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State of New Mexico  
House of Representatives


FIFTIETH LEGISLATURE  
SECOND SESSION, 2012

February 15, 2012

Mr. Speaker:

Your **RULES AND ORDER OF BUSINESS COMMITTEE**, to whose Investigatory Subcommittee has been referred the matter relating to the consideration of the impeachment of the Public Regulation Commissioner, District 3, has had it under consideration, submits the attached final report from the Subcommittee adopted by the House Rules and Order of Business Committee and recommends that the report of the Subcommittee be adopted.

Respectfully submitted,

  
\_\_\_\_\_  
Nick L. Salazar, Chairman  
House Rules and Order of Business  
Committee

Adopted   
\_\_\_\_\_  
(Chief Clerk)

Not Adopted \_\_\_\_\_  
(Chief Clerk)

Date 2/15/12

The roll call vote was 20 For 0 Against  
Yes: 20  
No: 0  
Excused: None  
Absent: None

.189719.1

State of New Mexico  
House of Representatives

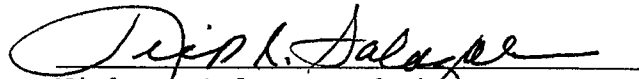
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No: 0  
Excused: None  
Absent: None

.189719.1

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**HOUSE OF REPRESENTATIVES  
FIFTIETH LEGISLATURE, SECOND SESSION**

**FINAL REPORT  
OF THE  
INVESTIGATORY SUBCOMMITTEE  
OF THE  
HOUSE RULES AND ORDER OF BUSINESS COMMITTEE**

**Introduction**

This final report of the Investigatory Subcommittee of the House Rules and Order of Business Committee (HRC) summarizes the impeachment inquiry regarding the former public regulation commissioner from Public Regulation Commission (PRC) District 3, Jerome D. Block, Jr. The subcommittee conducted its inquiry pursuant to the charge issued to it by the house of representatives when the legislature was meeting in special session in September 2011. The report is presented to the full committee for its approval and is intended to close the matter of the impeachment inquiry of the commissioner while providing a historical record of the inquiry.

This report will recapitulate:

1. the subcommittee's charge from the house of representatives, allocation of its funding and its composition;
2. the background to the proceedings;
3. the basis for impeachment in the Constitution of New Mexico;
4. the statutory authority related to impeachment in New Mexico;
5. the rules and procedures adopted by the subcommittee;
6. the meetings held by the subcommittee;
7. the preliminary report to the HRC at the end of the special session; and
8. the progress of the subcommittee's investigation prior to the resignation of the commissioner.

For these proceedings, the Investigatory Subcommittee was able to draw upon the experiences of the investigation of the state treasurer in 2005. While no official has been impeached in the history of the state, the proceedings in 2005 were the first in the state to have developed rules and to have conducted an investigation. (In 1925, articles of impeachment were drafted against Judge Reed Holloman by his political enemies, but there is no evidence in the historical record of any actions taken by the legislature in that case.) As will be discussed below, neither the state's constitution nor the state's statutes give much by way of guidance for

impeachment proceedings. The Investigatory Subcommittee worked diligently to craft rules and procedures appropriate to its charge, always keeping in mind the importance of transparency in its proceedings and the importance of fairness to the subject of the investigation.

**I. Charge from the House of Representatives, Funding and Composition of the Investigatory Subcommittee**

The house of representatives authorized the creation of this subcommittee on the first day of the First Special Session of the Fiftieth Legislature, September 6, 2011. The legislature convened in special session at the call of Governor Susana Martinez to address redistricting after the 2010 census, as well as other matters placed by the governor on the proclamation.

The charge to the subcommittee, presented on the floor of the house of representatives by Representative W. Ken Martinez to the speaker of the house, was as follows:

Mr. Speaker, I ask unanimous consent that the speaker appoint a subcommittee of the Rules and Order of Business Committee, consisting of an equal number of members of the majority and minority parties, to investigate and make recommendations on whether the house should consider the impeachment of the public regulation commissioner from District 3 for alleged crimes, misdemeanors or malfeasance in office and that the subcommittee be authorized, within the limitations of funding as authorized by law, to retain special independent counsel as necessary and that the subcommittee be directed to meet promptly to develop a process it proposes to follow in carrying out this important task and report prior to the adjournment of this special session first to the Rules and Order of Business Committee and then to the house on the status of the investigation.

Unanimous consent was granted by the house of representatives. In addition, \$1 million was appropriated in House Bill 1 for the impeachment investigation.

Pursuant to the charge given to the subcommittee, the speaker appointed 10 members of the HRC to the subcommittee in equal numbers from the majority and minority parties. The co-chairs of the subcommittee were Representatives Joseph Cervantes and Zachary J. Cook. The additional members of the subcommittee were Representatives Eliseo Lee Alcon, Gail Chasey, Anna M. Crook, Larry A. Larrañaga, Al Park, Dennis J. Roch, Debbie A. Rodella and Don L. Tripp. Representatives Cervantes, Crook, Larrañaga and Rodella had previously served on the special subcommittee formed to consider the impeachment of the state treasurer in 2005.

Work for the subcommittee was coordinated by Raúl E. Burciaga, director, Legislative Council Service (LCS); Douglas Carver, staff attorney, LCS; Alise Rudio, staff attorney, LCS; and Leslie Porter, research assistant, LCS.

