THE TWENTIETH DAY

CARSON CITY (Monday), November 29, 2004

Senate called to order at 10:15 a.m.

President Hunt presiding.

Roll called.

All present.

Prayer by the Chaplain, Pastor Albert Tilstra.

We come with anxious hearts into Your presence today. Let us not be frightened by the task that confronts us but rather give thanks that You have matched us with this hour. God helping us, may we be part of the answer and not part of the problem. Therefore, enable the members of this body to see clearly the issues set before them. Grant them the wisdom and courage necessary to make good decisions in the best interest of all the citizens of this great State of Nevada.

AMEN.

Pledge of allegiance to the Flag.

Senator Raggio moved that further reading of the Journal be dispensed with, and the President and Secretary be authorized to make the necessary corrections and additions.

Motion carried.

MOTIONS, RESOLUTIONS AND NOTICES

Senator Raggio moved that the following persons be accepted as accredited press representatives, and that they be assigned space at the press table and allowed the use of appropriate media facilities: KNPB-TV Channel 5: Erin Meehan Breen; CREATIVE IMAGES PHOTOGRAPHY: Daniel Nollsch; KRNV-TV News 4: Kausik Bhakta, Valerie Bischoff, Josh Brackett, Victoria Campbell, Hetty Chang, Jeff Deitch, Gene Kennedy, Chuck King and Melissa Santos.

Motion carried.

SPECIAL ORDERS OF THE DAY

Madam President administered the oath to Senators Carlton, Heck and Washington.

I do solemnly swear or affirm that I will faithfully and impartially try the impeachment against the Honorable Controller Kathy Augustine of the State of Nevada now pending, and will give my decision according to the Constitution, law and evidence so help me God.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of the Legislative Counsel Bureau and that on the 12th day of November, 2004, pursuant to Nevada Revised Statue 283.170 and 283.180, I served true and correct copies of the NOTICE TO APPEAR AND ANSWER ARTICLES OF IMPEACHMENT, the ORDER FOR SERVICE OF NOTICE TO APPEAR AND ANSWER ARTICLES OF IMPEACHMENT, the ARTICLES OF IMPEACHMENT and the RULES OF THE SENATE for the 21st SPECIAL SESSION upon the counsel for Kathy Augustine by personally delivering a true and correct copy to her counsel at the Legislative Building, 401 South Carson Street, Carson City, Nevada.

FRED W. REMBOLD
Employee

Senator Raggio gave notice that any proposed changes to the Senate Standing Rules be proposed immediately upon convening the Committee of the Whole. If the proposed rule is adopted, it will be adopted under Senate Standing Rule No. 61—Additional Rulings on Procedure.

Remarks by Senators Raggio; Care; Brenda Erdoes, Legislative Counsel and Senator Amodei.

Controller Kathy Augustine and her counsel appeared before the bar of the Senate.

John L. Arrascada, Counsel for Controller Augustine, submitted on the Controller's behalf to the Senate an Objection to the Sufficiency of the Articles of Impeachment.

OBJECTION TO THE SUFFICIENCY OF THE ARTICLES OF IMPEACHMENT

November 26, 2004

To the Honorable the Senate of the State of Nevada:

IN THE MATTER OF THE IMPEACHMENT
OF
KATHY AUGUSTINE, *State Controller*

KATHY AUGUSTINE'S MOTION (1) TO DISMISS ARTICLES OF IMPEACHMENT DUE TO DUPLICITY IN THE CHARGING DOCUMENT, (2) TO MAKE AN ELECTION OF CHARGES, OR (3) BE REQUIRED TO PROVE BOTH CHARGES, AND TRIAL MEMORANDUM

'He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself.'

The Complete Writings of Thomas Paine (as cited by Mr. Justice Rutledge in his dissenting opinion in Application of Yamashita, 327 U.S. 1, 81, 66 S.Ct. 340, 379 (1946)).

I. FACTS

On or about July 1, 2004, Chief Deputy Attorney General Gerald Gardner ("DAG Gardner") filed a Request for Opinion with the Nevada Commission on Ethics wherein he alleged that State Controller Kathy Augustine had violated specific provisions of Nevada's Ethics in Government Laws.[1] Although she did not raise the issue of whether DAG Gardner could file a Request for Opinion at that time because State Controller Augustine did not want to prolong the proceedings and conceded that she should have known that Ms. Normington was working more than permitted by law on her campaign for reelection during state business hours, the stipulation, at page two, made it clear that any waiver of any rights were limited to the Ethics Commission proceeding and Ms. Augustine reserved all rights with respect to any other proceeding that might follow.[2]

The facts surrounding the violations of state ethics laws were related to Kathy Augustine's alleged willful use of government time and property to benefit herself in her reelection campaign for State Controller. Two former employees of Kathy Augustine—Jeannine Coward and Jennifer Normington—were the individuals who first approached the AG's Office with the allegations of ethics law violations by Kathy Augustine three days after they simultaneously resigned their unclassified positions.

Specifically, it was alleged by DAG Gardner (who was not a percipient witness and therefore based his accusations on information gathered from others) that Kathy Augustine had used state employees Jennifer Normington, Jeannine Coward, Sheri Valdez, and Susan Kennedy to compile guest lists for campaign fundraisers, type campaign contribution lists, type Secretary of State campaign filings, draft campaign function invitations, write campaign speeches, log campaign contributions, work on campaign mailers, and attend campaign fundraisers on governmental time. It was also alleged by DAG Gardner that Kathy Augustine had used state computers for word-processing and data storage of documents relating to her campaign, used State Controller letterhead to send campaign correspondence to various parties, used state telephones and fax machines for transmitting messages and correspondence relating to her

campaign, and used state printers and labels for printing address labels for campaign mailings. The facts as alleged by DAG Gardner were gathered by investigators with the AG's Office who, at the request of DAG Gardner, interviewed several former State Controller employees (Jennifer Normington, Jeannine Coward, Jim Wells, Sherry Valdez, Michelle Miles, and Susan Kennedy), interviewed Kathy Augustine,[3] reviewed computer data allegedly obtained from the State Controller's office, reviewed the State Controller's Policy Handbook, and the Nevada State Employee's Handbook. See AG's Request for Opinion filed with the Nevada Ethics Commission.

As a result of negotiations with the Nevada Ethics Commission, a Stipulation dated September 22, 2004, was entered into wherein Kathy Augustine admitted to willful violations of NRS 281.481(7) which provides, in part, that:

> A public officer or employee, other than a member of the Legislature, shall not use governmental time, property, equipment or other facility to benefit his personal or financial interest.

Use of the term "willful violations" contemplates that the individual so charged either knew or reasonably should have known that the violations were occurring.[4]

The exact violations that Kathy Augustine admitted under the Stipulation are as follows: (1) that she reasonably should have known that causing state employee Jennifer Normington, on state time, to perform functions related to her 2002 reelection campaign violated the statute; (2) that she reasonably should have known that the act of causing computer equipment owned by the State of Nevada and located in the Office of the Controller to be used for creating, maintaining, storing, and printing documents relating to her 2002 reelection campaign violated the statute; and (3) that she reasonably should have known that the act of causing equipment and facilities, provided by the State of Nevada for use by the Office of the Controller, to be used for business and purposes related to her 2002 reelection campaign violated the statute. Kathy Augustine was fined $15,000.00 by the Commission for those willful violations of NRS 281.481(7). See Stipulation (opinion 04-47) with the Nevada Ethics Commission.

As a result of the Stipulation, the Nevada Commission on Ethics was required by NRS 281.551(5)(a) to file a report with the Nevada State Assembly to determine whether or not impeachment proceedings should be filed against Kathy Augustine. On November 11, 2004, after hearing live testimony that was read from prepared texts and receiving documentary evidence, the Nevada State Assembly issued Articles of Impeachment for Kathy Augustine. Three separate articles of impeachment were approved which alleged that Kathy Augustine had willfully violated NRS 281.481(7) and that therefore, such willful violations constituted misdemeanor or malfeasance in public office pursuant to Section 2, Article 7 of the Nevada Constitution. Article 2, Section 7 of the Nevada State Constitution (Officers Subject To Impeachment) provides as follows:

> "The Governor and other State and Judicial Officers, except Justices of the Peace shall be liable to Impeachment for Misdemeanor or Malfeasance in Office; but judgment in such case shall not extend further than removal from Office and disqualification to hold any Office of honor, profit, or trust under this State. The party whether convicted or acquitted, shall, nevertheless, be liable to indictment, trial, judgment and punishment according to law."

The facts surrounding the three willful violations of NRS 281.481(7) consisted of the exact same violations that Kathy Augustine had stipulated to before the Nevada State Commission on Ethics: (1) that Kathy Augustine reasonably should have known that causing state employee Jennifer Normington, on state time, to perform functions related to Kathy Augustine's 2002 reelection campaign violated the statute; (2) that Kathy Augustine reasonably should have known that the act of causing computer equipment owned by the State of Nevada and located in the Office of the State Controller to be used for creating, maintaining, storing and printing documents relating to her 2002 reelection campaign violated the statute; and (3) that Kathy Augustine reasonably should have known that the act of causing equipment and facilities, provided by the State of Nevada for use by the Office of the Controller, to be used for business and other purposed related to her 2002 reelection campaign violated the statute.

On November 12, 2004, the Nevada State Assembly delivered the Articles of Impeachment to the Nevada State Senate for a full trial on the merits of the Articles of Impeachment.

II. ARGUMENT

a. EACH COUNT OF THE ARTICLES OF IMPEACHMENT SUFFERS FROM DUPLICITY AND REQUIRES EITHER THAT THE PROSECUTOR (1) MAKE AN ELECTION AS TO WHICH CHARGE TO PROCEED UPON, (2) PROVE BOTH CHARGES, OR (3) DISMISSAL.

In November 2002, two hundred fifty-five thousand four hundred twenty-one (255,421) Nevadans voted Kathy Augustine to a second term as State Controller. The Nevada State Senate is now tasked with the critical role of conducting a full and complete hearing on the merits of the Articles of Impeachment and the facts and circumstances surrounding its issuance in the course of deciding whether fourteen or more members of the Senate will remove her from office. Kathy Augustine is entitled to and must be afforded the full measure of due process of law in this proceeding, including, but not limited to, fair notice of what it is she must defend against, the right to confront and cross-examine witnesses called by the prosecutor, the ability to present her defense by calling witnesses in her behalf, to make all necessary arguments relative to the Articles that have been issued against her and the right to unanimity among those persons who may vote against her should their number equal two-thirds or more of the Senate.

