349, 2424), and take the stand in his own behalf (VI, 511, 524; Apr. 11, 1936, pp. 5370–86; Oct. 7, 1986, p. 29149), or he may not appear at all (III, 2307, 2333, 2393). In case he does not appear the House does not ask that he be compelled to appear (III, 2308), but the trial proceeds as on a plea of "not guilty." It has been decided that the Senate has no power to take into custody the body of the accused (III, 2324, 2367). The writ of summons to the accused recites the articles and notifies him to appear at a fixed time and place and file his answer (III, 2127). In all cases respondent may appear by counsel (III, 2129), and in one trial, when a petition set forth that respondent was insane, the counsel of his son was admitted to be heard and present evidence in support of the petition, but not to make argument (III, 2333). For a discussion of answers, arguments, and presentations of the respondent in the Clinton impeachment proceedings, see § 608a, *supra*.

The chairman of the committee impeaches at the bar of the Senate by oral accusation (III, 2413, 2446, 2473), and the managers for the House attend in the Senate after the articles have been exhibited and demand that process issue for the attendance of respondent (III, 2451, 2478), after which they return and report verbally to the House (III, 2423, 2451; VI, 501). The Senate thereupon issue a writ of summons, fixing the day of return (III, 2423, 2451; S. Res. 16, Jan. 8, 1999, p. ——); and in a case wherein the respondent did not appear by person or attorney the Senate published a proclamation for him to appear (III, 2393). But the respondent's goods were not attached. In only one case has the parliamentary law as to sequestration and committal been followed (III, 2118, 2296), later inquiry resulting in the conclusion that the Senate had no power to take into custody the body of the accused (III, 2324, 2367).

§ 612. Answer of respondent.

Answer. The answer need not observe great strictness of the form. He may plead guilty as to part, and defend as to the residue; or, saving all exceptions, deny the whole or give a particular answer to each article separately. *1 Rush., 274; 2 Rush., 1374; 12*

Parl. Hist., 442; 3 Lords' Journ., 13 Nov., 1643; 2 Wood., 607. But he cannot plead a pardon in bar to the impeachment. *2 Wood., 615; 2 St. Tr., 735.*

In the Senate proceedings of the impeachment of President Andrew Johnson, the answer of the President took up the articles one by one, denying some of the charges, admitting others but denying that they set forth impeachable offenses, and excepting to the sufficiency of others (III, 2428). The form of this answer was commented on during preparation of the replication in the House (III, 2431). In the Senate proceedings on the impeachment of President Clinton, the answer of the President also took up the articles one by one, denying some of the charges and admitting others but denying that they set forth impeachable offenses (Jan. 14, 1999, p. ——). Blount and Belknap demurred to the charges on the ground that they were not civil officers within the meaning of the Constitution (III, 2310, 2453), and Swayne also raised questions as to the jurisdiction of the Senate (III, 2481). The answer is part of the pleadings, and exhibits in the nature of evidence may not properly be attached thereto (III, 2124). The answer of the respondent in impeachment proceedings is messaged to the House and subsequently referred to the managers on the part of the House (VI, 506; Apr. 6, 1936, p. 5020; Sept. 9, 1986, p. 22317).

For a chronology of arguments and presentations of the respondent in the Clinton impeachment proceedings, see § 608a, *supra*.

§ 613. Other pleadings. Replication, rejoinder, &c. There may be a replication, rejoinder, &c. *Sel. Jud., 114; 8 Grey's Deb., 233; Sach. Tr., 15; Journ. H. of Commons, 6 March, 1640–1.*

A replication is always filed (for the form of replication in modern practice, see Sept. 26, 1988, p. 25357), and in one instance the pleadings proceeded to a rejoinder, surrejoinder, and similiter (III, 2455). A respondent has also filed a protest instead of pleading on the merits (III, 2461), but there was objection to this and the Senate barely permitted it. In another case respondent interposed a plea as to jurisdiction of offenses charged in certain articles, but declined to admit that it was a demurrer with the admissions pertinent thereto (III, 2125, 2431). In the Belknap trial the House was sustained in averring in pleadings as to jurisdiction matters not averred in the articles (III, 2123). The right of the House to allege in the replication matters not touched in the articles has been discussed (III, 2457). In the Louderback (VI, 522) and Ritter (Apr. 6, 1936, p. 4971) impeachment proceedings, the managers on the part of the House prepared and submitted the replication to the Senate without its consideration by the House, contrary to former practice (VI, 506). The Senate may consider