## **II. Background to the Impeachment Investigation**

Commissioner Block entered into office in 2009 with certain of his campaign practices under investigation by the secretary of state and the attorney general, and various incidents that occurred during his tenure in office caused further public outcry and increased concern by numerous state officials regarding his suitability for public office. While the subcommittee never reached the point in its investigation and deliberations where it had to consider precisely what acts of the commissioner might be subject to articles of impeachment, the following matters were contemplated in the subcommittee's discussions:

1. Commissioner Block's misuse of campaign funds, a matter that was being investigated by the attorney general;
2. Commissioner Block's lack of attendance at meetings of the PRC;
3. Commissioner Block's failure to return an automobile to a dealership (the vehicle was discovered abandoned about a month later);
4. Commissioner Block's misuse of credit cards issued by the PRC; and
5. Commissioner Block's admission of an addiction to prescription drugs.

The culmination of these incidents led the speaker of the house to state publicly that during the redistricting special session, a committee would be established to investigate whether the issues surrounding Commissioner Block warranted his impeachment by the house of representatives. It should be emphasized that the subcommittee had not determined when it completed its work which of these alleged incidents might warrant impeachment or might be properly considered the subject of an impeachment investigation. (As will be discussed in Section VIII below, Commissioner Block resigned his position before the subcommittee had advanced its investigation.)

## **III. Constitutional Basis for Impeachment**

The power of impeachment is firmly established in the Constitution of New Mexico. Article IV, Section 35 of the constitution vests the power of impeachment in the house of representatives, with impeachments to be tried by the senate. Article IV, Section 36 of the Constitution of New Mexico delineates the state officers that are subject to impeachment and states that impeachment shall be "for crimes, misdemeanors and malfeasance in office.". Section 36 also outlines the extent of the impeachment power and notes, "No officer shall exercise any power or duties of his office after notice of his impeachment is served upon him until he is acquitted."

Two further constitutional provisions relate, tangentially, to New Mexico's impeachment power. Article IV, Section 6 of the Constitution of New Mexico sets out the procedure to call the legislature into extraordinary session. The subcommittee discussed this provision of the state's constitution when determining when the certificates to be signed by legislators to recall the legislature into an extraordinary session might be signed and submitted to the governor (see Section VI below). Additionally, Article IV, Section 11 of the Constitution of New Mexico allows for each house of the legislature to punish individuals for contempt in its presence. The

subcommittee considered this power in the event that it was faced with an uncooperative or dishonest witness.

#### **IV. Statutory Authority**

There is no statutory guidance for conducting impeachment proceedings. The general provisions of the Governmental Conduct Act (Chapter 10, Article 16 NMSA 1978) might be applicable in any impeachment investigation (aside from judicial impeachment). Additionally, the statute on perjury (Section 30-25-1 NMSA 1978) was discussed by the subcommittee in the event a witness before the subcommittee was suspected of committing perjury.

The statutory authority most discussed by the subcommittee, however, was the statute that grants the legislature subpoena power, Section 2-1-10 NMSA 1978. (The subcommittee's deliberations on the use of the legislature's subpoena power will be discussed further in Section VIII below.) The house of representatives, at the request of the subcommittee, through the HRC, exercised the legislature's subpoena power for what is believed to be the first time in the history of the state when a subpoena was issued to the Office of the Attorney General for investigatory material it had collected in its investigation of the commissioner.

#### **V. Rules and Procedures Adopted by the Subcommittee**

The composition of the rules and procedures to be used by the subcommittee occasioned considerable deliberation (in addition to the discussion here, see also Section VI below). Every meeting of the subcommittee saw some measure of discussion and debate concerning the rules and procedures. Particular care was taken with articulating the standard of proof to be applied to the evidence that was to be presented to the subcommittee (Rule 5). Although the subcommittee adopted the rules in 2005 as a template from which to work, the lack of any constitutional or statutory guidance for the impeachment process requires the legislature, or the committee to which it delegates any facet of the impeachment process, to determine anew what procedures should be followed. The overriding concerns of the subcommittee were that the process be as transparent as possible for the benefit of the citizens of the state and that the principles of due process were honored as thoroughly as possible on behalf of the commissioner. The subcommittee was aware that the impeachment process was neither a criminal nor civil procedure; nonetheless, the members of the subcommittee wished to adhere as closely as possible to the fairness, balance and impartiality inherent in a trial in a court of law.

At its final meeting during the special session, the subcommittee adopted the following rules and procedures:

1. The subcommittee shall give public notice of the date, time and place of its meetings as soon as practicable before the commencement of its meetings.
2. At the request of special counsel or a majority of the subcommittee, the subcommittee shall conduct appropriate proceedings in executive session. Staff members must sign confidentiality statements.