Of primary importance to this entire proceeding is the determination of whether or not the charges described in the Articles constitute "misdemeanor" or "malfeasance" in her position as Nevada State Controller. The two are conceptually and legally distinct. Removal of Kathy Augustine from the Office of State Controller by way of impeachment can only be done if the Honorable Senate makes an affirmative finding that the stated violations of NRS 281.481(7) do, in fact, constitute "misdemeanor" or "malfeasance" in office.

A pleading suffers from duplicity when it joins in a single count two or more distinct and separate offenses. 1 Charles A. Wright, Federal Practice and Procedure § 142 (2d ed. 1982). See Gordon v. Eighth Judicial Dist. Court of State of Nev. In and For County of Clark, 112 Nev. 216, 913, P. 2d 240, 247-48 (Nev. 1996). The Nevada Legislature has recognized that although a charging document may set forth alternative means of committing a crime within a single count, alternative offenses must be charged in separate counts. NRS 173.075(2); NRS 173.115. See Jenkins v. Fourth Judicial District Court of State of Nevada in and for County of Elko, 109 Nev. 337, 849 P. 2d 1055, 1057 (Nev. 1993). Although Articles of Impeachment are *sui generis* and are not a criminal pleading, the principle is applicable to this proceeding as a benchmark of due process of law. The common-law rule against duplicity in pleading is one of the rules tending to produce singleness or unity of the issues, so that the adversary may be apprised, with certainty, of the theories and issues he is called upon to meet. This rule against duplicity in pleading is the basis for holding the pleading bad where the averments are in the alternative and the allegations and proof in support of one of the alternatives are insufficient to constitute a cause of action upon that theory. Peck v. Woomack, 65 Nev. 184, 192 P. 2d 874, 884 (Nev. 1948).

The vice of duplicity that arises in this impeachment case stems from the danger that a conviction on a duplicitous count could be obtained without a unanimous verdict among those voting against the State Controller as to each offense contained in count. See United States v. Aguilar, 756 F.2d 1418 (9th Cir. 1985). Thus, where a prosecutor charges two distinct offenses in a single count, each with different elements, he must either make a pre-trial decision as to which he will pursue or prove both in order to avoid a fatal duplicity. See Abney v. United States, 431 U.S. 651, 654, 52 L.Ed.2d 651, 97 S Ct 2034, 2037 (1977) and United States v. Ramirez-Martinez, 273 F. 2d 903, 913-915 (9th Cir. 2001). Because the State Controller and anyone in her position has the right to be impeached only if there is agreement of two-thirds of the Senate, and that agreement must be upon oath "to do justice according to Law and the Evidence", where the law is different as to each component of the duplicitous charges, this agreement is only present where each Senator making the decision agrees with the remaining thirteen or more as to what the prosecutor has proven. Should ten believe that he has proven only the elements of "malfeasance", eight believe that he has not but rather has proven the elements of "misdemeanor", and as many as three believe that he has proven both, NO IMPEACHMENT CAN RESULT.

The following section contains a review of case law pertaining to the terms "misdemeanor" and "malfeasance" as they have been historically used in proceedings involving formal removal of government officials both in Nevada and across the United States. What will become clear is

that they have different meanings and elements. Most importantly, the Nevada Supreme Court has defined "malfeasance" as meaning "malpractice". In a malpractice case, the party bearing the burden of proof must establish the standard by which the defendant's performance is to be judged and that the defendant's conduct deviated from that standard. In addition to causation of injury and damages, which are not at issue in the case *sub juice*, the essential predicate elements of a malpractice action are: (1) the duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise, and (2) breach of that duty. This standard has been applied to a lawyer's breach of duty, compare Morgan v. Smith, 110 Nev. 1025, 879 P. 2d 735, 739 (Nev. 1994) (fn.2) and Charleston v. Hardesty, 108 Nev. 878, 883-84, 839 P.2d 1303, 1307 (1992). See also NRS 11.207 and 683.133 regarding veterinarians. It has also been applied to physicians, surgeons, dentists and chiropractors. Compare Routt v. Miller, 95 Nev. 408, 595 P. 2d 1191 (1971) and Bonnie v. Rutherford, ___ Nev. ___, 89 P. 3d 40, 46 (May 12, 2004) (fn. 20). There is no good reason not to apply it to the conduct of an elected official who is charged with "malfeasance" if, as the Nevada Supreme Court has declared in context, it is equivalent to "malpractice".

Despite the latitude that this Honorable Senate has in establishing its rules and in its deliberations, the Nevada Constitution, Article 7, §1 requires that it decide this case based upon "Law and Evidence". The Nevada Supreme Court has already established the "Law" as to the meaning of "malfeasance" in the context of removal of an official from office and the requirements for proving malpractice. Since notice is a requirement of due process of law, every elected official in Nevada has, until now, had only this definition of malfeasance upon which to base his or her conduct. Thus they have, consciously or otherwise, been influenced in their own conduct by what they have seen or known of others similarly situated conducting themselves. As a result, on the malfeasance aspect of the Articles of Impeachment, the Special Prosecutor must establish what that standard of conduct is and that the State Controller deviated from it. Kathy Augustine and her counsel then must be permitted to present both experts and lay witnesses and any relevant documentary evidence that sheds light on whether or not the allegations against her are commonplace and generally accepted throughout the relevant government sectors. Malfeasance in office cannot be proven unless and until it is established that Kathy Augustine's challenged actions run contrary to the established practice and custom of similarly situated elected officials. Impeachment for anything less than actual malfeasance in office runs contrary to the Nevada Constitution and the relevant case law and must not be permitted.

What will become absolutely clear after reading this review national jurisprudence in this area of impeachment is that Kathy Augustine's actions DO NOT constitute either misdemeanor or malfeasance while in office. Instead, Kathy Augustine's actions should be viewed as exactly what they are: poor judgment decisions by a superior who was not well-liked by her subordinates. In fact, not being well-liked by her subordinates is perhaps too kind—the facts reveal a group of FORMER employees who were biased, disgruntled, prone to exaggeration and/or outright lies, and who clearly held a grudge against their boss. The "witnesses" against Kathy Augustine made numerous derogatory references to Kathy's personality, appearance, and personal life when presenting their testimony both to investigator's with the AG's Office and to the Assembly itself.

There is no doubt that in spite of her telling each of her employees that were active in her campaign not to use state time to do it, Kathy's actions were inappropriate in so far as she allowed some of her employees to work on her reelection campaign during state time and that she failed to stop them from using state equipment to do the campaign work. However, Kathy's misguided actions DO NOT and MUST NOT be used to find her guilty of "misdemeanor or malfeasance in office" as that phrase is commonly understood and interpreted in courts and legislative proceedings across the United States. Her actions constituted minor transgressions that fall far short of a legitimate basis to impeach her and remove her from the office to which the electorate appointed her. To find otherwise would substantially lower the bar for any and all elected officials in the State of Nevada who have dissatisfied or vindictive employees, constituents or opponents that have axes to grind and who seek to pollute the impeachment process with allegations of improper activities that in no way amount to a violation of the public trust.

An impeachment proceeding is classified as a criminal prosecution wherein the State is required to establish the essential elements of the charge beyond a reasonable doubt. State v. Douglas, 217 Neb. 199, 201, 349 N.W.2d 870 (Nebraska, 1984), quoting from State v. Hastings, 37 Neb. 96, 55 N.W. 774 (Nebraska 1893). "While an impeachment proceeding is not a criminal proceeding in a strict sense of the word, it is a judicial proceeding in the nature of a criminal proceeding in which the rules of evidence apply." Id. Before a public official can be removed from office, the State must have proved beyond a reasonable doubt one or more of the allegations. Id.

"The Constitution, in relation to impeachment, has in mind the protection of the people from official delinquencies or malfeasances … The primary purpose of an impeachment is to protect the State, not to punish the offender." Ferguson v. Maddox, 114 Tex. 85, 98 , 263 S.W. 888 (Texas S. Ct. 1924). See also Deats v. Carpenter, 61 A.D.2d 320, 322, 403 N.Y.S.2d 128 (NY App. 3rd Dept, 1978), wherein a removal statute is viewed as having been enacted to allow a local government to rid itself of an unfaithful or dishonest public official. "The statute was intended to improve public service and not to punish the offender." The State of Nevada does not need to be protected from Kathy Augustine and thus, impeachment amounts to the death penalty for someone who has done nothing to justify such drastic action.

b. MISDEMEANOR AND MALFEASANCE IN OFFICE—A SURVEY OF RELEVANT CASELAW.

Article 2, Section 7 of the Nevada Constitution provides that "Misdemeanor or Malfeasance in Office" are grounds for impeachment of an elected state official. Unfortunately, both the Nevada Constitution and the Nevada Revised Statutes are silent as to what types of actions by an elected state official would constitute misdemeanor or malfeasance in office so as to warrant impeachment or other removal proceedings. Nevada case law does, however, provide guidance as to the meaning of "malfeasance" and case law from other jurisdictions provides additional clarifications of that term. "Misdemeanor," as that term in used in Article 2, Section 7 of the Nevada Constitution, is not similarly addressed by Nevada case law, but case law from other states provides cogent analysis of the use of that word in terms of impeachment or other removal proceedings for elected officials.

