The Impeachment of Attorney General Jason Ravnsborg

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On the evening of September 12, 2020, South Dakota’s Attorney General, Jason Ravnsborg, was returning to his home in Pierre from a political event in Redfield, when he struck and killed Joseph Boever, a pedestrian walking along U.S. Highway 14.1 This occurred in Hyde County, a short distance west of Highmore.2 During the following days and weeks, the accident and Governor Kristi Noem’s demands that the Attorney General resign as a result of the accident were front page news throughout the state of South Dakota.3

The matter formally came before the legislature on February 24, 2021, when Representative Will Mortenson introduced House Resolution (“HR”) 7001, which called for the Attorney General’s impeachment.4 HR 7001 was amended in the House of Representatives to provide that if the Attorney General was convicted, pled guilty or nolo contendere, or was acquitted in the pending Hyde County criminal cases, then the House of Representatives may evaluate whether articles of impeachment are necessary and proceed accordingly.5

At that time, I became interested in how the Office of Attorney General would be filled in case of impeachment or resignation. My legal research revealed what I thought was a strange anomaly in South Dakota law. The Attorney General is one of the “constitutional officers” elected by the voters.6 The South Dakota Constitution’s Article IV, Section 8 provides that except for the constitutional offices, the Governor can organize all executive and administrative offices into not more than twenty-five departments, and Article IV, Section 9 provides that these departments shall be headed by an executive who shall be appointed by the

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2. Id.
3. Id.
4. Id.
5. Id.
6. See S.D. CONST. art. IV, § 7. In addition to the Attorney General, the other constitutional officers are the Secretary of State, Auditor, Treasurer, and Commissioner of School and Public Lands. Id.
Governor with the advice and consent of the Senate.\(^7\) Article IV, Section 3 provides: “Whenever a vacancy occurs in any office and no provision is made by the Constitution or laws for filling such vacancy, the Governor shall have the power to fill such vacancy by appointment.”\(^8\)

Under my interpretation of that provision of the South Dakota Constitution, if there is no provision in the constitution or laws for filling a vacancy, then the Governor can fill the vacancy by appointment without the advice and consent of the Senate.

I could find no constitutional or statutory provision for filling vacancies in the constitutional offices. It seemed peculiar to me that the administrative department positions could be filled or replaced by the Governor but only with the advice and consent of the Senate. However, the constitutional offices, which are provided for in the South Dakota Constitution and all of whom are initially elected by the voters of the state, could be replaced by the Governor without the approval of the Senate.

As a result of this discovery, I prepared and, on January 26, 2021, introduced Senate Bill (“SB”) 112, which required that the replacement of constitutional officers be done with the advice and consent of the Senate.\(^9\) SB 112 was very well-received and passed the Senate on February 2, 2021, by a vote of 32-2 and the House on March 3, 2021, by a vote of 54-14.\(^10\) It has since been codified as South Dakota Codified Law section 3-4-3(1) which provides that vacancies shall be filled as follows:

The attorney general, secretary of state, state auditor, state treasurer, and commissioner of school and public lands, by the Governor with the advice and consent of the Senate. However, if a vacancy occurs in any of the offices listed in this subdivision while the Legislature is in recess, the Governor shall make a temporary appointment until the next session of the Legislature.\(^11\)

Attorney General Ravnsborg subsequently pled guilty to two of the misdemeanor charges that had been filed against him as a result of the accident.\(^12\) As a result, during 2021 and 2022 the South Dakota Legislature further considered the impeachment of the Attorney General.\(^13\)

This was the first impeachment proceeding in the history of the state of South Dakota and required the legislature to consider issues that had never previously

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7. Id. §§ 8-9.
8. Id. § 3.
11. SDCL § 3-4-3(1) (2021).
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... come before it.\textsuperscript{14} Article XVI of the South Dakota Constitution provides the authority for impeachment and removal from office of some state executive and judicial officers. It provides:

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 judgement 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.\textsuperscript{15}

The constitution requires a majority vote of the members of the South Dakota House of Representatives to impeach and a two-thirds vote of the South Dakota Senate to convict.\textsuperscript{16} A state official must be both impeached and convicted in order to be removed from office.\textsuperscript{17}

The impeachment process started with a special session of the legislature in November of 2021.\textsuperscript{18} At that time the House of Representatives appointed a select committee to investigate the matter and make a recommendation to the House as to what action to take.\textsuperscript{19} The Senate took no action at that time, as the Senate had to wait until the House made a decision on impeachment before the Senate would decide whether to convict.\textsuperscript{20}

The House select committee investigated whether there were grounds for impeachment and filed a report on March 28, 2022, which, by a 6-2 vote, recommended against impeachment.\textsuperscript{21} However, on April 12, 2022, the House voted to impeach the Attorney General by a vote of 36-31 with 3 members missing.\textsuperscript{22} Since the impeachment resolution required 36 votes to pass, it had exactly enough to pass.\textsuperscript{23} The House Resolution of Impeachment (House Resolution 7002) called for the Attorney General’s impeachment on two grounds: (1) Crimes Causing the Death of Joseph Boever; and (2) Malfeasance in Office Following the Death of Joseph Boever.\textsuperscript{24}

The Senate then met in Pierre on April 26, 2022, and determined the rules that would be followed in the trial of the impeachment resolution.\textsuperscript{25} I was one of

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\textsuperscript{14} Dunteman, supra note 1.

\textsuperscript{15} S.D. CONST. art. XVI, § 3.

\textsuperscript{16} Id. §§ 1-2.

\textsuperscript{17} Id.

\textsuperscript{18} S.D. S. Con. Res. 601.

\textsuperscript{19} S.D. H.R. Res. 7001.

\textsuperscript{20} See S.D. CONST. art. XVI, §§ 1-2.


\textsuperscript{22} Dunteman, supra note 1.

\textsuperscript{23} See S.D. CONST. art XVI, § 2. That would be 50% plus 1 of the 70 members of the House of Representatives.


the thirty-three senators who participated in the trial of the Attorney General.\textsuperscript{26} This was neither a civil trial nor a criminal trial so none of the usual rules for court proceedings or rules of evidence applied. The South Dakota Constitution does require that the Lieutenant Governor preside over the trial of an impeachment resolution,\textsuperscript{27} but since Lieutenant Governor Rhoden is not a lawyer and had no experience in presiding over a trial, he retained former Lieutenant Governor Matt Michels to assist him in conducting the trial.\textsuperscript{28}

Differing from the normal legal practice, in this impeachment case, the senators were provided with all of the prosecution and defense evidence in advance and given an opportunity to study it before the trial.\textsuperscript{29} The evidence consisted of hundreds of pages of investigative reports, transcripts of interviews, photographs, etc. Since all of the evidence was received in advance, there were no evidentiary issues which needed to be resolved during the trial, which simplified the process and significantly sped up the trial.

The Senate trial of the two charges took place on June 21, 2022.\textsuperscript{30} According to the rules that had been adopted by the Senate in April, the prosecution and the defense were each allowed one hour to make an opening statement, four hours to present any evidence, and one hour to make a closing statement.\textsuperscript{31} In addition, the Attorney General would be allowed an unlimited amount of time to personally testify and answer questions if he chose to do so.\textsuperscript{32}

In preparation for the trial of the impeachment charges, I studied all of the evidence that was furnished to us in advance of the trial. It appeared to me that the North Dakota Bureau of Criminal Investigation (“BCI”) did a thorough job of investigating the case and followed up on every possible lead.\textsuperscript{33} In addition to studying all of the evidence that was furnished to us, I read The Impeachers: The Trial of Andrew Johnson and the Dream of a Just Nation, a book about the impeachment of Andrew Johnson, our first President to be impeached.\textsuperscript{34} That first Presidential impeachment presented some of the same issues that we were faced with during this impeachment trial. As related there:

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\textsuperscript{26} Transcript of Proceedings, supra note 13, at 4-7. There are thirty-five senators but two were absent for the trial. \textit{Id}. Since there is required to be a two-thirds vote of the entire membership to convict, if a senator is absent for any reason, this has the same effect as a “no” vote.