3. The task of gathering and presenting evidence to the subcommittee shall be the responsibility of special counsel. In that regard:

a. all documentary evidence from public records, including affidavits of investigative authorities, shall be presented in open, public sessions;

b. as other evidence is gathered, and at the request of special counsel, the subcommittee shall decide how that evidence is to be presented — i.e., through live witnesses, depositions or otherwise;

c. also at the request of special counsel, the subcommittee will decide whether that evidence is to be presented in public sessions or whether respect for ongoing civil, criminal or administrative proceedings or questions of privilege requires that such evidence be presented in executive session;

d. testimony by witnesses, whether presented in public session or otherwise, shall be under oath, through direct questioning by special counsel. Members of the subcommittee shall, however, retain the right to question any witness presented. Members of the subcommittee may submit questions to the special counsel regarding testimony by deposition;

e. these proceedings are investigative and charging in nature and thus do not require an adversarial hearing. Nonetheless, the public regulation commissioner shall be apprised of the evidence submitted by special counsel, and the commissioner's response to that information shall be invited by way of:

(1) the commissioner's own testimony, under oath, provided through the questioning of special counsel; and

(2) through other means, under terms and conditions deemed appropriate by the subcommittee, upon the recommendation of special counsel; and

f. special counsel is authorized to request the issuance of subpoenas on behalf of the subcommittee.

4. After the presentation of the evidence, the subcommittee, sitting in executive session, shall receive and consider the advice of special counsel with respect to any potential articles of impeachment.

5. The question presented to the subcommittee and the house is, "Is there credible evidence to warrant impeachment?". The subcommittee and the house will apply the following standard of proof:

There is credible evidence to warrant impeachment.

6. The subcommittee shall make a report to the full committee. If the report recommends articles of impeachment, the subcommittee shall present the articles of impeachment through the committee to the whole house.

7. If and when articles of impeachment are presented to the house, all house members shall be given access to all the evidence considered by the subcommittee.

Rules 1 through 4 were adopted at the September 13, 2011 meeting of the subcommittee. Rules 5 through 7 were adopted at the September 22, 2011 meeting of the subcommittee.

#### **VI. Overview of the Meetings Held by the Subcommittee and the HRC\***

The subcommittee met five times during the course of the special session, on the following dates:

September 8, 2011;  
September 13, 2011;  
September 15, 2011;  
September 20, 2011; and  
September 22, 2011.

In addition, the subcommittee met on October 21, 2011 to complete the work required of it before the regular legislative session in 2012. The subcommittee will also be required to present this final report to the HRC during the 2012 legislative session.

The subcommittee's discussions centered around three themes: (1) actions taken by the subcommittee that investigated impeaching the state treasurer in 2005; (2) rules and procedures to be used during the subcommittee's investigation; and (3) the process to be used to call the legislature back into session, if necessary, to consider articles of impeachment. The subcommittee also decided to hire a special counsel to assist it in its investigation, as had been done in 2005. For these proceedings, the subcommittee engaged the services of Robert J. Gorence, Esq.

#### **2005 Proceedings**

While the subcommittee had the 2005 impeachment process as a model, it determined that it would not be bound by the special subcommittee's processes from 2005. As noted in Sections III and IV above, there is little constitutional or statutory guidance for the conduct of impeachment proceedings. The subcommittee welcomed having the precedent of the 2005 proceedings from which to base its work, but it made significant changes to the rules and procedures that had been adopted in 2005. The subcommittee also acknowledged that the

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\*This section provides a summary of the subcommittee's meetings. Further details can be found in the subcommittee's *Preliminary Report of the Investigatory Subcommittee of the House Rules and Order Business Committee* of September 23, 2011 or in the minutes for the subcommittee's meetings. The preliminary report and the minutes have been posted on the legislature's web site and are available in hard copy through the LCS.



allegations surrounding Commissioner Block presented a completely different set of circumstances than what had been presented with the impeachment of the state treasurer. The state treasurer was an official responsible for millions of dollars in state investment and was the subject of investigation by the Federal Bureau of Investigation for corruption that directly implicated his actions in office. The allegations surrounding Commissioner Block involved substantially smaller amounts of money, but they also involved a wider pattern of behavior, some of which occurred when he was a candidate for a seat on the PRC and some of which may have occurred when he was not acting in his official capacity. (The commissioner resigned before the subcommittee had to reach the question of which allegations would be subject to possible articles of impeachment.) Nonetheless, the subcommittee insisted that what was of principal importance was not the amounts of money involved but the possible violation of public trust that seemed to be present in the allegations.

#### Rules and Procedures

As noted in Section V above, the subcommittee took particular care with the rules and procedures it adopted for the impeachment investigation. The rules used in 2005 provided a starting point, but after hearing input from Mr. Burciaga, Mr. Gorence and former Supreme Court Justice Paul Kennedy, who had served as special counsel in 2005, the subcommittee made a number of changes, most significantly with the standard of proof to be used and concerning the use of confidential materials by the subcommittee. In 2005, the standard of proof had been: "there is clear evidence to warrant impeachment". After substantial discussion, the subcommittee adopted a revised standard for these proceedings: "there is credible evidence to warrant impeachment". The subcommittee felt that this burden of proof struck a balance between the high bar set in criminal proceedings of clear and convincing evidence and the lower bar in civil proceedings of a preponderance of the evidence. The subcommittee also believed that the "credible evidence" standard gave clearer guidance to the legislators who would be deciding on articles of impeachment. Additionally, the subcommittee was uncomfortable with the possible use of confidential materials in coming to its determination of whether articles of impeachment were warranted, as the subcommittee was firmly committed to having these proceedings be as transparent as possible. Mr. Gorence assured the subcommittee that he would not present any evidence to the legislature against Commissioner Block that could not be made public. The subcommittee decided to remove the language concerning confidential material that had been part of the rules in 2005.