There are three Nevada cases that squarely address the issue of what constitutes malfeasance in office. The earliest case, D.M. Buckingham v. Fifth Judicial Dist. Court In And For Mineral County, et al., 60 Nev. 129, 102 P.2d 632 (Nev. 1940), involved removal proceedings that were filed against D.M Buckingham, the duly elected and acting county clerk and ex officio treasurer of Mineral County. The basis for the removal proceedings were allegations that Mr. Buckingham failed to appropriately invoice and document moneys received by him in his official capacity. Pursuant to Article 7, Section 4 of the Nevada Constitution, removal for such a state officer was permissible if the complained of actions constituted malfeasance. The Nevada Supreme Court found that the word malfeasance as used in the Nevada Constitution means the same thing as the word "malpractice," but that both words contemplated acts of commission, as opposed to acts of omission. The allegations against Mr. Buckingham alleged that he failed to do some official act(s) (failure to appropriately invoice and document moneys) and such acts of omission are considered to be nonfeasance. Because the complaint against Mr. Buckingham did not allege acts of nonfeasance as a basis for removal, the Court found that his actions did not come within the meaning of the word malfeasance as was contemplated by the Constitution and which was the only basis for removal cited in the complaint. Accordingly, removal from office was inappropriate.[5]

The next Nevada case addressing the meaning of malfeasance in the context of impeachment or other removal proceedings is Jones v. Eighth Judicial Dist. Court, 67 Nev. 404, 219 P.2d 1055 (Nev. 1950). Jones involved an attempt to remove Robert E. Jones, the Clark County District Attorney, based upon allegations of neglect of duty, nonfeasance and malfeasance in office. As to the malfeasance related actions, DA Jones had publicly accused the sitting Sheriff of engaging in criminal activity (burglary); demanded that if the Sheriff did not immediately resign, a criminal complaint would be filed against him; and submitted an expense report to the County for reimbursement of travel expenses related to his investigation of the Sheriff's alleged burglary. The complaint against DA Jones alleged that he knew his accusations against the Sheriff were false; that the accusations were only made for the purpose of getting the Sheriff to

resign from office; and that the request for reimbursement for expenses was fraudulent because DA Jones had never personally incurred the claimed expenses—his traveling companion paid for all of them.

Recognizing that malfeasance means malpractice, the Nevada Supreme Court held that in order to warrant removal of an elected official from office, the act of malfeasance must have a direct relation to and be connected with the performance of official duties. Id. at 408. In other words, the conduct charged as constituting malfeasance must be something that the defendant did in his official capacity. Id. The Court then held that DA Jones' actions in making the allegations against the sheriff did not amount to malfeasance because "[t]he District Attorney is not alleged to have filed any charge or accusation before any committing magistrate nor did he threaten to prosecute the sheriff on any such complaint. It does not appear that the sheriff was about to perform some official act and that he was intimidated into doing or refraining from doing any official act." Instead, the Court characterized the DA's actions as "heated, possibly rash, statements to the sheriff … that … does not state sufficient facts to constitute a cause for removal." Id. at 408-409. However, when considering the allegation that the DA had submitted a false claim for travel, the court found that the DA could be prosecuted for removal because the submission of the false expense report was done knowingly and the DA had actually collected the reimbursed amount from the County. Accordingly, the Court viewed these acts as constituting malfeasance because they were done with knowledge and in the DA's official capacity.

The third and final Nevada case to address the meaning of malfeasance in any meaningful way as it pertains to impeachment or removal proceedings is Jack Schumacher v. State of Nevada, 78 Nev. 167, 370 P.2d 209 (Nev. 1962). In Schumacher, removal proceedings were filed against the county assessor based upon grounds of nonfeasance. Nonfeasance is the substantial failure to perform a required legal duty. Id. at 171. The county assessor was charged with failure to properly assess certain properties, failure to file statutorily required lists of assessed properties, and failure to require statements of value. The assessor argued that nonfeasance, like malfeasance, should be treated like a claim of malpractice. Therefore, the assessor argued that the Court should consider evidence of established customs, practices, and procedures of other assessors when determining whether an assessor is guilty of nonfeasance so as to warrant removal from office. The Court disagreed with the assessor's argument and stated that unlike situations involving malfeasance, it was not error to exclude evidence of established customs, practices, and procedures of assessors in connection with charges of nonfeasance, when such evidence would be in conflict with statutory provisions. Id. at 174.

What those three Nevada cases clearly demonstrate is that charges of malfeasance require evidence of malpractice by the challenged official while acting in their official capacity. Malpractice in office can only be proven by a review of the established customs, practices, and procedures of similarly situated elected officials. In Kathy Augustine's case, the Senate must consider the allegations against her in light of the established customs, practices, and procedures of all elected officials who are running campaigns for reelection while they are still in office. Therefore, in order to satisfy the burden of proof in an impeachment proceeding, the State must present evidence that proves that the allegations against Kathy Augustine are not commonplace and are not generally accepted throughout the local and state government sectors. Malfeasance in office cannot be proven unless and until it is established that Kathy Augustine's challenged actions run contrary to the established practice and custom of similarly situated elected officials. Impeachment for anything less than actual malfeasance in office runs contrary to the Nevada Constitution and the relevant case law and must not be permitted.

Nationally, what constitutes malfeasance for purposes of impeachment or other removal from elected office has been the subject of many cases. What becomes evident from a review of these cases is that the acts relied upon to allege malfeasance in office must relate to the elected official's performance of his or her official duties.

In Atwood v. Cox, 88 Utah 437, 55 P.2d 377 (Utah 1936) removal of a school board member was sought for charging and receiving reimbursement for official acts that were already compensated by the board member's salary. The Utah Supreme Court ruled that one is guilty of malfeasance when there is evidence of some reasonable intent or knowledge that one's actions are wrong; no specific intent to defraud is necessary, but there must be conscious wrongdoing on

the part of the official. Id. at 393. "The innocent filing of an illegal claim, thinking that he [the elected official] is entitled to it, does not make malfeasance in office in that regard." Id. The Court found that the school board member did not have the requisite knowledge or intent when he filed the request for reimbursement.

See also In re Petition To Remove John G. Sims, 206 W.Va. 213, 523 S.E.2d 273 (W. V. 1999) (county prosecutor removed from office for improperly using pre-hearing publicity to prejudice pending adjudicatory proceedings); Joseph L. Wallage v. The State of Delaware, 58 Del. 521, 211 A2.d 845 (Del. 1965) (city councilman charged with the crime of malfeasance in office for solicitation of a bribe; the crime of malfeasance is intended to deter public officers who are acting in their official capacities from committing corrupt and unlawful acts in disregard of the high standard of integrity that such officers are held to by virtue of the fiduciary nature of their duties; conviction for malfeasance in office upheld); and Evan Meacham v. Frank Gordon, 156 Ariz. 297, 751 P.2d 957 (Az. 1988) (impeachment of governor of Arizona for malfeasance in office based upon criminal indictments for perjury, willful concealment, and filing false campaign contribution reports; although case only involved challenge to procedural issues in impeachment trial, Meacham was eventually impeached and removed from office).

In Lief E. Jacobsen v. V.M. Nagel, 255 Minn. 300, 96 N.W.2d 569 (Minn. 1959), recall of a city councilman was denied where the grounds stated in the recall petition reflected merely political criticisms of the councilman's actions. The court found that malfeasance requires proof of conduct that affects official duties rather than conduct which affects the official's personal character as a private individual. Id. at 573, citations omitted. "Although affecting the performance of official duties, the conduct 'must relate to something of a substantial nature directly affecting the rights and interests of the public.'" Id. (Citations omitted).

Custom or practice of the office is directly addressed in the case of In re Proposed Petition to Recall Governor Jesse Ventura, 600 N.W.2d 714 (Minn.1999). This was an attempt to recall the governor for malfeasance based upon a variety of reasons including his use of state security personnel on a book promotion tour. The court denied the recall request because, among other reasons, there is a long-standing practice for the governor to use state security when performing either official duties or when engaged in personal activities. See also State of South Dakota v. Peterson, 607 N.W.2d 262, 269, 2000 SD 39 (S. D. 2000). That case involved proceedings to remove the register of deeds on grounds of malfeasance or nonfeasance in office due to the way the register collected, remitted, and accounted for fees. The Court held that there was no evidence of malfeasance or nonfeasance because no corrupt or evil design or purpose by register not to comply with the strict letter of the law was found. "Although he charged fees rather than collecting them in advance, his was not the only register of deeds' office in the state to do so." Id.

In Bert A. Fannin v. Commonwealth of Kentucky, 331 S.W.2d 726 (Ky Ct.App 1960), a justice of the peace was being prosecuted for removal based upon a charge of malfeasance in office for personally retaining money that was entrusted to the court in pending cases. The Kentucky Court of Appeals held that "[m]alfeasance, as a ground for removal of an officer, refers to evil conduct or an illegal deed, the doing of which one ought not to do, or performance of an act by an officer in his or her official capacity that is wholly illegal and wrongful." Id. at 728, quoting from 43 Am.Jur., Public Officers, sec. 195, p.39. The court then found sufficient evidence of evil intent by the justice of the peace and ruled that removal was appropriate. See also Boyer v. City of Potosi, 77 S.W.3d 62 (Mo. App. 2002) (impeachment of city mayor based upon charge of malfeasance in office for illegally terminating chief of police, for permitting false claims for wages, and for making false report of officer misconduct).

In R. Craig Williams v. City of Dover, 130 N.H. 527, 543 A.2d 919 (N.H. 1988), removal proceedings were brought against R. Craig Williams, a part-time city planning board member, that alleged malfeasance in office for assisting his full-time employer in installing a driveway and greenhouse without procuring the necessary permits that were within the jurisdiction of the planning board. It was undisputed that Mr. Williams knew the permits were required for such installations. Nevertheless, the New Hampshire Supreme Court found that there was no evidence that Mr. Williams' actions were directly related to or connected with the performance of his duties as a planning board member. "The object of the requirement that the act or omission relate to the duties of the public office is to ensure that an official is not removed for malfeasance in office when the alleged wrongful acts or omissions occurred while the officer was acting in his

private capacity as opposed to his capacity as a public officer." Id. at 921-922, quoting from Madsen v. Brown, 701 P.2d 1086, 1091 (Utah 1985). See also State ex rel. Ayer v. Ewing, 231 Ind. 1, 106 N.E.2d 441 (Ind. 1952) (impeachment proceedings brought against township trustee for failure to hire certain teacher applicants; Court held that the failure to perform just one duty required by law is not a sufficient cause for impeachment of an officer as there must be a general failure to perform official duties alleged).

Similarly, courts are reluctant to remove a public official when the allegations against the elected official "are not based on any malicious or corrupt acts, but rather for minor neglect of duties, administrative oversights, or violations of law … ." Deats v. Carpenter, 61 A.D. 2d 320 at 322, 403 N.Y.S. 128 (NYAD, 3d Dept. 1978). In the case of State ex rel. Knabb v. Frater, 198 Wash. 675, 679, 89 P.2d 1046 (Wash.1939), which concerned the removal of a public officer, the Supreme Court of Washington stated the following:

> "Where the constitution or a statute authorizes a removal for official misconduct or malfeasance, misconduct, or maladministration in office, or similar acts of misbehavior in office, the general rule is, that the officer can be removed only for acts or omissions relating to the performance of his official duties, not for those which affect his general moral character, or his conduct as a man of business, apart from his conduct as an officer. In such a case … it is necessary to separate the character of the man from the character of the office."

