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STATE OF COLORADO
DEPARTMENT OF LAW

FORMAL)
OPINION)
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of)
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No. 24-001

3/19/2024

Philip J. Weiser, Attorney General of the State of Colorado, as chief legal representative for the State, issues this Formal Opinion *sua sponte* pursuant to his authority under § 24-31-101(1)(a) & (d), C.R.S. (2023), following a request from the Speaker of the Colorado House of Representatives.

QUESTIONS PRESENTED AND SHORT ANSWERS

Question Presented.

- (1) When an impeachment comes before the House of Representatives pursuant to Article XIII of the Colorado Constitution: what legal frameworks, statutes, or case law govern the impeachment process by the House of Representatives; and what grounds exist under the law for a state or judicial officer to be impeached, tried, and removed from office?

Short Answer.

- (1) No Colorado law or rule provides express procedural requirements for consideration of an impeachment proceeding by the House of Representatives. To date, however, impeachment proceedings in the House of Representatives have begun with a House resolution. As with all House resolutions, a resolution calling for impeachment of a state officer is subject to Rule 26 of the Rules of the House of Representatives.

The Colorado Constitution provides that a state or judicial officer may be impeached, tried, and removed from office for having committed “high crimes or misdemeanors or malfeasance in office.” Malfeasance in office occurs when: (1) an officer willfully engages in a wholly wrongful and

unlawful act; and (2) such act either (a) breaches a specific statutory requirement imposed on the officer, or (b) involves the corrupt or improper exercise of the discretion vested in the officer.

LEGAL AND FACTUAL BACKGROUND

An original provision of the Constitution of the State of Colorado—article XIII—vests the General Assembly with authority to impeach, try, and remove state and judicial officers for “high crimes or misdemeanors or malfeasance in office.” COLO. CONST. art. XIII, §§ 1–2.¹ Impeachment proceedings must begin in the House of Representatives. *Id.*, § 1. If a majority of the House members vote to impeach a state officer, the matter moves to the Senate for a trial. *Id.* If two-thirds of the Senate vote to convict the state officer, then the officer is removed from office and disqualified from holding “any office of honor, trust or profit in the state.” *Id.*, §§ 1–2.

The General Assembly has rarely exercised the impeachment power. Since 1876, the House has considered impeachments of six state officers, three of which resulted in impeachment.² The most recent impeachment resolution considered by the House was in 2004. *See* H.R. Res. 04-1007, 64th Gen. Assemb., 2d Reg. Sess. (Colo. 2004).³ The last time the House impeached a state officer was in 1939. *See* H.R. Res. 4 & 5, 32d Gen. Assemb., 1st Extraordinary Sess. (Colo. 1939) (impeaching two members of the Civil Service Commission). The Senate has never convicted a state officer impeached by the House.⁴

¹ This opinion uses the term “state officers” to reference both state officers and judicial officers.

² (1) 1893: H.R. Res. 33, H.R. Journal, Gen. Assemb., 9th Reg Sess. 397–99, 1707–13 (Colo. 1893) (House voting against impeachment);

(2) 1903: H.R. Journal, Gen. Assemb., 14th Reg Sess. 564–66 (Colo. 1903) (House voting against impeachment);

(3) 1935: H.R. Journal, 30th Gen. Assemb., 1st Extraordinary Sess. 57–63 (Colo. 1935) (adopting articles of impeachment for malfeasance in office and H.R. Res. 4);

(4) 1939: H.R. Journal, 32nd Gen. Assemb., 1st Extraordinary Sess. 319, 322–26 (Colo. 1935) (adopting articles of impeachment for malfeasance in office and H.R. Res. 4);

(5) 1939: H.R. Journal, 32nd Gen. Assemb., 1st Extraordinary Sess. 320, 326–30 (Colo. 1935) (adopting articles of impeachment for malfeasance in office and H.R. Res. 5); and

(6) 2004: H.R. Journal, 64th Gen. Assemb., 2d Reg. Sess. 1611 (Colo. 2004) (committee voting against H.R. Res. 04-1007).

³ The committee to which the resolution was referred voted to postpone indefinitely the impeachment resolution, thereby ending the House’s consideration of the issue. H.R. Journal, 64th Gen. Assemb., 2d Reg. Sess. 1611 (Colo. 2004).

