

# ALASKA STATE LEGISLATURE

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Sen. Rick Halford, Vice-Chair  
Sen. Dave Donley  
Sen. John Torgerson  
Sen. Johnny Ellis



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## Senate Judiciary Committee

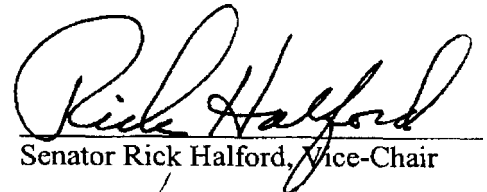
May 3, 2000

In the matter concerning three boxes of materials containing 30 self-styled "Article of Impeachment" purportedly from one Ralph Kermit Winterrowd<sup>2<sup>nd</sup></sup> (sic) referred to the Senate Judicial Committee on Monday May, 1, 2000.

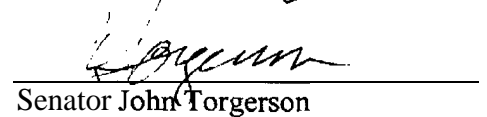
Following Legislative Legal Services review, the committee has considered the materials and recommends no further action.

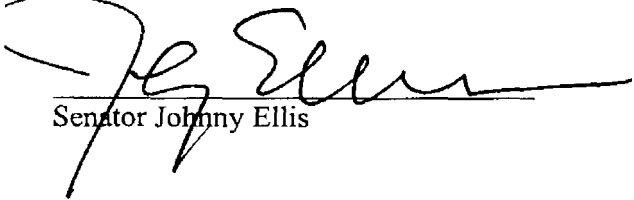
Said documents will be returned to the Senate Secretary for proper filing.

  
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Senator Robin Taylor, Chair

  
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Senator Rick Halford, Vice-Chair

  
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Senator Dave Donley

  
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Senator John Torgerson

  
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Senator Johnny Ellis

Attachment: Copy of Legal Service Memorandum Work Order No. 21-LS1654

## LEGAL SERVICES

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### MEMORANDUM

May 3, 2000

**SUBJECT:** Materials Delivered to the Senate Secretary Entitled "Articles of Impeachment" of Various Justices and Judges (Work Order No. 21-LS 1654)

**TO:** Senator Robin Taylor

**FROM:** Gerald P. Luckhaupt   
Legislative Counsel

You have asked this office to review three boxes of material that were delivered to the Senate Secretary purportedly from one **Ralph Kermit Winterrowd** 2nd (sic). The boxes contain some 30 self-styled "Articles of Impeachment of [NAME OF JUSTICE, JUDGE, OR MAGISTRATE]" naming justices, judges, and magistrates of the state of Alaska." I have been informed that the receipt of these self-styled "Articles of Impeachment" was announced during the regular Senate Calendar under messages or communications and the President referred the materials to the Senate Judiciary Committee.<sup>2</sup>

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"The justices named are: Warren W. Mathews, Dana **Fabe**, Walter L. **Carpeneti**, Robert L. Eastaugh, Alexander O. **Bryner**, Allen T. **Compton**. The judges named are: John E. Reese, Sigurd E. Murphy, James N. **Wanamaker**, Eric T. Sanders, Sen K. Tan, Johanthan H. Link, Stephanie Joannides, Peter G. **Ashman**, Natalie K. Finn, Eric Smith, Milton M. Souter, Elaine M. **Andrews**, Larry B. Card, Dan A. **Hensley**, Stephanie Rhoades, John K. R. Lohff, Karen L. Hunt, Suzanne Lombardi, **Gregory** J. Motyka, **Brian Shortell**, William H. **Fuld**, Harold M. Brown. The magistrates named are: Jennifer K. Wells, David L. **Zwink**.

<sup>2</sup>I question whether these materials were properly received by the Senate under the daily calendar **item** messages or **communications**. Rule 7, Uniform Rules of the **Alaska** State Legislature, provides:

Communications received by a house **from** the other house or the governor are read by the clerk or secretary and spread upon or paraphrased in the journal. **All other official communications to a house are referred directly by the clerk or secretary to the presiding officer for referral by the presiding officer to a committee or to file. The presiding officer may direct that the receipt of a communication and the subject to which it**

(continued...)