in closed session various preliminary motions made by respondent (*e.g.,* to declare the Senate rule on appointment of a committee to receive evidence to be unconstitutional, to declare beyond a reasonable doubt as the standard of proof in an impeachment trial, and to postpone the impeachment trial) prior to voting in open session to dispose of those motions (Oct. 7 and 8, 1986, pp. 29151 and 29412).

For a chronology in the Senate of disposition of motions permitted under Senate impeachment rules, see § 608a, *supra*.

§ 614. Examination of witnesses.

Witnesses. The practice is to swear the witnesses in open House, and then examine them there; or a committee may be named, who shall examine them in committee, either on interrogatories agreed on in the House, or such as the committee in their discretion shall demand. *Seld. Jud., 120, 123.*

In trials before the Senate witnesses have always been examined in open Senate, although examination by a committee has been suggested (III, 2217) and utilized (S. Res. 38, 101st Cong., Mar. 16, 1989, p. 4533). In the 74th Congress, the Senate amended its rules for impeachment trials to allow the presiding officer, upon the order of the Senate, to appoint a committee to receive evidence and take testimony in the trial of any impeachment (May 28, 1935, p. 8309). In the trial of Judge Claiborne the Senate directed the appointment of a committee of twelve Senators to take evidence and testimony pursuant to rule XI of the Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials (S. Res. 481, Aug. 15, 1986, p. 22035); and in Nixon *v.* United States, 113 S. Ct. 732 (1993), the Supreme Court refused to declare unconstitutional the appointment of such a committee to take evidence and testimony.

For a chronology of motions to subpoena witnesses during the Senate impeachment proceedings against President Clinton, see § 608a, *supra*.

§ 615. Relation of jury trial to impeachment.

Jury. In the case of Alice Pierce, *1 R., 2,* a jury was impaneled for her trial before a committee. *Seld. Jud., 123.* But this was on a complaint, not on impeachment by the Commons. *Seld. Jud., 163.* It must also have been for a misdemeanor only, as the Lords spiritual sat in the case, which they do on misdemeanors, but not in capital cases. *Id., 148.* The judgment was a forfeiture of all her lands

and goods. *Id., 188.* This, Selden says, is the only jury he finds recorded in Parliament for misdemeanors; but he makes no doubt, if the delinquent doth put himself on the trial of his country, a jury ought to be impaneled, and he adds that it is not so on impeachment by the Commons, for they are in loco proprio, and there no jury ought to be impaneled. *Id., 124.* The Ld. Berkeley, *6 E., 3,* was arraigned for the murder of L. 2, on an information on the part of the King, and not on impeachment of the Commons; for then they had been patria sua. He waived his peerage, and was tried by a jury of Gloucestershire and Warwickshire. *Id., 126.* In *1 H., 7,* the Commons protest that they are not to be considered as parties to any judgment given, or hereafter to be given in Parliament. *Id., 133.* They have been generally and more justly considered, as is before stated, as the grand jury; for the conceit of Selden is certainly not accurate, that they are the patria sua of the accused, and that the Lords do only judge, but not try. It is undeniable that they do try; for they examine witnesses as to the facts, and acquit or condemn, according to their own belief of them. And Lord Hale says, "the peers are judges of law as well as of fact;" *2 Hale, P. C., 275;* Consequently of fact as well as of law.

No jury is possible as part of an impeachment trial under the Constitution (III, 2313). In 1868, after mature consideration, the Senate overruled the old view of its functions (III, 2057), and decided that it sat for impeachment trials as the Senate and not as a court (III, 2057), and eliminated from its rules all mention of itself as a "high court of impeachment" (III, 2079, 2082). However, the modern view of the Senate as a court was evident during the impeachment trial of President Clinton. There the Senate con-

vened as a "Court of Impeachment" (see, *e.g.,* Jan. 7, 1999, p. ——). In response to an objection raised by a Senator, the Chief Justice held that the Senate was not sitting as a "jury" but was sitting as a "court" during the impeachment trial of President Clinton. As such, the House managers were directed to refrain from referring to the Senators as "jurors" (Jan. 15, 1999, p. ——).