Turning now to the definition of "misdemeanor in office," as grounds for impeachment, that term has a much broader coverage than the common law misdemeanor as usually defined and applied in criminal cases. However, the actions constituting the alleged misdemeanor in office must be squarely connected to the duties of the office—just as in the definition of malfeasance in office.

In Stanley v. Jones, 197 La. 627, 2 So.2d 51 (La. 1941) it was held that misdemeanor in office for purposes of an impeachment provision in the state constitution means any misconduct in office. County clerk who committed murder cannot be removed for misdemeanor in office because the act he committed was wholly disconnected with his office. State ex re. Henson v. Sheppard, 192 Mo. 497, 91 S.W. 477 (Mo. 1905). The phrase misdemeanor in office, when used in impeachment proceedings, should be applied in the parliamentary sense and when so applied it means misconduct in office. Yoe v. Hoffman, 61 Kan. 265, 59 P. 351 (Kan. 1899). A misdemeanor in office for purposes of impeachment means something that amounts to a breach of the conditions tacitly annexed to the office, and includes any wrongful official act or omission to perform an official duty. In re Investigation of a Circuit Judge of the Eleventh Judicial Circuit of Florida, 93 So.2d 601 (Fla. 1957).

In State v. Douglas, 217 Neb. 199, 349 N.W.2d 870 (Neb. 1984), articles of impeachment were adopted against the attorney general for actions involving his personal business transactions with a financial institution that was being investigated for financial irregularities. It was alleged that the AG committed a misdemeanor in office by violating the Nebraska professional rules of conduct for lawyers by not avoiding an appearance of impropriety in his financial dealings with the bank that was under investigation. The Court found that the Nebraska Constitution which allows for the impeachment of all civil officers for "any misdemeanor in office" means that the act or omission for which an officer may be impeached and removed from office must relate to the duties of the office. Id. at 201 (quoting from State v. Hastings, supra). The court went on to provide this additional quote from State v. Hastings:

> "[A]n impeachable high crime or misdemeanor is one in its nature or consequences subversive of some fundamental or essential principle of government or highly prejudicial to the public interest, and this may consist of a violation of the constitution, of law, of an official oath, or of duty by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers for improper motives or for an improper purpose." Id. at 202.

It was ultimately held that the AG did not commit misdemeanors in office for the purpose of impeachment because the offenses alleged did not relate to the duties of the office—violation of the lawyer's professional code of responsibility was not an impeachable offense.

Accordingly, impeachment based upon malfeasance or misdemeanor in office can only be done for acts done that specifically relate to the elected office itself. There must also be some

intent on the part of the elected official to violate some duty connected with the office or it must be reasonably clear based upon the practice and customs of the office or similarly situated offices that the actions taken by the elected official are incongruous with the duties of the office. An application of the facts pertaining to the charges alleged against Kathy Augustine will absolutely show that she has not committed an act(s) of malfeasance and/or misdemeanor in office that would justify impeachment.

c. THE FACTS AS ALLEGED DO NOT CONSTITUTE EVIDENCE OF MALFEASANCE OR MISDEMEANOR IN OFFICE BY KATHY AUGUSTINE

Bribery, failure to carry out the responsibilities of the elected office, submission of false or inflated expense reports, altering official records, filing false campaign reports, perjury, willful concealment, retention of public moneys for personal use, unlawful termination of subordinates, etc.,—these are examples from the cases cited above of impeachable offenses that directly stem from the duties of a public official and that clearly affect the public trust. Unlike the elected government officials who were impeached or otherwise removed from office for these instances of malfeasance or misdemeanor in office, Kathy Augustine has not committed any act(s) that could, in any reasonable person's mind, let alone where a weighing of evidence takes place, be construed as rising to the same level of official misconduct.

What Kathy Augustine did amounts to misguided judgment—plain and simple. The ONLY reason her misguided actions have gotten her to the stage of the first impeachment trial in the State of Nevada is because three former extremely biased employees (Jennifer Normington, Jeannine Coward, and Jim Wells) who were prone to hyperbole and gross exaggeration, got together and somehow convinced the powers that be within the AG's Office that their mean bitchy boss should be made an example of for doing something that goes on at every level of government during an election year and particularly where the candidate is already holding office. Their statements to investigator's from the AG's Office and their orchestrated testimony before the Assembly, neither of which was subject to ANY cross-examination, is filled with absolutely irrelevant and highly inflammatory statements about how demanding of a boss Kathy was; how verbally and emotionally abusive she was towards her employees; that she had a bad temper; that Kathy flung papers at her employees when she was mad; that Kathy was computer illiterate; that Kathy hated her employees; that the controller's office was too stressful; that Kathy was greedy for campaign donations; that Kathy was a cheap boss; that Kathy remarried too quickly after her husband died; that Kathy remarried a man who was her previous deceased husband's hospital nurse; that Kathy was not very smart; that Kathy's demanding personality caused her employees to suffer from health conditions; that Kathy's employees referred to her temper as the "wrath of Kath"; that Kathy unfairly reassigned her employees to duties that they didn't want to do; and that Kathy just wasn't a nice person. NONE of this testimony is even remotely related to the allegations of malfeasance and misdemeanor in office.

It was a well known fact that Kathy was not well-liked—by her employees and by fellow government officials. Kathy speaks her mind about all issues pertaining to the duties of the Controller's Office and she often took sides of an issue that were unpopular to say the least. She can be a stern, short-tempered, and highly demanding boss and elected official. Nevertheless, she has always maintained the integrity of the office to which she was elected, and her primary goal as State Controller has been to ensure that the responsibilities of that office are carried out completely. That same sense of duty to the office to which she was elected also caused her to enter into a Stipulation with the Nevada Ethics Commission to make amends for her misguided judgment. Kathy Augustine has recognized that "the buck stops" with the office holder. The Stipulation resulted in her being assessed the highest fine in the Commission's history. That should have been the end of the story for Kathy Augustine in terms of having to make amends for this episode.

III. CONCLUSION

A review of the facts and the law as discussed hereinabove compel this Honorable Senate to do several things. First, it must recognize the problems that the Articles of Impeachment creates in insuring that there is a true agreement among a two-thirds majority of the Senate should they vote to impeach. This can only be cured by demanding that the prosecutor make an election of theories or prove both. The only alternative is dismissal.

Second, if the prosecutor decides to go forward on a malfeasance theory, it requires an inquiry into the standards of behavior of others similarly situated to determine if there has been a deviation from it that amounts to malpractice.

Finally, whatever charge or charges the prosecutor chooses to press on with, in the end the Senate must recognize that the purpose of impeachment is to protect the public, not to punish the official. Removal from office is simply not necessary or just based upon the law and evidence in this case, for no matter how dissatisfied her accusers are with the way they have been treated, Kathy Augustine has done nothing to harm the citizens who elected her or those that she serves that would rise to the level of such a drastic sanction.

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[1] NRS 281.511-2 is the statutory basis for proceeding on an Ethics Complaint. A threshold question regarding his bias in this matter is whether the Attorney General or his deputies are "a person" as that term is used in this statute. An examination of NRS 281.511-1 indicates they are not. It reads:

> 1. The Commission shall render an opinion interpreting the statutory ethical standards and apply the standards to a given set of facts and circumstances upon request, on a form prescribed by the Commission, *from a public officer or employee* who is seeking guidance on questions which directly relate to the propriety of *his own past, present or future conduct* as an officer or employee.

Thus we see that a public officer (the Attorney General) or a public employee (Deputy Attorney General Gardner) may only request an ethical opinion as to their own conduct. This conclusion is further fortified by a reading of NRS 0.010 et seq. which provides definitions and declarations of legislative intent which apply to Nevada Revised Statutes as a whole. NRS 0.039, defines "Person" as follows:

> *Except as otherwise expressly provided in a particular statute* or required by the context, "person" means a natural person, any form of business or social organization and any other *nongovernmental* legal entity including, but not limited to, a corporation, partnership, association, trust or unincorporated organization. *The term does not include a government, governmental agency or political subdivision of a government.*

The Nevada Ethics in Government Law, NRS 281.411 et seq., makes no special definition of "person" as it is used in that statute, nor is there anything in its context that requires a meaning be supplied to it different from its general use definition mandated by NRS 0.039. Thus, the definition of "person" in NRS 0.039 controls.

[2] Nevada Commission on Ethics hearings are judged on the preponderance of the evidence standard.

[3] It is undisputed that Kathy Augustine was represented by and advised by DAG Sean Chesney when she was interviewed by the AG investigators. He had been her advisor for over a year. After the AG investigators told the State Controller that she had a right to remain silent and to not answer their questions, DAG Chesney advised her to waive her right. Moreover, he encouraged her to supply information that the AG investigators did not seek and volunteered information himself to the investigators. The next day, DAG Chesney informed the State Controller that he could no longer represent her due to a conflict of interest. Kathy Augustine is not seeking the suppression of her statement in this hearing.

[4] It is important to note that the agreed upon Stipulation utilized the lesser degree of knowledge—reasonably should have known—when referring to the willful violations of 281.481(7) that Kathy Augustine stipulated to.

[5] "Malpractice" is defined by Black's Law Dictionary (5th Edition, 1979) as "professional misconduct or unreasonable lack of skill." It is further defined by Black's as "wrongful conduct that affects, interrupts or interferes with the performance of official duties."

Respectfully submitted,
JOHN L. ARRASCADA
DOMINIC P. GENTILE
KATHLEEN T. JANSSEN
PAOLA M. ARMENI
WILLIAM H. GAMAGE
CHARLES D. LOMBINO
Attorneys for State Controller Kathy Augustine

Senator Raggio moved that the Secretary of the Senate dispense with the reading of the Objection to the Sufficiency of the Articles of Impeachment and that it be entered into the Journal for this legislative day.

Motion carried.

Senator Raggio moved that the matter of the Objection to the Sufficiency of the Articles of Impeachment be referred to the Committee of the Whole.

Remarks by Senator Raggio.

Motion carried.

Senator Raggio moved that the Senate resolve itself into a Committee of the Whole to convene at 11 a.m. in Room 4100 for the purpose of considering the Objection to the Sufficiency of the Articles of Impeachment with Senator Amodei as Chair of the Committee of the Whole.