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To respond to your request I have decided to review Mr. Winterrowd's correspondence first and then **I will** review the law relating to impeachment and the meaning of the terms "malfeasance or misfeasance."

**The Three Boxes of Stuff.**

**It** is physically impossible for me to read the contents of **each** box in **full**, analyze the **self-styled** "Articles of Impeachment," and review and comment upon each within the **timeframe** you have requested for the completion of this memorandum. With this understanding, I conducted a cursory scan of the contents of the boxes and the self-styled "**Articles of Impeachment**" appear very similar as to each justice, judge, or magistrate identified and I decided to select one of the purported "**Articles**" to read and review for this memorandum. At random I selected the **self-styled** "**Articles of Impeachment of Walter L. Carpenetti.**"

**Self-Styled "Articles of Impeachment of Walter L. Carpenetti" Submitted by Ralph Kermit Winterrowd 2nd(sic)**

Mr. Winterrowd's purported "Articles" contain at least 5 statements why he apparently believes Justice of the Alaska Supreme Court **Walter L. Carpenetti** should be impeached. Mr. Winterrowd's grounds are:

**"Article I"** - Mr. Winterrowd contends that the oath of office that Justice **Carpenetti** took is **unlawful** and that his entering into office before taking a "**lawful**" oath constitutes "a high crime, malfeasance, misfeasance and **nonfeasance.**" According to Mr. Winterrowd the oath is unlawful because it refers to the "Constitution of the United States of America" which, again according to Mr. **Winterrowd** is, not the "true name" of the federal Constitution, the true name being "Constitution of the United States." The fact that people may refer to a document, thing, or person by more than one name does **not** invalidate the document, thing, or person **itself** or actions taken in the name of the document, thing, or person. For example, the **fact that** I might refer to the Constitution as the United States **Constitution** or the Constitution of the United States of America does **not** mean I am **referring** to some document other than Constitution of 1787 and its amendments. In any event, Art. XII, § 5, **Constitution**

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<sup>2/</sup>(...continued)  
**relates be noted in the journal.**

Only communications received **from** the other house or **from** the governor are **to** be read by the secretary. Other "official communications" are **to** be referred directly to the presiding officer for referral by the presiding **officer**. These "official communications" can then be noted in the journal if so ordered by the presiding **officer**. I cannot conceive of any rationale as to how these self-styled "**Articles of Impeachment**" are to be considered "official communications." They are letters **from** a constituent, **from** a state citizen (who apparently denies that citizenship preferring to **identify** himself as a territorial citizen), expressing his personal views concerning the judiciary. They should be dealt with and considered as are other letters **from** constituents.

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of the State of Alaska, prescribes the oath of office for all public officers of this State. That provision provides:

All public **officers**, before entering upon the duties of their offices, shall take and subscribe to the following oath or affirmation: "I do solemnly swear (or **affirm**) that I will support and defend the Constitution **of the United States** and the Constitution of the State of Alaska, and that I will faithfully discharge my duties as ..... to the best of my ability." The legislature may prescribe further oaths or **affirmations**.

Justice Carpeneti executed this oath on November 6, 1998, a copy of which is attached to the "Articles" as Exhibit 28. Apparently, Mr. **Winterrowd** also believes that this is insufficient to meet what he believes to be a federal oath requirement. I fail to see any deficiencies in the oath of **office** required by the Constitution of the State of Alaska.

**"Article II"** - Mr. Winterrowd contends that some judicial officers have executed oaths to support and defend the "Constitution of the United States of America" and **that this is illegal** and grounds for impeachment as "of America" should not be included. Again, I find Mr. **Winterrowd's claims** specious. The Constitution of the United States is the Constitution of the United States of America. Our country is not the United States it is the United States of America. An oath to support and defend the Constitution of our country is not deficient.