⁴ Both impeachments in 1939 resulted in acquittals in the Senate. S. Journal, 32d Gen. Assemb., 1st Extraordinary Sess. 203–07 (Colo. 1939) (reflecting the acquittals for both state officers the House had impeached). The House’s impeachment of another state officer in 1935 did not result in a Senate trial

Neither article XIII, the Rules of the House of Representatives, the Joint Rules of the Senate and the House of Representatives, nor the Colorado Revised Statutes prescribe specific processes for impeachment. Furthermore, article XIII of the Colorado Constitution provides limited guidance on impeachable offenses—restricting impeachment solely to “high crimes or misdemeanors or malfeasance in office.” COLO. CONST. art. XIII, § 2. This opinion discusses the laws governing the House’s impeachment process, as well as when conduct by a state officer constitutes an impeachable offense.

ANALYSIS

This opinion analyzes both procedural and substantive aspects of impeachment. Each is addressed in turn below.

I. The Speaker has discretion to bring a resolution seeking the impeachment of a state officer before the full House or to refer the resolution to a committee of reference.

Article XIII grants the House the “sole power of impeachment” and requires that a majority of the House vote in favor of impeachment for the matter to proceed to a trial in the Senate. COLO. CONST. art. XIII, § 1. Aside from the reference to a majority vote to approve an impeachment, article XIII is silent on both how the House should begin an impeachment proceeding and the process the House must follow when considering whether to impeach a state officer.

Article V, section 12 gives the House the “power to determine the rules of its proceedings.” That power is plenary, subject only to other constitutional limitations. *In re Speakership of the House of Representatives*, 25 P. 707, 710 (Colo. 1891).

Exercising this power, the House has adopted legislative rules to govern its affairs. § 2-2-404(1), C.R.S.; COLO. LEGIS. RULES, RULES OF THE H.R. (Nov. 2023) (“House Rules”). These rules—the Rules of the House of Representatives of the Colorado General Assembly (“House Rules”)—have “the force and effect of law.” § 2-2-404(7); *In re Interrogatory on H.R.J. Res. 20-1006*, 2020 CO 23, ¶ 35. The House Rules—much like article XIII itself—do not specifically address the process by which the House initiates and conducts an impeachment inquiry. *See generally* House Rules. Indeed, the House Rules contain no express reference to impeachment.

Historically, the House has commenced an impeachment inquiry by introduction of a House resolution. *See, e.g.*, H.R. Res. 1, 30th Gen. Assemb., 1st

because the officer resigned prior to trial. S. Journal, 30th Gen. Assemb., 1st Extraordinary Sess. 61–62 (Colo. 1935).

Extraordinary Sess. (Colo. 1935).⁵ The House Rules dictate procedures for consideration of resolutions in Rule 26. Rule 26(c) states:

(c) House resolutions . . . upon introduction shall be read by title only and ordered printed. At the discretion of the Speaker they shall then either:

- (1) Lay over one day before being acted upon; or
- (2) Be referred to a committee of reference, where they shall be considered as House bills are considered.

House Rule 26(c). As such, pursuant to Rule 26(c), the Speaker—at their discretion—may have the resolution acted upon by the full House or referred to a committee of reference. Both approaches have been used for past pending impeachment resolutions. H.R. Journal, 64th Gen. Assemb., 2d Reg. Sess. 951 (Colo. 2004) (referring H.R. 04-1007 to a committee of reference); H.R. Journal, 32d Gen. Assemb., 1st Extraordinary Sess. 11–13 (Colo. 1939) (considering H.R. Res. No. 1—which would have initiated an impeachment inquiry—before the entire House).⁶

In short, article XIII does not specify how the House must initiate and conduct an impeachment inquiry. Article V, section 12 empowers the House to enact its own procedural rules. Assuming the impeachment process was initiated through a House resolution (as has been the House’s past practice), Rule 26(c) governs the House’s consideration of the resolution and directs the Speaker to either bring the resolution to the House floor or refer the resolution to a committee of reference.