#### Recall of the Legislature

There was also substantial debate about the mechanics of recalling the legislature. Article IV, Section 6 of the Constitution of New Mexico provides that the legislature can be recalled into an extraordinary session when three-fifths of members elected to each chamber of the legislature certify to the governor that an emergency exists in the affairs of the state. In 2005, as in these proceedings, the legislature was already meeting in special session when the subcommittee considering the state treasurer's impeachment began its deliberations. At that time, it was decided to circulate the certificates for signature while the legislators were in Santa Fe. Debate in the subcommittee in these proceedings centered on two issues: (1) whether beginning to collect signatures before the subcommittee had completed its investigation amounted to prejudging the

case against Commissioner Block; and (2) who would decide when the signed certificates would be submitted to the governor. The subcommittee worked diligently to draft language that did not lend the reader to believe a legislator signing a certificate had prejudged the commissioner. The certificates also included language requiring a majority vote of the subcommittee in order for the signatures to be submitted to the governor. The subcommittee authorized the LCS to begin collecting signatures while the legislature was meeting in special session. The issues surrounding the certificate were the only ones for which a complete consensus could not be reached among the members of the subcommittee.

The final language of the certificates read as follows (the language presented is for the house of representatives; identical language, except for the name of the chamber, was used for the certificates for the senate):

The undersigned members of the NEW MEXICO HOUSE OF REPRESENTATIVES do hereby certify that, in our opinion, an emergency exists in the affairs of the state of New Mexico and that it is necessary for the legislature to convene to receive and consider the report of the investigatory subcommittee to the house rules and order of business committee. The subcommittee, upon completion of its investigation of Jerome D. Block, Jr., public regulation commissioner, district 3, will report its findings and recommendations to the house of representatives. Therefore, upon a majority vote of the subcommittee to deliver the certificates, we respectfully request that you convene the legislature in extraordinary session within five days of your receipt of a sufficient number of signatures pursuant to the provisions of Article 4, Section 6 of the constitution of New Mexico.

At its final meeting during the special session, the subcommittee anticipated that it would require two further meetings after the end of the special session in order to complete its work. The subcommittee scheduled a half-day meeting for October 21, 2011 in order to have an update from Mr. Gorence regarding the status of his investigation, and it scheduled a full-day meeting for November 1, 2011 for Mr. Gorence to present the results of his investigation and consideration of whether, and which, articles of impeachment were warranted.

In addition, on September 23, 2011, the full HRC heard a report of the subcommittee's work from Mr. Burciaga, approved the subcommittee's *Preliminary Report of the Investigatory Subcommittee of the House Rules and Order of Business Committee* and approved the HRC chair to make a motion on the floor of the house of representatives for the issuance of a subpoena, which was approved by the house that same day.

The New Mexico Legislative Council met on October 3, 2011 and authorized the subcommittee to meet on October 21, 2011 in order to complete its work, and, in the event that the commissioner did not resign as he had agreed pursuant to a plea bargain, on November 1, 2011 to continue its investigation.

On October 21, 2011, the subcommittee met to receive a report on the investigation from Mr. Burciaga and Mr. Gorence, to discuss the *Petition for Protection* filed by the Office of the Attorney General and to hear a presentation concerning the subcommittee's draft final report and issues related to future impeachment investigations from Mr. Burciaga and Mr. Carver.

#### **VII. Preliminary Report of the Subcommittee**

As directed in the charge to the subcommittee, at the end of the special session, the subcommittee submitted the *Preliminary Report of the Investigatory Subcommittee of the House Rules and Order of Business Committee* to the HRC. The HRC unanimously adopted the preliminary report (with four members excused) on the morning of September 23, 2011. Later on September 23, the HRC submitted the preliminary report to the house of representatives for adoption. The preliminary report was adopted by the full house of representatives on a unanimous voice vote.

#### **VIII. Progress of the Investigation Prior to the Commissioner's Resignation**

Mr. Gorence had begun the collection and review of evidence when press reports appeared indicating that Commissioner Block was negotiating a plea arrangement with the attorney general, an agreement that reportedly would include his resignation from office. In order to avoid encumbering the state with additional legal expenses, it was decided to have Mr. Gorence stop his work in reviewing the evidence assembled pending the outcome of the negotiations between Commissioner Block and the attorney general.

Mr. Gorence was able to obtain a fair amount of information in the short time that he was working on the investigation of Commissioner Block's activities. The PRC turned over 500 to 700 pages of documents to Mr. Gorence. The Office of the State Auditor released more than 300 pages of documents to Mr. Gorence and further provided its risk assessment (a formal audit of Commissioner Block) to Mr. Gorence on October 13, 2011. Neither the PRC nor the Office of the State Auditor required a subpoena for the documents these agencies provided. Additionally, Representative Nate Gentry provided for the subcommittee's use, through the LCS, of certain records he had obtained, mostly through public records requests, concerning Commissioner Block's activities.