**"Article III"** - Mr. Winterrowd contends that Justice **Carpeneti's** execution of an employment affidavit, presumably so Justice Carpeneti could get paid, was in conflict with his position as a public official and that this constitutes a high crime. Why? Is not every public **official** of the state technically an employee of the state? The state receives the benefit of their labor, the state pays the person, the state provides them office space and supplies. A justice, like a legislator or the governor, is an employee of the state for certain purposes. The state is who they work for - the state is their employer. This does not in any way amount to malfeasance or misfeasance in office.

**"Article IV"** - Mr. Winterrowd contends that Justice Carpeneti has entered upon his position without receiving a commission from the governor and that this **somehow** constitutes grounds for impeachment. Mr. **Winterrowd** provides no proof of this claim nor does he show how this constitutes an impeachable **offense**. Article IV, § 5 of the Constitution of the State of Alaska provides that the governor shall fill a vacancy of supreme court justice by appointing a person nominated by the judicial council. When the justice is appointed by the governor, the authority of the appointing authority, the governor, **ends**. See, *Division of Elections v. Johnstone*, 669 P.2d 537, 539 - 540 (Alaska 1983). Whether the governor is required to issue a commission to a judicial officer under AS39.05.035 is an interesting question, but the resolution of that question does not affect the authority of the person appointed to assume the office the person has been appointed to. Once the person has been appointed the authority of the governor to stop or revoke that appointment ends. The federal cases cited by Mr. Winterrowd, while interesting and significant **as** they relate to **the**

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authority of the executive to appoint, are inapposite to whether Justice Carpeneti is lawfully holding the office he does.

**"Article V"** - Mr. Winterrowd contends that Justice Carpeneti was not licensed to practice law in the state of Alaska upon his appointment to the bench and that this constitutes an impeachable offense. The only proof of this claim is Mr Winterrowd's statement that he found no such license to practice law in the Appellate Courts Clerk's Office. When Justice Carpeneti was appointed to the Supreme Court he was a Superior Court Judge. When Justice Carpeneti was appointed to the Superior Court, he was in the private practice of law in Juneau. Justice Carpeneti was a member of the Alaska Bar Association at that time. Justice Carpeneti was not eligible for appointment unless he was licensed to practice law in Alaska.

**"Article VI"** - Mr. Winterrowd next contends that Justice Carpeneti possesses only single citizenship as a citizen of the United States and that this constitutes an **impeachable** offense. Again, no evidence is provided nor cogent argument or authority. Art. IV, § 4, Constitution of the State of Alaska, provides that justices and judges must be citizens of the United States and of the State. At the time Justice Carpeneti was appointed to the Alaska Supreme Court he was a resident of Juneau and a judge of the Superior Court. He was a citizen of Alaska under any definition of the term except possibly under some obscure definition of the term known only to Mr. Winterrowd.

**"Article VII"** - Mr. Winterrowd next complains that Justice Carpeneti decides cases **from unlawful courts** - that is, courts not created in or identified in Chs. 50 and 184, SLA 1959, and that this constitutes an impeachable offense. Again no cogent argument or authority is provided. Article IV, § 1, Constitution of the State of Alaska, provides that the judicial power "is vested in a supreme court, a superior court, and the courts established by the legislature" and "[j]udicial districts shall be established by law." Section 3 of that same Article provides that the superior court shall consist of five judges and that the number of judges may be changed by law. The legislature has established the superior court and the number and Location of judges of the superior court in AS 22.10. The **legislature** has established the district court and the **number** of district judges and magistrates in AS 22.15.

**"Article VIII"** - Mr. Winterrowd contends that Justice Carpeneti ignores certain laws enacted by the legislature in 1959 and that this constitutes an impeachable offense. Again, there is a dearth of support for the claim, but it appears that Mr. Winterrowd objects to the Alaska Supreme Court's adoption of Rule 91, Alaska Rules of Civil Procedure, which abolished certain common law **extraordinary** writs. That rule does not actually abolish the relief available by those writs but only requires that they be obtained not by the filing of an old style writ but by the filing of an action or motion under the rules of civil procedure. Such appears to be within the rule-making authority granted to the Alaska Supreme Court under Art. IV, § 15, Constitution of the State of Alaska.