\textsuperscript{27} S.D. CONST. art. XVI, § 2.


\textsuperscript{29} Transcript of Proceedings, supra note 13, at 9.

\textsuperscript{30} \textit{Id}. at 13. The trial was scheduled for June 21st and 22nd but was completed in one day.

\textsuperscript{31} S.D. S. Res. 702, at R. 4-3(2)-(5), (9).

\textsuperscript{32} \textit{Id}. at R. 4-3(6).

\textsuperscript{33} The North Dakota Bureau of Criminal Investigation (“BCI”) was asked to do the investigation of this accident because the South Dakota Division of Criminal Investigation, which would normally have investigated such a case is under the control and supervision of the Attorney General’s office. Transcript of Proceedings, supra note 13, at 125.

\textsuperscript{34} U.S. SENATE, Impeachment Trial of President Andrew Johnson, 1968, https://perma.cc/XW83-YKB6 (last visited Nov. 18, 2022).
So in 1868 Congress and the public would have to consider the definition of a high crime and the meaning of a misdemeanor. It was bewildering. “The multitude of strangers were waiting for impeachment,” [Mark] Twain observed. “They did not know what impeachment was, exactly, but they had a general idea that it would come in the form of an avalanche, or a thunder clap, or that maybe the roof would fall in.”

For no one knew what the first-ever impeachment of the President of the United States would look like or what sufficient grounds, legal or otherwise, were necessary. No one knew partly because the U.S. Constitution provides few guidelines about impeachment beyond stipulating, in Article II, Section 4, that a federal officer can be impeached for treason, bribery, or a high crime or misdemeanor.

And if the President—the President of the United States—was to be impeached for treason, bribery, or a high crime or misdemeanor, then the country had to define “high crime.” Originally, the crime warranting impeachment was “maladministration,” but James Madison had objected; the term was hazy. Yet “high crimes and misdemeanors” is fuzzy too. In Federalist 65, Alexander Hamilton clarified—sort of: a high crime is an abuse of executive authority, proceeding from “an abuse or violation of some public trust.” Impeachment is a “national inquest into the conduct of public men.” Fuzzy again:

are impeachments to proceed because of violations of law—or infraction against that murky thing called public trust? But surely if the crimes that were impeachable were “high,” then the Founders must have meant “high misdemeanors” as well. For a misdemeanor is a legal offense, ranked below that of a felony. Was a President to be impeached for any misdemeanor—like stealing a chicken—or did it have to be something, well, “higher”?  

We had that same situation here in South Dakota’s impeachment proceedings. What is “crimes, corrupt conduct, or malfeasance or misdemeanor” in office? That is vague and had never been answered in South Dakota since there had never been an impeachment proceeding before.

Because of its similarity, I also reviewed this case in comparison to the fatal traffic collision case involving former Governor William Janklow, who killed a

36. S.D. Const. art. XVI, § 3.
37. Dunteman, supra note 1.
motorcyclist in an accident in August of 2003. Governor Janklow’s case was different in that he was a United States Congressman, a federal official not subject to impeachment under the South Dakota Constitution. The Janklow case also differed because the local prosecutor made the decision to try the case and left the decision up to a jury—which found Governor Janklow guilty of reckless driving and second degree manslaughter. That did not happen in this case. Instead, the local prosecutor plea bargained the case down to two Class 2 misdemeanors: illegal lane change in violation of South Dakota Codified Law section 32-26-6 and driving while using his cell phone in violation of South Dakota Codified Law section 32-26-47.1.