Obtaining files in the possession of the Office of the Attorney General presented more of a challenge as the attorney general required a subpoena before he would produce documents. As mentioned in Section IV, there is a statute granting the legislature the power of subpoena, Section 2-1-10 NMSA 1978. To the best of the subcommittee's knowledge, however, the legislature had never before issued a subpoena. The LCS created a subpoena form that asked the attorney general for the following:

1. The complete investigative file pertaining to allegations that Jerome D. Block, Jr., engaged in conduct that constituted a violation of campaign finance laws, including allegations of misuse of campaign funds. This request for information includes, but is not limited to, all records, documents, physical objects constituting evidence, audit compilations,

video/audio recordings, reports of interviews, all forensic analysis and all expert reports.

2. The complete investigative file pertaining to allegations that Jerome D. Block, Jr., engaged in conduct that constituted a violation of misuse of state property, including misuse of a state-issued gasoline card, as well as allegations that Jerome D. Block, Jr., engaged in a theft, or converted for his personal use, without authorization, an automobile. This request for information includes, but is not limited to, all records, documents, physical objects constituting evidence, audit compilations, video/audio recordings, reports of interviews, all forensic analysis and all expert reports.

The statute requires the subpoena to be requested during a regular or special session by a standing committee of the legislature and to be approved by a majority vote of the elected members of the chamber of which the standing committee is a part. For a committee of the house of representatives, the subpoena is to be issued by the speaker of the house. On Friday, September 23, 2011, the HRC approved the chair to request a subpoena to the full house of representatives. Later that same morning, the co-chairs of the Investigatory Subcommittee, through the chair's motion, presented the subpoena to the house of representatives while it sat in session. The subpoena was approved by voice vote and signed by the speaker of the house. The subpoena was served on the attorney general that afternoon, with a deadline of Wednesday, September 28, 2011, for production. After some negotiations between the Office of the Attorney General and Mr. Gorence, the attorney general produced some of the required documents on the afternoon of September 28, 2011.

While the attorney general provided a substantial amount of material, he withheld some of the requested documents, citing privilege and other exceptions. On September 28, 2011, the Office of the Attorney General filed a *Petition for Protection* with the First Judicial District Court, claiming four privileges for documents that it had not produced: executive privilege; law enforcement privilege; work product privilege; and attorney-client privilege. The petition and its accompanying summons were not served on Mr. Gorence, the named defendant, until October 14, 2011.

Mr. Gorence opened negotiations concerning the petition with the Office of the Attorney General, and it was quickly determined that the petition could be resolved with a stipulated dismissal. The subcommittee gave Mr. Gorence the authority to arrange a stipulated dismissal of the *Petition for Protection* and gave the co-chairs of the subcommittee the authority to review and approve the language of the stipulated dismissal. The subcommittee stressed that, under the language of the stipulated dismissal, the subcommittee would not concede the privileges being claimed by the Office of the Attorney General. A *Stipulated Dismissal* was filed with the court on November 2, 2011.

### **Conclusion and Recommendation**

The final meeting of the subcommittee during the special session was on September 22, 2011. The special session adjourned on September 24, 2011. Events involving Commissioner

Block developed rapidly in the following days. Press reports concerning a possible plea agreement between the Office of the Attorney General and Commissioner Block started surfacing at the beginning of the week. The *Plea and Disposition Agreement* between the Office of the Attorney General and Commissioner Block was signed on September 28, 2011. As part of the agreement, Commissioner Block agreed to resign within 10 days and he pled guilty to the following crimes: fraudulent use of a credit card (over \$2,500 in a six-month period), a third degree felony; theft of identity, a fourth degree felony; violation of the Election Code, Campaign Reporting Act and Voter Action Act, a fourth degree felony; conspiracy to commit a violation of the Election Code, a fourth degree felony; and embezzlement (over \$500 but not more than \$2,500), a fourth degree felony. Additionally, Commissioner Block pled no contest to embezzlement (over \$2,500), a third degree felony. Commissioner Block submitted his resignation on October 6, 2011, to be effective October 7, 2011 at 3:00 p.m.

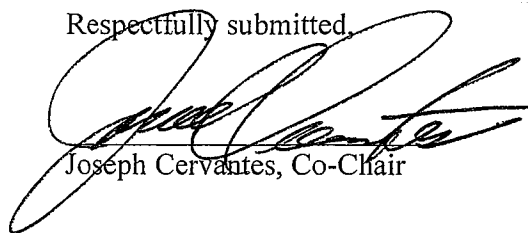
The commissioner's felony plea obviated the need for impeachment, as the commissioner had agreed to resign his office and as the New Mexico Supreme Court has ruled that immediately upon a public official being found guilty of a felony, the official can no longer hold office (*see State ex rel. King v. Sloan*, 2011-NMSC-020, stating that former Public Regulation Commissioner Carol Sloan's status as a qualified elector under the state constitution automatically ceased when she was convicted of a felony, and her eligibility to hold public office ceased when her status as qualified elector ceased). As a consequence, at its meeting of October 21, 2011, the subcommittee determined that the only action remaining to it was the submission of its final report to the house of representatives at the 2012 Second Session of the Fiftieth Legislature.

As Commissioner Block is no longer in office, the subcommittee makes no recommendation regarding what potential impeachment charges might have been brought. As has been noted above, the subcommittee never had an opportunity to review any of the evidence against the commissioner. The subcommittee is satisfied that with the resignation of the commissioner, no additional purposes would be served by any further legislative action with respect to his conduct.