**"Article IX"** - Mr. Winterrowd contends that Justice Carpeneti's membership in the Alaska Bar Association is **illegal** based upon an act of the territorial legislature and that this membership is an impeachable offense. AS 08.08.020(a) provides that "[e]very person

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licensed to practice law in the state shall become a member in the Alaska Bar." Since a person may not be appointed a justice or judge **unless** they are **licensed** to practice law in Alaska and Justice Carpeneti was licensed to practice law in Alaska prior to his appointment to the bench, Mr. Winterrowd's complaint **makes** little sense. Mr. Winterrowd appears to choose particular enactments **from** the past and ignore the subsequent amendment or repeal of those enactments, preferring to have the law be whatever his particular ends require. The trouble is the historical enactment Mr. **Winterrowd** refers is no longer the law.

**"Article X"** - Mr. Winterrowd contends that Justice Carpeneti has no official bond and that this is an impeachable **offense**. Again, Mr. Winterrowd cites a territorial enactment and **further** argues that Justice Carpeneti is not an employee of the state and therefore is not covered by the general state bond the state provides for its employees and **officers**. That Justice Carpeneti is not technically an employee of the state is specious as have earlier discussed. Further, the current provisions on **bonding** only require bonds for employees when "required by statute or regulation." AS 39.15.010. For example, AS 39.05.050 requires "[t]he principal executive officer of each department and subordinate officials" to be bonded at state expense. This provision is not authority for requiring judicial officers to be bonded as judicial officers are not a principal executive officer of a department or a subordinate **official**. The departments of state government are found in the executive branch. See Art. III, §22, Constitution of the State of Alaska. Justices and judges are members of the judicial branch of state government. **While** no specific provision requiring bonding of judicial officers is required by state statute the general state bonds the state purchases to cover all state employees cover judicial officers as they are technically an employee of the state just as the governor and legislators are. Further, the court system has provided by rule (see Rule 34, Alaska Rules of Administration) that the general state bond is to cover judicial officers.

**"Article XI"** - Mr. Winterrowd next contends that pursuant to certain territorial laws and certain historical laws of the State of Oregon that Justice Carpeneti is not a justice of a "court of justice" and that he somehow has no authority to act as he acts and takes appeals from courts that are not constitutionally authorized courts of justice and that this constitutes an impeachable offense. Article IV, Constitution of the State of Alaska defines the judicial power of the state. Justice Carpeneti was appointed pursuant to those provisions to a position on a court authorized by those provisions. Further, Justice Carpeneti acts in cases **from** the superior court - again authorized by Art. IV and **from** "the courts established by the legislature." Art. IV, § 1. Nothing cited by Mr. Winterrowd calls this into question.

**"Article XII"** - Mr. Winterrowd next contends that "compiled laws are not true laws." AS 01.05.006 provides that the bulk formal revision of the laws of Alaska are the "general and permanent law of Alaska." All general and permanent laws enacted by the territorial and state legislatures before 1963 were repealed by Ch. 2, §1, SLA 1963. Mr. Winterrowd's reliance upon historical enactments that have been repealed does not support his arguments and only results in the **waste** of time and resources.

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**"Article XIII"** - Mr. Winterrowd next contends that American citizens are entitled to a **lawful** judge in the first instance. Mr. Winterrowd does not explain why this should result in Justice **Carpinetti's** impeachment. In any event procedures are provided to ensure that persons receive an impartial hearing before a neutral and detached judge. See Canon 3, Code of Judicial Conduct; AS 22.20.020.

**"Article XIV"** - Mr. Winterrowd next observes that the actions of courts without jurisdiction are void. Again, he does not explain why this means that Justice Carpeneti should be impeached.

**"Article XV"** - Finally, Mr. Winterrowd observes that "crimes do not escape punishment, because they have not ripened into treason." If Mr. Winterrowd means by this that crimes that do not amount to treason may **still** be grounds for impeachment if they arise to malfeasance or misfeasance, then I agree with this general proposition. It has no bearing on this materials.