II. The Colorado Constitution authorizes the impeachment of state officers for malfeasance in office.

Article XIII, section 2 sets forth three grounds for impeachment, including “malfeasance in office.” COLO. CONST., art. XIII, § 2.⁷ Article XIII does not further

⁵ According to the House Rules, House resolutions may relate to specific types of matters, as well as “those matters which shall express the will of the House on any matter not mentioned in Rule 26A.” House Rule 26(a)(3)(E); *see also* House Rule 26A. An impeachment resolution would fall within this catch-all category of House resolutions stating the House’s “will.”

⁶ If a situation arises during the House’s consideration of an impeachment resolution that is not controlled by a specific House Rule, Rule 46 grants the Speaker authority to determine how to proceed. House Rule 46(a).

⁷ Article XIII, section 2 also permits impeachment for “high crimes or misdemeanors.” That term is much discussed because of its inclusion in the United States Constitution’s impeachment clause. U.S. CONST. art. II, § 4. Unlike its federal counterpart, Colorado’s impeachment clause includes the

define that term. Colorado case law specifically addressing article XIII is also limited, suggesting only that article XIII was intended to permit removal of certain officers “for cause” instead of for purely political reasons. *See Groditsky v. Pinckney*, 661 P.2d 279, 282–83 (Colo. 1983). Other authorities and interpretive principles, however, shed light on what it means for a state officer to have engaged in malfeasance in office meriting impeachment and removal from office.

A. The Colorado Supreme Court held that malfeasance in office requires a wholly wrongful and unlawful act done willfully that involves the violation of a statutory duty or the improper or corrupt exercise of discretionary authority.

In *People v. Schneider*, 292 P.2d 982 (Colo. 1956), a grand jury indicted a county commissioner for malfeasance in office based on the allegation that he held a private interest in land that was in conflict with his duties as a county commissioner. *Id.* at 985. The district court quashed the indictment, and the People appealed. *Id.* at 983–84.

In considering the malfeasance count, the Colorado Supreme Court explained:

Malfeasance consists of the doing of an *act which is wholly wrongful and unlawful*; it involves *an act which the officer has no authority to do*. Malfeasance in office cannot be charged except for breach of a positive statutory duty or for the performance of a discretionary act with an improper or corrupt motive.

Id. at 985 (emphasis added). As the Court’s later statements indicate, the act supporting malfeasance in office must be willful. *Id.* Because the indictment in *Schneider* alleged mere ownership of the land and no intentional or willful corrupt act in office, the Court found it insufficient to support the charge of malfeasance in office, and thus affirmed the district court’s decision to quash. *Id.* In short, under *Schneider*, malfeasance in office requires (1) a willful act that is wholly wrongful and unlawful, and (2) that involves either (a) a breach of a positive statutory duty, or (b) the performance of a discretionary act with an improper or corrupt motive.

separate ground of malfeasance in office. Notably, each of the three resolutions containing articles of impeachment approved by the House have alleged malfeasance in office, not high crimes or misdemeanors. Given its unique relevance to Colorado, this opinion is limited to malfeasance in office.

While *Schneider* did not involve an article XIII impeachment, the Court's holding is instructive.⁸ First, the language in *Schneider* speaks broadly to the concept of malfeasance in office without limiting its analysis to the criminal context. Notably, the court was generally opining on what constituted malfeasance in office.

Second, the statute interpreted in *Schneider*—the criminal act of malfeasance in office—is nearly identical to the malfeasance in office statute that existed at the time of the adoption of the Colorado Constitution in 1876 and the one that was passed during the first territorial Legislative Assembly. *Compare* An Act Concerning Criminal Jurisprudence § 100, Acts 1st Sess. 311 (1861) (“Omission of duty”) *and* Criminal Code § 115, Colo. Gen. Laws (1877) (“Malfeasance or corruption in office”) *and* § 40-7-47, C.R.S. (1953) (“Malfeasance in office—removal”).⁹ The framers of the

⁸ Not only does *Schneider* define what constitutes malfeasance in office, it also helps understand what malfeasance in office is not. For example, malfeasance in office would not include a state officer exercising their constitutional rights unless that exercise violated a separate, constitutional limitation on those rights. Taking any other approach would ignore the requirement that the officer's actions must be “wholly wrongful and unlawful” and would raise serious constitutional questions. Instead, *Schneider* focuses on acts that violate the law or involve corruption. For example, some of the articles of impeachment approved by the House in the 1935 proceedings alleged the officer had engaged in extortion and solicited kickbacks. H. Journal, 30th Gen. Assemb., 1st Extraordinary Sess. 57–59 (Colo. 1935).