As an appendix to this report, the subcommittee provides a memorandum from the LCS discussing issues and legislation involving the impeachment process that the legislature might wish to consider were an impeachment contemplated in the future.

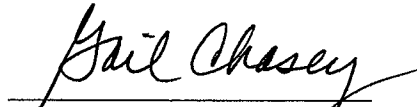
The subcommittee requests that the HRC adopt this report as its report to the house of representatives and requests that this report be made a part of the journal.

Respectfully submitted,


  
Joseph Cervantes, Co-Chair


  
Zachary J. Cook, Co-Chair

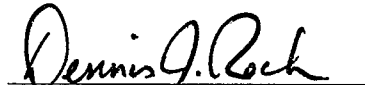
  
Eliseo Lee Alcon, Member

  
Gail Chasey, Member

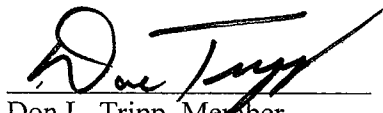
  
Anna M. Crook, Member

  
Larry A. Larrañaga, Member

  
Al Park, Member

  
Dennis J. Roch, Member

  
Debbie A. Rodella, Member

  
Don L. Tripp, Member

Date: 2-15-2012

# APPENDIX

State of New Mexico

# Legislative Council Service

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411 State Capitol, Santa Fe, New Mexico 87501

(505) 986-4600 Fax: (505) 986-4680

## Information Memorandum

DATE: January 21, 2012

TO: Raúl E. Burciaga

FROM: Douglas Carver and Alise Rudio\*

SUBJECT: IMPEACHMENT — NOTES FOR FUTURE CONSIDERATION

The following memorandum was compiled to review issues that could be applicable to future impeachment investigations, drawn from the investigation of former Public Regulation Commissioner Jerome D. Block, Jr. It is principally provided for internal discussion purposes, although its themes were briefly addressed at the October 21, 2011 meeting of the Investigatory Subcommittee of the House Rules and Order of Business Committee (hereinafter, Investigatory Subcommittee).

Neither the Constitution of New Mexico nor the state's statutes provide much in the way of guidance for impeachment proceedings. The procedures used in the investigation of Commissioner Block, which were in large measure based on those used in the investigation of State Treasurer Robert Vigil in 2005, proved to be sufficient for their immediate purposes, but it was evident that certain changes in circumstances may have either prolonged aspects of the subcommittee's work or made certain elements of its work difficult, if not impossible, to accomplish. This memorandum addresses some of those concerns. Any opinions expressed are those of the authors and do not necessarily reflect the opinions of the New Mexico Legislative Council or any other member of its staff.

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\* Ms. Rudio drafted her contribution to this memorandum before she left the LCS.



### **The Type of Committee to Best Handle Impeachment**

The legislature may want to contemplate whether the committee structure used in the state's two impeachment investigations is the best approach for investigating an impeachment. In 2005 and 2011, it was decided to create a subcommittee of the House Rules and Order of Business Committee (HRC), a standing committee of the legislature. Under this approach, the subcommittee only has the powers conferred upon it by the parent committee from which it was appointed and cannot report directly to the house of representatives. Additionally, standing committees (and subcommittees of standing committees) of the legislature can only meet when the legislature is in session. In order for the subcommittee investigating impeachment to meet outside of session, the New Mexico Legislative Council needs to grant its approval. There is a concern with the potential for duplicating efforts. The parent committee must first adopt or reject the subcommittee's recommendations for action, and then the parent committee can make recommendations to the house of representatives. The concern is that the parent committee could decide to rehash a subcommittee's proceedings, or not adopt the subcommittee's recommendations, or make changes to those recommendations without having gone through the deliberative process undertaken by the subcommittee. Principles of legislative comity should alleviate such concerns somewhat. Furthermore, in 2011, the subcommittee was composed of half of the members of the parent committee, and thus, presuming consensus on the subcommittee, only one additional vote would have been required on the parent committee in order to send the subcommittee's recommendations to the full house of representatives. Additionally, both subcommittees included an equal number of legislators from the majority and minority parties. Nonetheless, the process of a subcommittee reporting through a parent committee to the full house of representatives is somewhat cumbersome, and there remains the issue of the necessity for legislative council approval for a subcommittee investigating impeachment to meet when the legislature is not in session, all of which raises the potential for legislative roadblocks in the impeachment process.

An alternative approach would be to appoint a special or select committee instead of a subcommittee (*See* House Rule 9-1; the procedures for appointing such a committee are outlined in *Mason's Manual of Legislative Procedures*, Chapter 59). A special or select committee can be

appointed by the house of representatives or the senate to accomplish a specific task; the committee would be dissolved as soon as that task is completed. A special or select committee may report directly to its respective chamber instead of reporting through a parent committee. A special or select committee may provide more flexibility and less duplication of effort than a subcommittee of a standing committee.

**Recommendation:** The impeachment process by its nature seems designed to be flexible, and so caution would be merited before mandating a process for handling impeachment. Were the issue to arise again, however, the house of representatives should consider appointing a special committee rather than, as has been the practice, a subcommittee of a standing committee.