In **summary**, I have found nothing in the materials submitted by Mr. Winterrowd that provides any serious or even arguable grounds for impeachment of Justice Carpineti, or for any other justice or judge for that matter.

#### **The Law Relating to impeachment.**

**Article IV, §12**, Constitution of the State of Alaska, provides:

Impeachment of any justice or judge for **malfeasance or misfeasance** in the performance of his official duties shall be according to procedure prescribed for civil officers.

The procedure prescribed for impeachment of civil officers is found in **Art. II, § 20**, Constitution of the State of Alaska, which provides:

All civil **officers** of the State are subject to impeachment by the legislature. Impeachment shall originate in the senate and must be approved by **two-thirds** vote of its members. The motion for impeachment shall list fully the basis for the proceeding. Trial on impeachment shall be conducted by the house of representatives. A supreme court justice designated by the court shall preside at the trial. Concurrence of two-thirds of the members of the house is required for a judgment of impeachment. The judgment may not extend beyond removal **from** office, but shall not prevent proceedings in the courts on the same or related charges.

Impeachment of civil officers is not specifically limited to certain types of actions or omissions by this **provision**.<sup>3/</sup> But impeachment of a justice or judge is specifically limited

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<sup>3/</sup>At the Alaska Constitutional Convention, when discussing Art. II§ 20, concern  
(continued. ..)

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to “malfeasance or misfeasance in the **performance** of his official duties.” A justice or judge<sup>4</sup> may not be impeached for any other ground or reason.

This filing by Mr. Winterrowd, although styled by Mr. Winterrowd as “**Articles of Impeachment**,” are not true articles of impeachment so as to trigger any action by the Senate or any other body. Only the Senate by its own actions can trigger impeachment proceedings.

**What is “malfeasance or misfeasance?”**

The Constitution does not define these terms and the Alaska Supreme Court has not had occasion to analyze the meaning of these terms in the context of **impeachment**.<sup>3</sup> *Black's Law Dictionary*, Sixth Edition, in defining “misfeasance” notes:

‘nonfeasance’ means the omission of an act which a person ought to do; ‘misfeasance’ is the improper doing of an act which a person might **lawfully** do; and ‘malfeasance’ is the doing of an act **which a** person ought not to do at all.

Courts in other jurisdictions have construed “malfeasance” and “misfeasance” in public **office**. The definitions of “malfeasance,” “misfeasance,” and “nonfeasance” have been described as follows: (1) malfeasance occurs when a public officer in exercising duties of office does an act which is wrongful or **unlawful in itself**; (2) misfeasance occurs when a public officer does an **otherwise** lawful act in a wrongful or unlawful manner; and (3) nonfeasance occurs when a public officer fails to do a required act *People v. Carlin*, 57 1 N.W.2d 742 (Mich. 1997). “Malfeasance” has been **described** variously as evil doing (*State ex rel. Knabb v. Frater*, 89 P.2d 1046 (Wash. 1939)); not merely an error in judgment or sound discretion, but willful, corrupt conduct that amounts to a breach of duty (*Bellis v. Board of Pensions and Retirement*, 634 A.2d 82 1 (Pa. 1993)); the wrongful doing of an

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<sup>3</sup>(...continued)

about the lack of express grounds for impeachment was expressed. Even without express grounds it appears that the delegates expected **that** impeachment would only lie for serious matters akin to “high crimes in office.” Constitutional Convention Proceedings, Part 3, pp. 1719, 1724, **1725**.

<sup>4</sup>Does the term “any justice or judge” also include a magistrate? In another context, the Alaska Supreme Court has held that magistrates are to be considered Art. IV judges. See *Buckalew v. Holloway*, 604 P.2d 240,243 (Alaska 1979). Considering this decision and the practical reality that magistrates “judge” persons coming before them, albeit in limited proceedings and ways, I conclude **that** magistrates are subject to **impeachment** under Art. IV, § 12, Constitution of the State of Alaska.

<sup>5</sup>In another context, the Alaska Supreme Court has suggested that “malfeasance” requires intentional action, whereas “misfeasance” does not necessarily include the element of intent. *Fairbanks North Star Borough School District v. Bowers Office Products, Inc.*, 85 1 P.2d 56, 57, fn. 2 (Alaska 1992).