§ 615a. The presiding officer.

An anxiety lest the Chief Justice might have a vote in the approaching trial of the President seems to have prompted this earlier action (III, 2057). There was examination of the question of the Chief Justice's power to vote (III, 2098); but the Senate declined to declare his incapacity to vote, and he did in fact give a casting vote on incidental questions (III, 2067). Under the earlier practice, the Senate declined to require that the Chief Justice be sworn when about to preside (III, 2080); but the Chief Justice had the oath administered by an associate justice (III, 2422). The President pro tempore of the Senate, pursuant to an earlier order of the Senate, appointed a committee to escort the Chief Justice into the Senate chamber to preside over the impeachment trial of President Clinton, administered the oath to him, and the Chief Justice in turn administered the oath to the Senators (Jan. 7, 1999, p. ——).

In impeachments for officers other than the President of the United States the presiding officer of the Senate presides, whether he be Vice President, the regular President pro tempore (III, 2309, footnote, 2337, 2394) or a special President pro tempore chosen to preside at the trial only (III, 2089, 2477).

§ 615b. Oath and quorum.

Senators elected after the beginning of an impeachment trial are sworn as in the case of other Senators (III, 2375). The quorum of the Senate sitting for an impeachment trial is a quorum of the Senate itself, and not merely a quorum of the Senators sworn for the trial (III, 2063). The vote required for conviction is two-thirds of those Senators present and voting (Oct. 20, 1989, p. 25335). In 1868, when certain States were without representation, the Senate declined to question its competency to try an impeachment case (III, 2060). The President pro tempore of the Senate administered the oath to the Chief Justice presiding over the impeachment trial of President Clinton, and the Chief Justice in turn administered the oath to the Senators (Jan. 7, 1999, p. ——).

§ 616. Attendance of the Commons.

Presence of Commons. The Commons are to be present at the examination of witnesses. *Seld. Jud., 124.* Indeed, they are to attend throughout, either as a committee of the whole House, or otherwise, at discretion, appoint managers to conduct the proofs.

Rushw. Tr. of Straff., 37; Com. Journ., 4 Feb., 1709–10; 2 Wood., 614. And judgment is not to be given till they demand it. *Seld. Jud., 124.* But they are not to be present on impeachment when the Lords consider of the answer or proofs and determine of their judgment. Their presence, however, is necessary at the answer and judgment in case capital *Id., 58, 158,* as well as not capital; *162.* * * *.

§ 617. Attendance of the House of Representatives.

The House has consulted its own inclination and convenience about attending its managers at an impeachment. It did not attend at all in the trials of Blount, Swayne, Archbald. Louderback and Ritter (III, 2318, 2483; VI, 504, 516); and after attending at the answer of Belknap, decided that it would be represented for the remainder of the trial by its managers alone (III, 2453). At the trial of the President the House, in Committee of the Whole, attended throughout the trial (III, 2427), but this is exceptional. In the Peck trial the House discussed the subject (III, 2377) and reconsidered its decision to attend the trial daily (III, 2028). While the Senate is deliberating the House does not attend (III, 2435); but when the Senate votes on the charges, as at the other open proceedings of the trial, it may attend (III, 2383, 2388, 2440). While it has frequently attended in Committee of the Whole, it may attend as a House (III, 2338).

§ 618. Voting on the articles in an impeachment trial.

* * * The Lords debate the judgment among themselves. Then the vote is first taken on the question of guilty or not guilty; and if they convict, the question, or particular sentence, is out of that which seemeth to be most generally agreed on. *Seld. Jud., 167; 2 Wood., 612.*

The question in judgment in an impeachment trial has occasioned contention in the Senate (III, 2339, 2340), and in the trial of the President the form was left to the Chief Justice (III, 2438, 2439). In the Belknap trial there was much deliberation over this subject (III, 2466). In the Chase trial the Senate modified its former rule as to form of final question (III, 2363). The yeas and nays are taken on each article separately (III, 2098, 2339) in the form "Senators, how say you? is the respondent guilty or not guilty?" (Oct. 9, 1986, p. 29871). But in the trial of President Johnson the Senate, by order, voted on the articles in an order differing from the

numerical order (III, 2440), adjourned after voting on one article (III, 2441), and adjourned without day after voting on three of the eleven articles (III, 2443). In other impeachments, the Senate has adopted an order to provide the method of voting and putting the question separately and successively on each article (VI, 524; Apr. 16, 1936, p. 5558). For a discussion of the vote of the Senate on each article of impeachment of President Clinton, see § 608a, *supra*.