### **The Inspection of Public Records Act and Its Applicability to Impeachment Proceedings**

During the week in which Commissioner Block's plea arrangement with the Office of the Attorney General unfolded (the week after the special session of September 2011 adjourned), the Legislative Council Service (LCS) received a request under the Inspection of Public Records Act (IPRA) for any videos that were in the LCS's possession that related to the impeachment proceedings. There was discussion among LCS staff and special counsel regarding whether the LCS was obligated under the IPRA to release the videos, or whether the impeachment investigation fell under one of the exceptions to the IPRA (focus was particularly on the law enforcement investigation exemption). Consensus was not reached on the issue, but it was decided to release the video in the LCS's possession with the caveat that the LCS was not agreeing that it was subject to an IPRA request.

**Recommendation:** Further research into this issue is necessary. The legislature might want to consider whether the IPRA should be amended to explicitly include legislative investigatory materials as an exemption under the IPRA.

### **Subpoenas**

To the best of anyone's knowledge, the subpoena that the house of representatives issued

on September 23, 2011 to the attorney general was the first use of the statute that authorizes legislative subpoenas (Section 2-1-10 NMSA 1978). The statute requires a subpoena to be requested by a standing committee of either chamber and to be voted on by the respective chamber while the legislature is meeting in regular or special session. As the legislature was meeting in special session at the time the subcommittee required a subpoena, it was possible for the subcommittee to have its subpoena issued in timely fashion.

It is easy to conceive of a situation, however, where a subpoena would be required for a thorough investigation, but it would not be possible for one to be issued. Robert J. Gorence, the special counsel to the subcommittee investigating Commissioner Block, had only just begun receiving what were well over 1,000 pages of evidence, as well as video footage, when the legislature adjourned its special session. The attorney general, in fact, produced his material after the special session ended; in addition, he refused to produce certain documents and filed a *Petition for Protection* in the First Judicial District Court citing various privileges protecting these documents. It could well have been possible that after his review of the evidence, Mr. Gorence would have required a subpoena for further documents or to call witnesses before the Investigatory Subcommittee. Since the legislature was not in session, it would not have been possible to have those subpoenas issued.

There was some discussion concerning whether the subcommittee could somehow use the subpoena power that is explicitly granted to the Legislative Finance Committee or of having the legislature issue "blank" subpoenas while it was still in session, but these were not considered to be viable alternatives.

**Recommendation:** The legislature might want to consider amending Section 2-1-10 NMSA 1978 to broaden the subpoena power in a manner that would allow a committee investigating a matter such as impeachment when the legislature is not in session to be able to issue subpoenas in its own right, without requiring approval of a chamber of the legislature sitting in regular or special session. The legislature may also want to consider including an extraordinary session in Subsection A of Section 2-1-10 NMSA 1978 because, currently, only regular and special sessions are referenced in the statute. Additionally, the reimbursement amounts in Section

2-1-10 NMSA 1978 are out of date (\$5.00 a day for attendance and \$0.08 a mile for travel); reimbursement pursuant to the Per Diem and Mileage Act would be more appropriate.

### **Oaths for Witnesses**

There was some discussion of whether oaths should be required of witnesses if they were called to testify before the subcommittee. Section 2-1-2 NMSA 1978 states, "The presiding officer of the senate, the speaker of the house of representatives, or the chairman of any committee of either house, or the chairman of any joint committee of both houses of the legislature, shall have power to administer an oath to any witness who may appear to testify at any investigation being had by either of said houses of the legislature, or any committee or joint committee thereof.". Section 2-1-2 NMSA 1978 does not apply to subcommittees, and, in the investigation of Commissioner Block, the chair of the HRC was not a member of the subcommittee. Thus, it appeared that there was not statutory basis for administering oaths to witnesses appearing before the subcommittee. In other states, statutes expressly designate who may administer oaths during impeachment proceedings and also include the actual oaths that are administered.

***Recommendation:*** The legislature might want to clarify by statute that the chair of a committee or subcommittee investigating a matter such as an impeachment may administer an oath to a witness. The legislature might also want to consider creating language for such an oath.

### **Perjury and Contempt**

Connected to the issue of oaths are those of contempt and perjury by witnesses appearing before the subcommittee. Article IV, Section 11 of the Constitution of New Mexico allows for each house of the legislature to punish individuals for contempt in its presence. Section 2-1-10(D) NMSA 1978 provides that any person who does not comply with a legislative subpoena is guilty of contempt of the legislature and, upon conviction, may be fined up to \$500, imprisoned for not more than six months, or both. The statute on perjury, Section 30-25-1 NMSA 1978, was discussed by the subcommittee in the event that a witness before the

subcommittee was suspected of committing perjury. A related statute is Section 30-25-2 NMSA 1978, regarding refusal to take an oath before any court, administrative proceeding, legislative proceeding or other authority in this state that is authorized to administer oaths or affirmations.

In the investigation of Commissioner Block, after special counsel served the Office of the Attorney General with the subpoena issued by the house of representatives, a question arose about what would happen if the Office of the Attorney General did not produce the documents that were requested in a timely manner, as the attorney general appeared to be resisting the production required by the subpoena. Special counsel had to consider the possibility of pressing contempt charges against the Office of the Attorney General for not complying with the subpoena. Because the subcommittee was breaking new ground by having the house of representatives issue a subpoena, there is no guidance for initiating contempt proceedings.