In my eighteen years as a circuit judge trying numerous cases, I know that there are frequently unanswered questions about what happened and why things happened. In this impeachment proceeding, even though I had studied all of the documentary evidence presented to the senators in advance of the trial and listened to all of the testimony on June 21, this case left many unanswered questions in my mind. I felt that the record in this case showed that Attorney General Ravnsborg had a long history of poor driving, that he frequently does not pay attention when he drives, and that he was intending not to pay attention that night because he wanted to think about some upcoming cases.

Still, I was puzzled and am still puzzled about some of the things that happened that night and why they happened. I do not understand why the Attorney General was driving on the shoulder of the road at the time of the accident, why he did not see Joe Boever in his headlights, or why he did not see him when he hit him. It was unclear how fast the Attorney General was driving. How long before the accident took place was he using his cell phone? I do not understand why he did not see Mr. Boever’s face in his windshield—when the glasses came through the windshield and into his car, why he did not see the body in the ditch, or why neither he nor the Hyde County sheriff saw Joe Boever’s body in the ditch when they walked right by it. There was no satisfactory explanation of why the sheriff did not investigate the lit flashlight in the ditch when he saw it.

When Attorney General Ravnsborg graduated from law school and started practicing law in Yankton, he appeared in my courtroom numerous times. I believe that I have known him longer than anyone else in the Senate. Based on my personal experiences with him, I do not believe that he would deliberately lie about what happened. He gained nothing by lying. He immediately reported the accident to law enforcement. No reasonable person would assume that Joe Boever’s body would never be discovered, nor would any reasonable person have

38. South Dakota v. Janklow, 2005 SD 25, ¶ 2-3, 639 N.W.2d 685, 690-91. I was particularly familiar with the facts of the Janklow case as I served as a substitute supreme court justice on the appeal of that case.
39. S.D. CONST. art. XVI, § 3.
40. Janklow, 2005 SD 25, ¶ 12, 639 N.W.2d at 692.
41. Judgment of Conviction and Sentence, supra note 12.
42. Since the sheriff had passed away before the impeachment proceedings, there was no way of questioning him about that failure.
assumed that once Joe Boever’s body was discovered that no one would have made a connection between his body and the accident the prior night at that precise location. This was not a “hit and run” accident, as the Attorney General immediately reported the accident to local law enforcement nor was there any indication that alcohol was involved in the accident in any way. Finally, this accident was not unique, as there are multiple vehicle-pedestrian accidents in South Dakota every year.

In making my decisions in this impeachment case, I knew that this was a political issue, not a court or legal issue, but I believed that the Senate needed to approach this as though it were a court trial. I felt that the Senate had an obligation to give both sides a fair hearing and make its decision based on the evidence, not on an emotional response to the accident. In evaluating the two charges against the Attorney General, which were brought by the House, I reached different conclusions.

I. COUNT 1—CRIMES CAUSING THE DEATH OF JOSEPH BOEVER.

One of the charges brought by the House of Representatives was that Attorney General Ravnsborg was convicted of Crimes Causing the Death of Joseph Boever.44 However, the only crimes he was convicted of were two Class 2 misdemeanors, illegal lane change and driving while using his cell phone.45 I questioned whether either of those Class 2 misdemeanors “caused” the death of Joseph Boever?

This left me with the same issue that was raised in the impeachment of Andrew Johnson in 1868; do you impeach someone for stealing a chicken—do you impeach someone for Class 2 misdemeanor traffic offenses? Is driving on the shoulder an improper lane change? Did the lane change or the earlier use of his cell phone cause the death of Joseph Boever? I did not believe that we should impeach a constitutional officer, elected by the voters of the state of South Dakota, for a Class 2 misdemeanor traffic offense, nor did I believe that the evidence showed that the Class 2 misdemeanors “caused the death” of Joseph Boever, and, as a result, I spoke and voted against impeachment on Count 1. There were other senators who had the same concerns, as that charge only passed by one vote.46