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official act with evil intent or motive or with gross negligence as to be equivalent to **fraud** (*Raduszewski v. Superior Court in and for New Castle County*, 232 A.2d 95 (Del. 1965)). "Misfeasance" also appears to include an element of wrong doing or **negligence** that is extreme enough to be considered morally reprehensible. As one court has explained, when a public officer has the right to perform an act in a discretionary manner, the manner in which the discretion is exercised does not amount to misfeasance unless there is also an improper or corrupt motive. *CAPS v. Board Members*, 832 P.2d 790 (N.M. 1992).

In considering the question of what constitutes an impeachable offense, most commentators seem to agree that willful wrongdoing or extreme negligence is required and that there can be no impeachment for policy differences. *Treatise on Constitutional Law-Substance and Procedure*, Rotunda and Nowak, Second Edition, 1992. In particular, the idea that a judge can be impeached for an unpopular or **incorrect** judicial decision, which was originally accepted in England, was rejected in the early history of the United States on the ground that impeachment in such a situation would erode the protections of an independent judiciary. *Impeachment, the Constitutional Problems*, Berger, 1973, pp. 90-91.

Perhaps concern about protecting the independence of the judiciary motivated the delegates to our state constitutional **convention** to limit the grounds for impeachment under Art. IV, § 12 to malfeasance or misfeasance in the performance of official duties, even though no express grounds for impeachment of other civil officers are included in Art. II, § 20. The grounds for impeachment of members of the judiciary were specifically considered during the constitutional proceedings. In response to the question about why malfeasance and misfeasance are mentioned and nonfeasance is not, the following exchange occurred:

R. RIVERS: We set up an early retirement of judges for infirmities and incapacity which might occur prior to the age of compulsory retirement and when I was more or less subcommittee, within the Committee working on this, we considered that nonfeasance generally is because of illness or incapacity to perform. I don't see impeaching a man because he perhaps falls behind in the performance of his duties. So for the purposes of talking about impeachment, we just chose to say malfeasance and misfeasance, and we wanted to carry out that distinction. If a judge should, in the due course of a proceedings (sic) have an order in **front** of him that should be signed in the due course and refuses to sign it, that could be misfeasance instead of nonfeasance. So I think it is all covered and we're leaving the nonfeasance more or less to take care of the failure to perform because of incapacity and illness.

...

DOOGAN: What would you do in the case of a person who absolutely refuses to work, and that could very conceivably happen.

RIVERS: That would be misfeasance.

Constitutional Convention Proceedings, Part 1, pp. 729 - 730.

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**What is the Procedure for Impeachment?**

Under the terms of this section, the Senate considers whether to impeach a justice or judge. If two-thirds of the members of the Senate determine that **the** justice or judge should be impeached, then the House of Representatives acts as the trial court to hear the evidence and determine **the** verdict. A supreme court justice appointed by the state supreme court presides over this proceeding. A **two-thirds** majority of the House is required to impeach a justice or judge. There is nothing in statute or the constitution to direct the **steps** that the Senate should take in determining whether **there** are grounds to believe that a judge or justice has committed malfeasance or misfeasance in office, so the Senate would have substantial discretion in determining its procedures. The Senate's action can be considered to be **comparable** to the filing of an indictment in a **criminal** proceeding. There is nothing that requires participation by the accused judge or justice at this point in the proceeding. If the Senate decides by the required two-thirds vote of the membership (14 Senators) that the justice **or judge** should be impeached (by adopting Articles of Impeachment), then the matter is **referred** to the House of Representatives.

The House proceedings are comparable to a trial of the matter. There are no statutory or constitutional procedures set out for the House to follow, but **generally** there would be a presentation of the case against the accused justice or **judge** and an opportunity for the justice or judge to respond to the accusation. Witnesses would be subject to cross examination. The House after hearing the case, would vote on each of the **Articles** of Impeachment. A vote of two-thirds of the **members** of the House (27 members) would be required for conviction on any of the **articles**.

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