Motion carried.

Senate in recess at 10:31 a.m.

IN COMMITTEE OF THE WHOLE

At 11 a.m.

Senator Amodei presiding.

The Objection to the Sufficiency of the Articles of Impeachment considered.

SENATOR AMODEI (Chair, Committee of the Whole):

The Committee of the Whole of the Twenty-first Special Session of the Nevada Legislature will come to order. The Secretary of the Senate will have the record reflect the Senators present and so indicate as the remaining members arrive. A copy of the meeting record will be made available for those members who are not present for the opening remarks. The Defense will please proceed with your arguments.

DOMINIC P. GENTILE (Counsel for Controller Augustine):

Mr. Chair, along with John Arrascada, I have the privilege of representing Kathy Augustine, Controller of the State of Nevada. This week Controller Augustine will present the Commission on Ethics the third consecutive monthly installment of $500 to fulfill the conditions of the $15,000 fine imposed by the Commission. The fine is the largest ever imposed by the Commission on Ethics; however, it is not the largest amount the Commission could have imposed. If the Controller is tried for the Articles of Impeachment, she may face removal from office for the same conduct for which the Commission on Ethics did not impose the maximum fine.

No circumstance has occurred in Nevada to provide guidance to carrying out the responsibility before you. The question at the foundation of these impeachment proceedings is whether the public needs protection from the person who is the focus of the Articles of Impeachment. Historically, federal and state impeachment trials have been necessary for the protection of the public. You must be sensitive to the fact that there were 255,421 votes for Controller Augustine to remain in office, and since that time, there has not been one challenge or criticism brought forth as to her competency.

Since taking office, the Controller established the debt-collection program that recovers approximately $100,000 per month. Additionally, the Office of the State Controller has received a national award for publishing an annual financial report. Controller Augustine has not been accused of a crime. The duty of this body is to define and afford Controller Augustine due process of law in accordance with the Nevada Constitution basing your decision on justice, the law and the evidence. Fact determines we do not have the knowledge to indicate how that standard compares to other standards to which we may be accustomed. We do know it to be a higher standard than that employed by the Commission on Ethics. If it were not, the mere fact of an adverse finding by the Commission would make it res judicata or already established.

At the time Controller Augustine entered into the stipulation before the Commission on Ethics, her qualification was not that she knew, but that she reasonably should have known the unclassified employee was working on her campaign. The Controller should have known where

that employee was working and how much state time the employee spent on a given project. The stipulation presented before the Commission on Ethics is a proceeding wherein the burden of proof is deemed a preponderance of evidence, also considered adversarial litigation.

To be loyal to the concept of justice of law and evidence, you must listen to the evidence and then compare that to the law. It is at this point where problems occur during a duplicitous pleading. The term duplicitous defines two distinct and separate charges in one pleading. The danger being there may be no agreement as to what actually occurred. The Nevada Constitution requires a two-thirds majority and calls for unanimity in that majority.

In my attempt to demonstrate the potential danger with this process, I will focus on the terms stated in the pleading—misdemeanor or malfeasance—which are two distinct and different elements of due process.

The Nevada Supreme Court has provided some degree of guidance concerning malfeasance.

The judicial role in this type of proceeding recognizes there are two types of due process of law. Legislators are concerned with the passage of laws to ensure them to be understandable which is considered a fundamental element of due process. When the Nevada Supreme Court interprets a law, its opinion becomes grafted onto that statute. As importantly, part of our perception of law is derived from case law as well as from statute.

The Nevada Supreme Court has defined malfeasance in the context of proceedings involving the removal of elected officials from office pursuant to statute. In a malpractice action, the burden of proof is on the party who brings forth the action. I will address three of the five cases defined by the Nevada Supreme Court.

In 1940, D. M. Buckingham, the Clerk-Treasurer of Mineral County, Nevada, was accused of receiving undocumented funds. Concerning the Buckingham case, D.M. Buckingham v. Fifth Judicial District Court In and For Mineral County, *et al*., 60 Nev129, 102 P.2d 632 (Nev.1940), the Supreme Court ruled that malfeasance in the context of official conduct and removal from office proceedings means malpractice.

In 1950, Robert Jones, serving as District Attorney of Clark County, Nevada, accused the sheriff of Clark County of criminal misconduct. Mr. Jones did not initiate a formal criminal indictment against the sheriff but rather used the news media as the medium to distribute the information. In the proceeding Jones v. Eighth Judicial District Court, 67 Nev. 404, 219 P. 2d 1055 (Nev. 1950), the Nevada Supreme Court reiterated that, in this context, malfeasance means malpractice. Therefore, to remove Mr. Jones from office would be inappropriate.

Jack Schumacher, the Ormsby County Assessor in 1962, was criticized for inconsistent reassessment practices. A removal from office proceeding was prosecuted, and the Nevada Supreme Court, again, ruled that a malfeasance in office proceeding is a malpractice proceeding. Not one of the case-law examples resulted in the public officials' removal from office.

During the context of the malfeasance aspect of this proceeding, if it is dealt with appropriately as malpractice, the burden of proof lies with the Special Prosecutor. It is necessary to establish the standard of behavior in a relevant community. As an example, if a doctor were on trial for malpractice in Las Vegas, you would not hold that doctor accountable to the standard of care used by doctors in other medical communities. The specific condition of malfeasance you must define is to determine the relevant community.

On May 16, 2001, Jeannine Coward testified before the Assembly Committee on Government Affairs requesting passage of S.B. No. 228. Passage of the bill would change the classification of the executive assistant to the State Controller from a classified to an unclassified employee. The testimony of Ms. Coward indicated the purpose of the legislation was to bring the affiliation between the State Controller and the Deputy Controller in line with that of the other Constitutional Officers and their assistants. I submit to you that the relevant community is the correlation between those officers and their executive assistants. The relevant inquiry in a malpractice action would be to ascertain the scope of duties that other Constitutional Officers assign to their executive assistants, and that would establish the standard of the relevant community. Your understanding of the relevant community is essential in a malpractice/malfeasance case.

To appreciate additional framework, I read from Nevada Revised Statutes (NRS) 281.481 (7):

A public officer or employee, other than a member of the Legislature, shall not use governmental time, property, equipment or other facility to benefit his personal or financial interest. This subsection does not prohibit:

(a) A limited use of governmental property, equipment or other facility for personal purposes if:

(1) The public officer who is responsible for and has authority to authorize the use of such property, equipment or other facility has established a policy allowing the use or the use is necessary as a result of emergency circumstances;

(2) The use does not interfere with the performance of his public duties;

(3) The cost or value related to the use is nominal; and

(4) The use does not create the appearance of impropriety;

This statutory language focuses on the foundation of the relevant standard. The issues are what "limited use" is and what is "nominal cost." The answer must be what the "relevant community" considers it to be, not what you or I determine it to be. There is no way to arrive at a definition without analyzing how persons in similar situations interact with their executive assistants.

It is possible, for instance, that seven of you may decide malpractice occurred. That is not enough to impeach. Misdemeanor is a broadly defined term in the context of an impeachment proceeding. In examining the jurisprudence examples of other states and the federal system, impeachment and removal from office take place in situations of: bribery; failure to carry out the responsibilities of the elected office; submission of false or inflated expense reports; altering official records; filing false campaign report; perjury; willful concealment; retention of public monies for personal use; and unlawful termination of subordinates.

Even if every one of the Articles of Impeachment is proven, not one of the circumstances listed applies in this case.

It is possible that eight of you disagree and determine a misdemeanor has taken place, which does not constitute a two-thirds majority. I want to impress upon you that the potential danger is in the actual pleading. The Articles of Impeachment are stated in the alternative; it is a duplicitous pleading.

We are all aware we are involved in a historic precedence with this case. I consider this a heavy burden. I have tried 200-plus cases, and this is the first instance in my career that I have observed a jury of peers. I am grateful for my role, whatever the outcome, in the making of history.

No impeachment has ever taken place based on the facts such as those alleged in the Articles of Impeachment before you. The Nevada Supreme Court's role influenced this proceeding with its interpretation of malfeasance.

The Commission on Ethics did not find this case to be of the magnitude to impose the maximum fine; therefore, how can you even contemplate impeachment and removal from office? I submit to you that when the Commission has a valid impeachment case, you will be made aware by the amount of the fine imposed. I suggest you need to do something about this pleading because you are required to have a two-thirds majority. I propose three alternatives. You could force the Special Prosecutor to prove his case on the law and the evidence and insist on both of the alternative charges, malfeasance and misdemeanor. That requirement will bring forward the standard-of-care issue. It is within your power to elect with which of the two charges the Special Prosecutor proceeds, or instruct him to go forward with one or the other of the charges. Your third alternative is to dismiss the charges. You cannot meet the guidelines of due process under these Articles of Impeachment.

I propose you do not need to hear evidence to determine that public protection does not call for Controller Augustine to be impeached and removed from office. It is your sworn duty. I am not asking you to dismiss it. Yes, I will—I will ask you to dismiss this case. I want to be honest with you—you have options. It must be one of those three options in order to comply with due process. Thank you.

DANIEL J. GRECO (Special Prosecutor):

It is an honor and privilege to be here and to be here in the role of Special Prosecutor. We will be making history together in this unique proceeding. Mr. Gentile made comments I did not feel were directly relevant to the defense challenge of the Articles of Impeachment. Since he raised the matters, I will address them.

The trial will commence on Wednesday morning, will last approximately a week and a half to two weeks, possibly longer. During that trial you will hear evidence, not argument, but evidence—from witness after witness—that during the alleged timeframe, things were not rosy and wonderful or kind and pleasant as Mr. Gentile would have you believe. You will see, during that timeframe, it was an unpleasant working environment and several employees—not just one or two, but four—were directed to perform duties that involved and supported the Controller's campaign bid even though they did not want to. These employees did things out of fear for their jobs. In addition, you will hear that numerous other witnesses saw the employees being compelled to do things against their will.