§ 619. Judgment in impeachments.

Judgment. Judgments in Parliament, for death have been strictly guided per legem terrae, which they can not alter; and not at all according to their discretion. They can neither omit any part of the legal judgment nor add to it. Their sentence must be secundum non ultra legem. *Seld. Jud., 168, 171.* This trial, though it varies in external ceremony, yet differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments, prevailed; for impeachments are not framed to alter the law, but to carry it into more effectual execution against too powerful delinquents. The judgment, therefore, is to be such as is warranted by legal principles or precedents. *6 Sta. Tr., 14; 2 Wood., 611.* The Chancellor gives judgment in misdemeanors; the Lord High Steward formerly in cases of life and death. *Seld. Jud., 180.* But now the Steward is deemed not necessary. *Fost., 144; 2 Wood., 613.* In misdemeanors the greatest corporal punishment hath been imprisonment. *Seld. Jud., 184.* The King's assent is necessary to capital judgments (but *2 Wood., 614,* contra), but not in misdemeanors, *Seld. Jud., 136.*

The Constitution of the United States (art. I, sec. 3, cl. 7) limits the judgment to removal and disqualification. The order of judgment following

conviction in an impeachment trial is divisible for a separate vote if it contains both removal and disqualification (III, 2397; VI, 512; Apr. 17, 1936, p. 5606), and an order of judgment (such as disqualification) requires a majority vote (VI, 512; Apr. 17, 1936, p. 5607). Under earlier practice, after a conviction the Senate voted separately on the question of punishment (III, 2339, 2397), but no vote is required by the Senate on judgment of removal from office following conviction, since removal follows automatically from conviction under article II, section 4 of the Constitution (Apr. 17, 1936, p. 5607). Thus, the presiding officer directs judgment of removal from office to be entered and the respondent removed from office without separate action by the Senate on the question of punishment where disqualification is not contemplated (Oct. 9, 1986, p. 29873). A resolution impeaching the President may provide only for his removal from office (H. Res. 1333, Aug. 20, 1974, p. 29361) or for both his removal and disqualification from holding any future office (H. Res. 611, Dec. 19, 1998, p. ——).

§ 620. Impeachment not interrupted by adjournments.

Continuance. An impeachment is not discontinued by the dissolution of Parliament, but may be resumed by the new Parliament. *T. Ray 383; 4 Com. Journ., 23 Dec., 1790; Lord's Jour., May 15, 1791; 2 Wood., 618.*

In Congress impeachment proceedings are not discontinued by a recess (III, 2299, 2304, 2344, 2375, 2407, 2505, see also § 592, *supra*). The following impeachment proceedings extended from one Congress to the next: (1) the impeachment of Judge Pickering was presented in the Senate on the last day of the Seventh Congress (III, 2320), and the Senate conducted the trial in the Eighth Congress (III, 2321); (2) the impeachment of Judge Louderback was presented in the Senate on the last day of the 72d Congress (VI, 515), and the Senate conducted the trial in the 73d Congress (VI, 516); (3) the impeachment of Judge Hastings was presented in the Senate during the second session of the 100th Congress (Aug. 3, 1988, p. 20223) and the trial in the Senate continued into the 101st Congress (Jan. 3, 1989, p. 84). The impeachment of President Clinton was presented to the Senate after the Senate had adjourned sine die for the 105th Congress (Dec. 19, 1998, p. ——), and the Senate conducted the trial in the 106th Congress (Jan. 7, 1999, p. ——). While impeachment proceedings may continue from one Congress to the next, the authority of the managers appointed by the House expires at the end of a Congress; and the managers must be reappointed when a new Congress convenes (Jan. 6, 1999, p. ——).