***Recommendation:*** It appears that there is ample constitutional and statutory authority to prosecute someone for perjury in testimony to a committee conducting an impeachment investigation or to hold someone in contempt of such a committee. If there is another impeachment investigation, however, it would be valuable if the LCS or special counsel researched how such perjury or contempt would be enforced or prosecuted.

#### **Application of the Open Meetings Act to Impeachment Proceedings**

In general, executive sessions are not permitted by the rules of the house of representatives or of the senate. Exceptions are made in the senate rules for matters relating to personnel, for matters adjudicatory in nature, for certain ethics hearings or for any legislative matter not yet presented to either chamber of the legislature (Senate Rule 9-5-6). In the house of representatives, an exception is made for certain hearings on ethics matters (House Rule 9-5-6).

The Open Meetings Act allows the legislature to provide by joint rule to close certain meetings. Additionally, there are exceptions under the act for "matters adjudicatory in nature or to investigative or quasi-judicial proceedings relating to ethics and conduct or to a caucus of a political party" (Section 10-15-2(B) NMSA 1978). By providing the house of representatives with the "sole power of impeachment" of state officers, the Constitution of New Mexico confers

upon the legislature a quasi-judicial function. Accordingly, a committee could meet in closed session to discuss matters surrounding the impeachment of a state officer.

It is important to recognize, however, that there are competing policy interests in determining when a committee considering impeachment should meet in executive session. The primary reasons for meeting in closed session are: (1) to ensure that the initial investigatory work of the committee remains confidential to avoid any charge that the impeachment is jeopardizing the pending criminal prosecution; and (2) to protect attorney-client privilege. The competing interest is ensuring that the committee proceed as openly and transparently as possible. An investigatory committee will have to balance these competing interests. While a committee may want to keep the process as open as possible, there may be times that the committee would like to — or need to — meet in executive session.

In 2005, for example, the subject of the impeachment investigation was also the subject of a federal criminal investigation. The subcommittee in this instance felt the need to be able to meet in executive session to ensure the confidentiality of the ongoing federal criminal proceedings. In 2011, the same issues were not at play; special counsel informed the subcommittee that he did not anticipate presenting any evidence to the subcommittee that could not be presented to the full house of representatives for consideration of articles of impeachment or in trial in the senate. In adopting its procedures in 2011, the subcommittee allowed for the possibility of executive sessions but emphasized the importance of keeping the process as open as possible.

***Recommendation:*** The legislature might want to consider adopting a joint rule or procedures that allow for meeting in executive session if necessary, but also a policy that recognizes that the committee investigating impeachment will only meet in closed session in rare circumstances.

#### **Attendance of Other Members of the Legislature at Subcommittee Meetings and *Ex Parte* Communications**

An issue related to open meetings is whether other members of the legislature may or should attend the subcommittee's meetings and hearings. A preliminary review of the

impeachment procedures of other states indicates that most legislatures do not expressly prohibit other members from attending proceedings. In adopting procedures in 2011, the Investigatory Subcommittee discussed at length whether members of the house of representatives or the senate who were not on the subcommittee should be allowed to attend the subcommittee's meetings. The subcommittee discussed that in 2005 there was an informal agreement that other members should not attend the proceedings. The subcommittee also acknowledged that in the 2011 proceedings, the subcommittee's meetings were being broadcast over the internet, thus perhaps nullifying the utility of a ban on attendance. It was discussed that a member's appearance at a meeting of the subcommittee could be considered different in effect than merely having a member listen to the subcommittee's deliberations over the internet.

The subcommittee also discussed the need for a rule addressing *ex parte* communications between members of the legislature and the subject of the investigation. There were concerns about the possible appearance of impropriety were there to be *ex parte* communications with subcommittee members, who were deciding whether to recommend articles of impeachment; *ex parte* communications with members of the house of representatives, who might be deciding whether to impeach the official; and *ex parte* communications with members of the senate, who might be sitting as judges in the official's impeachment trial.

The subcommittee in 2011 decided not to adopt formal rules related to the attendance of other members of the legislature at the subcommittee's meetings or related to *ex parte* communications.

***Recommendation:*** The legislature might want to consider adopting a policy concerning attendance of other members of the legislature at the meetings of a committee investigating impeachment, not least so that the public is clear about what the express intent of the committee is. The legislature might want to consider clarifying by rule whether *ex parte* communications are allowed between members of the committee or other members of the legislature, and the official who is subject to an impeachment investigation.

**Court Challenges to Impeachment Proceedings**

In the early phase of the 2011 proceedings, members of the subcommittee asked LCS staff and the special counsel whether there could be court challenges to the impeachment process. A qualified answer was given, stating that as the power of impeachment is granted to the legislature by the Constitution of New Mexico, the courts would likely not entertain a challenge to impeachment proceedings, deeming them to be matters best handled by the legislative branch of government. Subsequent research has shown that, while rare, there have been challenges to aspects of impeachment proceedings that have been entertained by the courts, though generally the principle that such questions are non-justiciable has been maintained. *See*, for instance, *Nixon v. United States*, 506 U.S. 224 (1993), and subsequent cases that cite that unanimous United States Supreme Court decision. Thus, were there to be future impeachment proceedings in New Mexico, the committee investigating the impeachment might want to direct the LCS or special counsel to research possible challenges to impeachment proceedings in the event that the subject of an impeachment investigation brought a challenge to the proceedings in court.