Article 7, section 2, of the Nevada Constitution states, that state officers shall be liable for impeachment for misdemeanors or malfeasance in office. The Nevada Constitution does not define the phrase "misdemeanors or malfeasance in office." The Nevada Supreme Court has never had the opportunity to provide definition since this is the first instance where the Nevada Assembly has impeached a state-level officer. I would note the vast levels of the authority cited by the defense are not impeachment cases but rather judicial cases, primarily, all criminal in nature. Although the Nevada Supreme Court has not defined those terms, courts in other states have reviewed the constitutional provisions with terms similar to our statutory language. In the context of impeachment proceedings, those states have upheld that each house has the exclusive power to determine which acts constitute impeachable offenses when that particular house is exercising its function of the impeachment process. The bulk of the authorities that reference criminal cases, including removal of low-level county officials—which are not constitutional impeachment proceedings—have no relevance to this proceeding. Other state courts that have defined the terminology of state constitutions similar to the Constitution of the State of Nevada do have relevance to this proceeding.

For example, an impeachment proceeding of a state-level official occurred in Arizona in 1989. The Arizona Supreme Court heard the case involving Evan Meacham and the Arizona House of Representatives, (Evan Meacham v. Frank Gordon, 156 Ariz. 297, 751 P.2d 957 [Az. 1988]). Governor Meacham maintained the Arizona Senate erred in his conviction because the acts charged were not misdemeanors or malfeasance in office, as required by the Arizona Constitution. The statutes of Arizona are similar to Nevada laws.

The Arizona Supreme Court rejected Governor Meacham's claims on appeal and ruled that the Arizona Constitution leaves the determination to the Arizona Senate whether or not the acts were impeachable. The Arizona State Supreme Court ruled that the legislative bodies involved in the impeachment process had the sole discretion, authority and power to determine what constitutes malfeasance and misdemeanors; the Court does not. Further, by upholding the impeachment, the Arizona Supreme Court said it was the authority of the Senate to define the terms and whether or not the factual allegations constitute impeachable offenses. The majority of the defense authorities offered here are not germane to the issue before you.

The Nevada Supreme Court has never had cause to hear a case in which an individual has appealed the issue of proper procedure against a state-level official. The separation-of-powers doctrine dictates that impeachments are legislative and not judicial matters. However, much guidance has come from other state Supreme Courts that have heard impeachment cases.

In the 1957 Florida case, (Investigation of a Circuit Judge of the Eleventh Judicial Circuit of Florida, 93 So.2d 601 [FLa. 1957]), the court reviewed the issue of misdemeanor in office. Once again, a court clarified that impeachment and the definition of the terms are matters left to the sound discretion of the legislative body involved. The Florida court offered guidance to the definition of the term "misdemeanor in office as a ground of impeachment," stating that it carries a broader coverage than common-law misdemeanors as applied in criminal procedures. As applied to impeachment, misdemeanor in office may include any act involving moral turpitude which is contrary to justice, honesty, principles or good morals and if performed by virtue or authority of the office. Misdemeanor in office is synonymous with misconduct in office and is

broad enough to embrace any willful malfeasance, misfeasance or nonfeasance in office. It may not necessarily require corruption or criminal intent.

Mr. Gentile is urging you to adopt a malpractice standard for defining malfeasance. However, the cases he cites for that proposition are removal or criminal cases, not impeachment cases. I would respectfully submit those definitions have nothing to do with these proceedings. That is not for Mr. Gentile or me to decide; you must determine the definitions that apply. The only limitations imposed by case law are basic due-process restrictions, definitions and procedural mechanisms you establish and utilize during this proceeding. They cannot be arbitrary. I have extreme confidence you will not apply arbitrary rules or definitions during this proceeding.

As stated, my argument to the first section of Mr. Gentile's brief was that the case authorities he outlined were not relevant to this case. The second topic stated in his brief is the duplicitous-counts' arguments. The duplicitous-counts' theory is a doctrine in a judicial proceeding, specifically a criminal proceeding. Once again, it does not pertain to this hearing.

This body must decide what rules to impose and what procedural mechanisms to utilize. Assuming the duplicitous doctrine applied in this case, the NRS provides that the prosecutor, in a criminal case, may allege alternative theories in a single count. The Nevada Supreme Court supported the duplicitous doctrine in the 2004 case titled Crawford v. State. Additionally, the United States Supreme Court addressed the same issue in Shad v. Arizona. Both were felony murder cases, but I believe them to be instructive.

The state alleged alternative theories, that the defendant committed the acts by use of typical standard murder theory, (malice, forethought, premeditation, deliberation) or alternatively, the killing was committed during the course of a felony murder. In Nevada, if a person dies during the commission of enumerated felonies, the defendant is guilty of first-degree murder on a felony-murder theory, even if the murder was unintended. The felony-murder theory allows that the defendant could be found guilty even though evidence determined there was no intent to kill, or even cause harm. The state alleged the two alternative theories, yet it was unclear from the record whether the 12 jurors in the criminal case voted guilty to the first paragraph—willful, with malice of forethought, premeditated and deliberated—or did the jurors convict on the second theory—that it was a felony murder or unintended. Both cases, Crawford v. State and Shad v. Arizona, unequivocally held that it is not relevant and the state, pursuant to statute, can allege alternative theories. The alternative theories can require different facts to support a guilty verdict. The number of jurors who voted for which theory is not important and does not have relevance to the outcome.

In a criminal jury trial in Nevada, there is the requirement the verdict must be unanimous. In this proceeding, we need two-thirds of the Senate to sustain a guilty verdict as to any of the three Articles of Impeachment. My point being, even if this was a criminal, judicial case, and the duplicitous doctrine did apply, it is of no consequence. We are free to allege alternative theories in one count even if supported by different facts.

Another example, NRS 205.0832, the "comprehensive theft statute," there are several alternative ways that grand theft may be committed. Many of these alternatives are very different from one another; yet, the Supreme Court has held we may allege two or more theories in one complaint. Even if the duplicitous doctrine applied, it would not bar us from proceeding in the manner in which this case has been charged according to the three Articles of Impeachment, which were approved by the Assembly.

In closing, you, the Senate, determine the rules. This is not a court proceeding. The normal court rules, the case authorities, cited by the Defense have no application in this proceeding. The Senate, without doubt, will adopt certain rules as we proceed to fill in any void in the Senate Standing Rules you adopted. Previous appellate decisions, civil criminal cases have no application here. Thank you.

SENATOR AMODEI:

Before we proceed with questions from the Committee, Mr. Gentile, do you request rebuttal time at the opening stage?

MR. GENTILE:
The letter I received from the Legislative Counsel Bureau (LCB) suggested that if rebuttal were not taken at this stage, it would not be permitted at the trial stage. Is this the approach you will take?

SENATOR AMODEI:
That was an accurate statement. My purpose in asking if you wanted a rebuttal was to put your election on the record. Whatever you elect is fine with the Chair.

MR. GENTILE:
We will waive rebuttal.

SENATOR RAGGIO:
I have not had the benefit of reading the actual cases that have been cited; although, I have the summaries that were presented in the statement by Mr. Gentile. I am mindful of what the Special Prosecutor indicated in that the terms malfeasance or misdemeanor during an impeachment proceeding have a different meaning or connotation than in a judicial proceeding.

According to Mr. Gentile's analysis of the Buckingham Case, the court found the use of the word "malpractice" applicable since the contemplated acts were a commission rather than an act of omission. I question if there is a distinction in an impeachment procedure whether the acts charged are acts of commission or omission.

Although the three Articles of Impeachment do not refer to official duties, they are willful acts of a commission rather than an omission. Is there any distinction that should be made, or do we look at them in the sense it is a judicial proceeding and malpractice definition should not be applicable in this proceeding? I will direct my question to both the Special Prosecutor and the Controller's Counsel.

MR. GENTILE:
Senator Raggio, in the context of malpractice cases, there has been no distinction between omission and commission. I suggest that in the Buckingham Case, while the case would still be decided in terms that represent "malpractice," the meaning has become broader. For example, a doctor who fails to exercise reasonable diligence pursuant to the "community standard" can be just as guilty as though he did something affirmatively wrong. The focus should be whether the act or the omission of the act occurred within the framework of the official duties. It is still a malpractice.

MR. GRECO:
I believe, in its broadest sense, those terms, misdemeanor or malfeasance in office, simply refer to any misconduct committed during the course of, and relating to, employment in office hours. I do not believe acts of omission can be deleted from that definition. However, as you will see in this case, it may be a nonissue because virtually every act of misconduct committed by Controller Augustine is an act of commission not an act of omission. It may not come to have bearing in this case. In my mind, it includes both, but again, the Senate will be giving full definition to those terms.

SENATOR RAGGIO:
I do not have the section number with which to refer to, but the statute that makes it unlawful to use state property for personal or financial use defines "limited use." There is a need to determine whether the Articles of Impeachment are appropriate. We do not have the ability to determine whether, on that issue, the Articles of Impeachment are subject to objection.

I understand the statute does include language that some limited use of state property may not be an offense if used in accordance with an established policy. That seems to me to be a matter of the evidence not a matter for us to determine whether or not the Articles of Impeachment are appropriate at this time. I would like comment on that concern.

MR. GENTILE:
I agree. The point I tried to make earlier is that the determination of limited use is a question of fact and requires evidence from the community in which that type of conduct is applied.

Ms. Coward was right when she testified before the Assembly and was successful in her pursuit to have the position reclassified. It is necessary to examine the relationship between three specific officers: the Lieutenant Governor, the Attorney General and the Treasurer, and the association with their executive assistants. It is also necessary to look at the Controller's perception of the relationship in order to determine whether the conduct of "limited use" occurred.

MR. GRECO:

The best answer would come from the statutory language. Limited use of government property, equipment, time or the facility is appropriate under statute if four requirements are met. Those are:

1. The public officer responsible has the power to give authorization for use of the property, equipment, time or facility; has established a policy allowing the use of the equipment, time or facility; or the use is necessary as the result of emergency circumstances;
2. The use does not interfere with the performance with his public duties;
3. The cost or value related to the use is nominal; and
4. The use does not create the appearance of impropriety.

In this case, you will see the cost and value involved are anything but nominal. A conservative estimate was that one secretary spent more than 50 percent of her time doing Controller Augustine's bidding during the six months preceding the election which resulted in a massive cost to the taxpayers. Also, the allegations we will prove clearly create the perception of impropriety.

Yes, there are limited-use exceptions, but it has absolutely no application based on the facts of this case.

SENATOR NOLAN:

In respect to establishing a definition of malpractice, you emphasized the point of ascertaining a "standard of care" or we should consider a "standard of practice." The analysis you used to determine the relevant community is the relationship between other Constitutional Officers and their staffs.