⁹ The 1861 law stated:

Every Sheriff or other officer who shall be guilty of any palpable omission of duty or who shall willfully and corruptly be guilty of oppression, malfeasance, or partiality in the discharge of his duty, shall, upon conviction, be fined not exceeding two hundred dollars; and the court shall have the power on the recommendation of the jury to add to the judgment of the court, that any officer so convicted shall be removed from office.

The law included in the 1877 criminal code (characterized as “Malfeasance or corruption in office”) and section 40-7-47, C.R.S. (1953) (titled “Malfeasance in office—removal”) similarly provided (with slight differences that are not material here):

Every clerk, sheriff, coroner, constable, county commissioner, justice of the peace, recorder, county surveyor, or attorney general, or district attorney, who shall be guilty of any palpable omission of duty, or who shall willfully or corruptly be guilty of oppression, malfeasance, or partiality in the discharge of his office shall be fined a sum not exceeding two hundred dollars. The court shall have power upon the recommendation of the jury to add to the judgment of the court that any officer so convicted shall be removed from office. . . . It shall be the duty of the court when the judgment shall extend to removal from office, to cause immediate notice of such removal to be given to the

Colorado Constitution are presumed to have been aware of the offense, and their decision to use the same term of “malfeasance in office” in the constitution suggests an intent that the two should be interpreted similarly.¹⁰ *City & Cnty. of Denver v. Rinker*, 366 P.2d 548, 550 (Colo. 1961) (stating “there is a presumption that all laws are passed with knowledge of those already existing”); *see also Colo. Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 20 (holding “The electorate, as well as the legislature, must be presumed to know the existing law at the time it amends or clarifies the law.” (quoting *Common Sense All. v. Davidson*, 995 P.2d 748, 754 (Colo. 2000))).

B. The commonly understood meaning of the term “malfeasance” at the time of the Colorado Constitution’s adoption supports applying the *Schneider* interpretation of malfeasance in office to article XIII.

In addition to consulting precedent, dictionary definitions are instructive in determining the meaning of undefined constitutional terms. *See Wash. Cnty. Bd. of Equalization v. Petron Dev. Co.*, 109 P.3d 146, 152 (Colo. 2005). Here, dictionary definitions from the era when the Colorado Constitution was adopted support applying *Schneider*’s interpretation of malfeasance in office to article XIII.

In 1890, for example, one source defined malfeasance as “[t]he unjust performance of some act which the party had no right, or which he had contracted not to do,” and “the doing of an act wholly wrongful and unlawful.” *Malfeasance*, 14 JOHN HOUSTON MERRILL, AM. & ENGLISH ENCYCL. OF LAW 5 & n.2 (1890). Similarly, a 1910 dictionary defined malfeasance as “the wrongful or unjust doing of some act which the doer has no right to perform, or which he has stipulated by contract not to do.” *Malfeasance*, BLACK’S LAW DICTIONARY (2d ed. 1910); *see also Malfeasance*, AM. DICTIONARY OF THE ENGLISH LANGUAGE (10th ed. 1832) (defining the term as “evil doing; wrong; illegal deed”).

These definitions bear remarkable resemblance to the Court’s initial definition of “malfeasance” in *Schneider*. As the Court held:

proper department in order that the vacancy thus occasioned may be filled.

§ 40-7-47, C.R.S. (1953).

¹⁰ Nothing in this opinion should be construed to imply that a state officer must first be convicted of malfeasance in office in a criminal proceeding before the General Assembly can exercise its impeachment authority. The Colorado Constitution imposes no such limitation.

Malfeasance consists of the doing of an act which is *wholly wrongful and unlawful*; it involves an *act which the officer has no authority to do*.

Schneider, 292 P.2d at 985 (emphasis added). These general definitions of “malfeasance,” however, fail to give full effect to the constitutional language because they do not address “malfeasance *in office*.” COLO. CONST. art. XIII, § 2 (emphasis added); *Havens v. Bd. of Cnty. Comm’rs*, 924 P.2d 517, 523 (Colo. 1996) (“Wherever possible, we must give effect to every word of the provision.”).