II. COUNT 2—MALFEASANCE IN OFFICE FOLLOWING THE DEATH OF JOSEPH BOEVER.

I felt that the issue raised by Count 2 was different. It charged the Attorney General with malfeasance or misusing his office as Attorney General.47 The
record showed that Attorney General Ravnsborg is a poor driver. It showed that there have been several incidents where he avoided or attempted to avoid responsibility for his poor driving by identifying himself as the Attorney General. In this case, he started out by identifying himself as the Attorney General. Did he get special treatment as a result? He received the use of the sheriff’s personal car. Was that special treatment? Ultimately, although his actions resulted in the death of Joe Boever, he was allowed to plead to just two Class 2 misdemeanors. Was that special treatment? The record showed that during the investigation, he consulted with the staff at the Attorney General’s office about the accident and how to handle it. The investigators from the North Dakota BCI who wanted to question the Attorney General had to contact the head of the South Dakota Division of Criminal Investigation (“DCI”) in order to contact him. They had to contact the Attorney General’s Chief of Staff in order to talk to him. The Attorney General consulted a South Dakota Division of Criminal Investigation expert about cell phones and what could be found on his cell phone. The Attorney General put out a press release with his version of what happened on the Attorney General’s official letterhead stationery.

Attorney General Ravnsborg made this fatal traffic accident a part of the Office of the Attorney General (“Attorney General’s Office”)—he directly involved the Attorney General’s Office in this entire matter. He affected the credibility of the Attorney General’s Office by his conduct. As a result, I felt that in respect to Count 2, Malfeasance in Office Following the Death of Joseph Boever, the answer was “yes,” and I voted to impeach on that count.

This impeachment proceeding put me in an uncomfortable position. As I pointed out, I believe that I have known Attorney General Ravnsborg longer than anyone else in the Senate. He appeared in my court in Yankton numerous times. I made one of his nominating speeches at the 2018 Republican convention. Because of those circumstances, if I were serving as a judge in this case, I would have disqualified myself because of Canon 3 (E) of the Code of Judicial Conduct, which requires judges to disqualify themselves if their impartiality might reasonably be questioned. However, this was a political case, not a legal case, and the South Dakota Constitution requires a two-thirds vote of the entire

49. Id. at 270.
50. Id. at 41-42, 250.
51. Id. at 77, 218.
52. Compare Complaint, South Dakota v. Ravnsborg, No. MAG21-1, 2021 WL 651372 (S.D. 6th Cir. Feb. 17, 2021) with Dismissal of Complaint, Ravnsborg, No. MAG21-1 (Sept. 3, 2021) (evidencing that the Attorney General was originally charged with three misdemeanors but was ultimately allowed to plead to two misdemeanors).
53. Transcript of Proceedings, supra note 13, at 250.
54. See id.
55. See id.
56. Id.
57. Id.
58. S.D. CODE OF JUD. CONDUCT 3(E).
membership of the Senate to convict and remove an officer. There is no authority for disqualification, and there is no procedure for replacement of a senator who deems themselves disqualified. Because of the requirement for a two-thirds vote of the entire body, any senator who does not vote for any reason is the same as a “no” vote. In this impeachment proceeding, I put aside any personal relationships, thoroughly considered the evidence, and feel that I made the best decision that I could have made. I felt that the decisions which I made were solidly grounded on the available evidence and the language of the South Dakota Constitution.

60. There were some members of the House of Representatives who said that they “recused” themselves from the House vote, but since impeachment requires a majority vote of the entire House membership, their absence had the same effect as a “no” vote. Eric Mayer et al., Impeached: House Votes 36-31 to Impeach Ravnsborg, KELOLAND (Apr. 12, 2022, 6:50 PM), https://perma.cc/KAY6-JJMD. Similarly, the two Senators who were absent from the trial amounted to “no” votes.