To simplify my question, you have described a small pool of elected officials and their relationship with the staff as the relevant community. I would like clarification or comment on the context of this impeachment proceeding should our main consideration not be the public? Should we consider what the public would expect as the "standard of care" from those who are elected? Should we be addressing the public as the particular "community"?

MR. GENTILE:

Clearly, it is the public you are here to protect. When considering medical malpractice issues, a doctor is judged for behavior according to other doctors not according to the manner in which the public would behave. That is the standard in the relevant community in judging his behavior. When a doctor deviates from the standard of that relevant community, a decision is needed to determine if an injury occurred. There is a judgment that someone was harmed.

Where do we look to interpret limited use and nominal cost and determine if what took place in the Controller's Office was consistent with similarly situated staff under similar circumstances? When the executive assistant to the Controller was changed to an unclassified position, it was made consistent with the relationship and pay scale of the three other specific and named Constitutional Officers' assistants. They were the assistants to the Lt. Governor, the Attorney General and the Treasurer. I suggest to you, that statute was changed to make the executive assistant an unclassified position, and by definition, that establishes the relevant community. That is why that evidence would have to come forth for purposes of establishing a standard.

I do not disagree; we are here to determine if the public needs protection.

MR. GRECO:

This is not a medical-malpractice case. We are not here on a civil suit wherein a plaintiff is seeking millions of dollars for alleged malpractice. It is a legislative proceeding. The standard of care, that which what others who are similarly situated in a like community would or would not

do, has nothing to do with this impeachment process. You will hear this at length when the Defense attempts to show evidence that other elected officials may or may not have done similar things. I am confident that the scale of what others may have done and what occurred with the Controller is minimal. Although the evidence code does not apply in this proceeding, one rule you did adopt in the Senate Standing Rules is that the evidence must be relevant and germane. It is our position that any evidence of similarities done by others is not relevant and not germane to this proceeding.

To offer an analogy, we were involved in a Washoe County murder trial and another murder took place. The District Attorney's office decided not to prosecute or possibly plea-bargain that case. The defense attorney attempted to correlate the similar circumstances of the two separate cases. The Washoe County judges have soundly rejected that type of argument. This exact scenario occurred in a criminal proceeding whereby the defendant had a full constitutional panoply of rights which Controller Augustine does not have because this is not a criminal prosecution.

SENATOR CARE:

If a trial occurs, each one of us must ask the question: "Compared to what?" We have been free to examine and staff has analyzed case law in other jurisdictions, but what is this level to be compared to? The Articles of Impeachment speak of the Controller's "official powers." The language goes further to address abuse. What is the argument the Articles of Impeachment sufficiently lay out—that the abuse had risen to a certain level—and what if the Articles are, in fact, determined sufficient.

MR. GRECO:

I have pondered that same question at length. That is a decision the Senate will make. I believe the answer to the question "compared to what" would come during the deliberations of the penalty phase. If you sustain one or more of the allegations on the guilt-phase issue, a penalty phase will follow and, according to the Senate Standing Rules, will be limited to argument only. Your role in the guilt phase, just like a jury's role, is to determine whether the defendant committed these acts. In a criminal case, we would have to prove beyond a reasonable doubt. In this proceeding, we must only meet the constitutional language alluded to in earlier meetings with the LCB staff and Assemblyman Perkins.

Your role during the guilt phase is simply to determine, based on the constitutional language, whether the Controller committed one or more of these acts. The issue you raised might be contemplated in the penalty phase. The problem is we are making history. I do not have a direct answer for you. I suppose you must search your souls, use common sense and everyday experiences—much as a jury is instructed during a criminal trial. But, that differs greatly from the Defense calling in a multitude of witnesses to testify to de minimis or similar activities by other elected state officials. It is not relevant or germane. It would not be allowed in a criminal case where a defendant has a full panoply of constitutional rights, and since it cannot be allowed in those cases, it should not be allowed in this case. This is equivalent in a criminal jury trial to interrupting a state's presentation of evidence by bringing in a bevy of witnesses to talk about other robbery defendants who may have robbed them so the jury can make a decision as to whether to find the current robbery defendant guilty. That is not allowed in a criminal case because it is not relevant.

MR. GENTILE:

The standard the Constitution sets out is "the law and the evidence." It does not mean some law; it does not mean the law you want to choose. The law comes from this body by way of statues such as NRS 281.481(7), which is why we are here, but it also comes from the courts.

My concern is notice. Notice for every one of you and every Constitutional Officer. Notice as to how to behave which is why malpractice aptly fits here. That is why the Supreme Court has declared malfeasance to mean malpractice, so I agree with you. You must ask, "Compared to what?" All I have heard from Mr. Greco is about murder and robbery cases. They are not close. That question must come in at the level of making a determination of liability, not punishment. Under a malpractice standard, if malfeasance means malpractice, and it does to the Supreme Court, it is an element of substantive due-process notice. The Supreme Court has said every

person in this State is held to that notice. Controller Augustine should not have the rug pulled out from under her if the Supreme Court has said that and has said if for over 70 years. It is compared to the malfeasance aspect that the standard has to be a relevant community. When you cast the legislation that changed the classification of this job from classified to unclassified, you did it to bring it in line with those other three offices.

SENATOR COFFIN:
May I have an update on our calendar? Am I correct in understanding that we are dedicating today to this subject and tomorrow there is nothing on our calendar? Is there a reason for that?

SENATOR AMODEI:
It is my understanding that today we are hearing the presentations regarding the Objection to the Articles of Impeachment. There will be opportunity for the members of the Committee to question the presenters, and then, time will be allowed for the members to consider what has been presented. We will reconvene in the Senate Chamber and vote whether to sustain or not sustain the Objection to the Articles of Impeachment.
Should today's questioning continue into the evening, we would meet as the Committee of the Whole for as long as it takes to finish.

SENATOR COFFIN:
Thank you. I was wondering the reasoning behind the allotment of the extra day for questions. My concern was the possibility of a contentious discussion. I do have questions, and now, I will not be concerned that there may not be sufficient time for response. I do not want to deprive anyone of the chance to answer.
Mr. Greco, you were introduced to us indirectly a few weeks ago when your name was submitted, and we voted to accept you as our Special Prosecutor. I did not have the opportunity to meet you at that time. I am trying to recall if you were present for the impeachment proceedings in the Assembly.

MR. GRECO:
I was not. My first involvement came when the Senate appointed me, and by that time, the Assembly proceeding had been completed.

SENATOR COFFIN:
Please help me to understand the legal terminology. This is a problem I may encounter throughout these proceedings. I do hope that the other defense does not do this as much as in the 17-page justification and dispute of the Articles of Impeachment.
What is the term for a product in law that may have come from a flawed process?

MR. GRECO:
There could be a number of terms, depending on the circumstances. Could you be more specific?

SENATOR COFFIN:
Since I was unfamiliar with your background, I investigated your resume on the Internet and learned you are considered to be a skilled prosecutor.
At times, during a criminal case there could be an error on the part of law enforcement; however, the case moves forward. What term would be used when an element in the process of a criminal case has not been done correctly?

MR. GRECO:
For instance, if a residence is entered improperly, the defense may allege that law enforcement erred and file a Motion to Suppress. If the Court agrees there was no valid exception to the Constitution to enter the premises, the Court may rule to suppress the evidence. Therefore, one such term would be "suppress," or possibly "misconduct," on the part of law enforcement. There is a wide range of terms that could be associated depending on and determined by initial circumstances of the case.

SENATOR COFFIN:

I witnessed the entire Assembly proceeding and got the impression the Articles of Impeachment were written prior to the evidence being gathered. Do you have a differing opinion?

MR. GRECO:

If you are asking me if I know for certain, I do not, but I am certain that is the case. Much like the Grand Jury's indictment is typed ahead of time by counsel for the state. I am fairly confident the Office of the Attorney General had some involvement in drafting the Articles of Impeachment. Again, I did not come on board until the Senate appointment.

You mentioned witnessing the Assembly proceeding. The Senate body must start anew and has a solemn duty to consider only the evidence presented over the next two weeks. You must forget any evidence or facts you heard during the Assembly proceedings. In a regular trial, the jury must disregard any information they may have seen or heard in the media prior to the commencement of the proceedings.

SENATOR COFFIN:

I regret we seem to be bound by time limits. I would like to progress as far as possible today so we may feel better about the circumstances we are undertaking.

Our rules appear to be different than the rules used in the Assembly. I question if the fruit of its labor has not spoiled and are worthy of discussion, even though Defense has objected, by use of the term duplicitous. As laymen, we are unfamiliar with legal terms and must use common sense.

Looking at the Assembly process, I was amazed at the methods used and the construction of the Articles of Impeachment because the witnesses were sitting in a group and allowed to converse among themselves. I surmised they were discussing the case; in addition, the witnesses were allowed to observe the testimony of each other.

It was my assumption, the Assembly operated under the pretense they did not need the testimony of the witnesses, and the Articles of Impeachment had been prepared in advance of the testimony. If that is the case, why should we go through the guilt phase, then the trial phase and last the penalty phase? Why all these different phases if guilt has not already been predetermined by the Assembly?

MR. GRECO:

Senator Coffin, the Controller's guilt has not been determined. The role of the Assembly was to determine whether charges were warranted then, simply, to charge her. It is not identical, but the closest parallel would be the grand jury process.

To reiterate, if you are aware of facts from the Assembly hearing, you must forget them. We are here to determine guilt.

SENATOR COFFIN:

Thank you, that does help me. I am confident you will have a clear mind. Not hearing the Assembly testimony, you will not already have reached a decision, although your job is to prosecute. You have kept yourself from that. I assume I poisoned myself by listening to the testimony. It is my understanding the testimony here will not be that different, and maybe, I will gain clarity.

I am troubled by discussions regarding limiting communities of interest during this process. The malpractice analogy was used by the Defense to speak on the "community of executive assistants." Apparently, he deems there to be another community who parallel the Controller's. For 18 of the 22 years I have served in the Nevada Legislature, I have served on "money committees." They were Ways and Means for four years and Finance for the rest of the time. During that time, I have approved and help design many budgets of the state officers; we have approved positions delegating duties we knew were to represent the Controller in various functions. I would not be surprised if the job descriptions of some of those positions contained phrases we are all familiar with, "may have to work 80 hours, may have to work 10 depending on the boss." We have always known, in the money committees, that we have approved people who have had duties other than the official office duties. We have not been generous with those

people, but past and present Governors, Secretaries of State and Treasurers have all had people who have been given that duty. We know it. Since we know that, are we to be shocked that someone spent time on something other than what the job description says?