Schneider addresses that issue by clarifying that malfeasance in office is even more specific, requiring that the action not only be wholly wrongful and unlawful, but also involve a violation of specific legal obligation or the corrupt or improper use of the discretion the law vests in the officer. *Schneider*, 292 P.2d at 985 (“Malfeasance in office cannot be charged except for breach of a positive statutory duty or for the performance of a discretionary act with an improper or corrupt motive.”); *see also* FLOYD R. MECHEM, TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 457 (1890) (noting that if removal is for malfeasance in office, the misconduct “must be such as affects [the officer’s] performance of his duties as an officer and not only . . . his character as a private individual”).¹¹ Thus, *Schneider*’s interpretation of “malfeasance in office” comports with the plain and ordinary meaning of that term at the time the Colorado Constitution was adopted, further supporting its application in an impeachment inquiry under article XIII.

C. Current statutory references to malfeasance focus on violations of statutory duties and corrupt activity, consistent with the Court’s “malfeasance” definition in *Schneider*.

Schneider’s interpretation of “malfeasance in office” is also consistent with several current references to malfeasance in office in the Colorado Revised Statutes. For example, section 22-44-116, C.R.S., provides that school district employees are guilty of “malfeasance in office or position of employment” if they “knowingly and willfully violate[] any provision of this part 1 or fail[] to perform any duty required

¹¹ Laws enacted shortly after 1876 also support this interpretation. For example, less than a decade later, the General Assembly enacted a law requiring officers of the City of Denver to take an oath that they had “not been convicted at any time of malfeasance in office, bribery, or other corrupt practices or crimes,” suggesting that malfeasance could involve some level of corruption. 1885 Colo. Sess. Laws 101 (S.B. 177); *Young v. Brighton Sch. Dist.* 27J, 2014 CO 32, ¶ 12 (holding the meaning of an ambiguous term “may be ascertained by reference to the meaning of words associated with it”). Another 1885 law authorized the Governor to remove appointees for “incompetency, neglect of duty, or malfeasance in office,” suggesting that malfeasance went beyond poor administration and negligence. 1885 Colo. Sess. Laws 330 (H.B. 226); *Havens*, 924 P.2d at 523 (holding courts will construe provisions “as a whole with effect given to every term contained therein”)

by this part 1.” Another statute specifically includes the concept of engaging in corrupt activity. § 35-23-110, C.R.S. (titled “malfeasance of inspectors” and stating that “accept[ing] money or other consideration directly or indirectly for an incorrect or improper performance of the inspector’s duty” is a petty offense). These statutes demonstrate that *Schneider's* understanding of malfeasance in office continues to exist in statutory law today.

D. In an impeachment inquiry, malfeasance in office requires a wholly wrongful and unlawful act done willfully that either violates the state officer’s legal obligations or involves the corrupt or improper exercise of the discretion vested in the officer.

Applying these legal authorities, a state officer may be impeached, tried, and removed from office under article XIII of the Colorado Constitution if: (1) the officer has willfully engaged in a wholly wrongful and unlawful act; and (2) that act has either (a) breached a specific statutory requirement imposed on the officer, or (b) involved the corrupt or improper exercise of the discretion vested in the officer. Consistent with the Colorado Supreme Court’s description, this standard gives effect to both the general understanding of malfeasance, as well as what it means to engage in malfeasance in office specifically.

CONCLUSION

A House resolution seeking the impeachment of a state officer is subject to the same processes applicable to other House resolutions. Under House Rule 26(c), the resolution must either be acted upon or referred to a committee of reference by the Speaker.

For a state officer to be impeached, tried, and convicted in an impeachment inquiry, conduct amounting to a high crime or misdemeanor or malfeasance in office must have occurred. To impeach, try, and convict a state officer of malfeasance in office, the House and Senate must determine (1) the officer has willfully engaged in a wholly wrongful and unlawful act; and (2) such act either (a) breached a specific statutory requirement imposed on the officer, or (b) involved the corrupt or improper exercise of the discretion vested in the officer.

Issued this 19th day of March, 2024.

/s/ Philip J. Weiser
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