MR. GRECO:

No, I do not believe there should be shock. I do regard the incidents that occurred in the Office of the Controller from late 2001 until the second week of November, 2002, to be of such magnitude it would be clear why the State is seeking to remove Controller Augustine from office.

MR. GENTILE:

I would like to respond to Mr. Greco's analogy of the Assembly hearing to a grand jury proceeding. It is not even close. In the 1970s, I served on the American Bar Association, Criminal Justice Section Grand Jury Committee. Over a four-year period, we created substantial revisions to the practices applied during grand jury procedures. Senator Raggio helped implement many of those revisions as protection for persons being investigated by a Nevada grand jury, and Nevada is only one of two states to do so.

There are several protections provided under Nevada's grand-jury processes that were not adhered to during the Assembly hearing. For example, 1) hearsay is not admissible in a grand jury hearing; yet, hearsay was rampant during the Assembly proceeding. (2) Witnesses are not allowed to be present during the testimony of the others. (3) Even in a federal grand jury, witnesses are not allowed to read from prepared text. During the Assembly proceedings, every witness read testimony prepared by the Office of the Attorney General.

To call the proceedings analogous to Nevada's grand-jury process does a grave disservice to the way grand juries are operated in Nevada and to the work that was done in this body to see to it that grand juries operated that way. The only two states that afford specific protections to persons under grand-jury investigation are Nevada and New York.

SENATOR BEERS:

My question is procedural, and I assume directed to the Chair. We have had Mr. Gentile and Mr. Greco discuss their conflicting definitions of malfeasance and malpractice rendered by the Supreme Court not in impeachment cases but in removal from office cases. I am not certain as to what that distinction is. The prosecution has stated, "No, the definitions are up to the Senate." Why is there a divergence in views to fundamental legal principles? How are we to resolve those differences? Will each member resolve these issues for him or herself? Will we vote as a committee? Will we rely on the Legislative Counsel to clear up the disagreements?

SENATOR AMODEI:

For procedural matters, the Legislative Counsel is available for your questions. Determining your vote, for which you are being paid in the vicinity of $100 per day, is ultimately your decision after listening to the arguments of both sides. At this phase of the trial, read what has been submitted and make your own determination according to law and evidence.

I will not suggest how each member should vote on the substance of any matter. Should I lapse into or transgress to a point where it may appear I am suggesting how you should vote, please feel free to stop me.

SENATOR BEERS:

There are some fundamental crossroads of legal principal where we have conflicting paths that may considerably influence the decision I would make. How am I to determine if there is legal justification whether or not a Supreme Court case applies? The same scenario applies to the duplicity issue where the prosecutor tells us that duplicity is just fine. I assume there is authority by which to base or to determine which of the choices would be the prevailing legal thought. A judge would so instruct the jury as to legal principle that would be applicable.

MR. GRECO:

During an initial meeting, I raised the issue as to who will provide instruction to the Committee regarding questions of law. As I understand it, there is no judge. You are all equal as

committee members. To resolve such dilemmas as raised by Senator Beers, you may look to either the Chair or Legislative Counsel for guidance.

The position raised by the Defense is that the theories, defenses and phrases apply in criminal cases but not in a legislative forum. Therefore, it is our opinion that the holdings of those judicial cases where the defendant has considerably more rights than the Controller do not apply.

At some point, I imagine you will be consulting with Legislative Counsel for further guidance, especially in terms of offering further definitions to the terms of misdemeanor or malfeasance, or as I would suggest, leave it to each of you.

I am not fully familiar with your procedures so I am not in a position to give a complete answer.

MR. GENTILE:

The Constitution says you must decide this case on "law and evidence." The law as declared by the Nevada Supreme Court may not bind you, but that does not mean it is not a good idea. The members of the Court are also elected officials and have pondered this issue for 70-plus years. Because this is the first impeachment trial, you must resolve and make a determination to set the threshold that will last forever.

Every person in Nevada is responsible for knowing the law. One cannot claim not to know the law. It is not a valid defense. Therefore, you are bound by the Nevada Constitution to decide this case by the "law and the evidence."

The law of the State of Nevada, as declared by the Supreme Court in the framework of a removal case, states that malfeasance is malpractice. Theoretically, under the separation of powers theory, you are free to reject that concept. That does not mean it is smart to do it. It does not mean it is fair to those people who have labored under the belief for so many years that malfeasance means malpractice in a removal case. The law of the State of Nevada as declared by the Supreme Court as well as passed by its lawmakers in the Legislature is what the Constitution requires. On the malfeasance aspect as grounds for impeachment, you must set the bar, now, so that in the future we will not be operating in the dark.

SENATOR TITUS:

Mr. Greco, in four instances you have stated this proceeding would take two weeks. I would remind you we are here at taxpayer's expense, and we want to take as long as necessary to provide due process, but we also want to do this as expeditiously as possible.

You differentiated between this and a criminal procedure. You stated in a criminal procedure you must prove beyond a shadow of a doubt and in this case you do not need to. In another statement, you said the Controller would have dramatically more rights in a criminal procedure, and in another, you used the term "panoply of rights." Would you explain the reasoning used by the Attorney General to implement this legislative procedure as opposed to pursuing criminal charges when the opportunity was present? Was it because it would be easier to proceed here because the Controller would not have those kinds of defenses? If that is not the reason he chose it, then explain why he did chose to bring it here instead of pursuing a criminal defense.

MR. GRECO:

Senator, I became involved with this case approximately two weeks ago. I have no knowledge why the Attorney General's Office elected to proceed with a Commission on Ethics procedure.

SENATOR TITUS:

Aren't you assisted by the Attorney General?

MR. GRECO:

Given the conflicts raised by Mr. Gentile, I made the decision that it was best to limit contact with the Attorney General's Office, and it has been limited to specific research subjects only. I felt it was safe to avoid detailed or in-depth discussions regarding the case.

Senator Titus, I can speculate if you like. As you have heard from Mr. Gentile, Controller Augustine admitted three ethics violations. There were lengthy negotiations that preceded her plea. There were several drafts of the complaint reviewed by the Office of the Attorney General, the Counsel for the Commission on Ethics and Mr. Gentile.

I am presuming there were negotiations concerning criminal charges, and therefore, eliminating the risk Controller Augustine would spend time in jail. Perhaps, Mr. Gentile will address this matter. The best people to pose this question to would be Gerald Gardner, Office of the Attorney General and Mr. Gentile.

SENATOR RAGGIO:

Point of Order, the Chair has been most liberal to allow this type of discussion. The issue before us is a motion to dismiss the Articles of Impeachment based on the language contained in the Articles of Impeachment. We are drifting into unnecessary areas. If the Articles of Impeachment are sustained, then, these matters will be brought forth and, then, the application of any legal principles to the issue of guilt or innocence.

The matter before us now is to overrule or sustain the motion as to the adequacy of the Articles of Impeachment; it is not the procedures involved during the Assembly process or what standards, if any, may apply to the evidence.

SENATOR CARE:

I do not have the trial experience of the counsel here, but it is a fascinating process to watch a jury come to the realization that they have a serious duty.

SENATOR TOWNSEND:

This question is for Legislative Counsel regarding the issue brought forth by Senator Raggio. In the Articles of Impeachment and the matter regarding the insufficiencies therein, does this Committee have the jurisdiction to determine whether malfeasance/malpractice is the standard we will use as the determining factor, or do we only have the obligation to accept or reject the standard as it is specifically stated? Can we as a group, if we decide to proceed, establish one or the other?

BRENDA J. ERDOES (Legislative Counsel):

There are no absolutes in terms of what the procedure is. You are not required to do anything other than sustain or not sustain the sufficiency of the Articles of Impeachment. However, you are at liberty, as a body, to make additional rulings or decisions.

SENATOR NOLAN:

If we define the allegations, at hand, as malpractice, is it possible we could encounter a quagmire or dilemma with various definitions outlined in the NRS? Is it possible for you to provide the current definition of the term "malpractice"?

MRS. ERDOES:

I can provide you additional definitions available for the term malpractice. I am not sure how to address the concern of creating a quagmire; I have not yet been able to predict those situations for you. In my opinion, the standard ultimately comes down to each of you doing what is required by the Nevada Constitution. I do not believe there is any binding definition of malpractice.

SENATOR COFFIN:

I have a question on the effect of the motion. Is the effect of the motion to say that we do not agree with the objections raised?

SENATOR AMODEI:

That will take place on the Senate Floor after you have reviewed the documents and reflect on the presentations of the day. There will be an opportunity for discussion and debate at that time.

On the motion of Senator Raggio, the Committee did rise, return and report to the Senate Chamber.

SENATE IN SESSION

At 2:38 p.m.

President Hunt presiding.

Quorum present.

REPORTS OF COMMITTEE

Madam President:

Your Committee of the Whole to which was referred the Objection to the Sufficiency of the Articles of Impeachment begs leave to report back that it has completed consideration of the Objection.

MARK AMODEI, *Chairman*

SPECIAL ORDERS OF THE DAY

Roll call on the Objection to the Sufficiency of the Articles of Impeachment

SUSTAINED—1.

NOT SUSTAINED—Amodei, Beers, Care, Carlton, Cegavske, Hardy, Heck, Horsford, Lee, Mathews, McGinness, Nolan, Raggio, Rhoads, Schneider, Tiffany, Titus, Townsend, Washington, Wiener—20.

The vote having failed to receive a majority, Madam President declared the Objection to the Sufficiency of the Articles of Impeachment not sustained.

Madam President directed Controller Augustine to enter a plea forthwith to the Articles of Impeachment.

Controller Augustine pleaded not guilty.

Senator Raggio moved, pursuant to Nevada Revised Statute 283.210(2), that the Senate proceed to try the impeachment of Controller Kathy Augustine as a Committee of the Whole on Wednesday, December 1, 2004, at 8:30 a.m. in Room 4100 of the Legislative Building.

Motion carried.

Madam President directed Controller Augustine or her counsel to appear before the Senate sitting as a Committee of the Whole on Wednesday, December 1, 2004, at 8:30 a.m. in Room 4100 of the Legislative Building.

REMARKS FROM THE FLOOR

Senator Raggio requested the following legal opinion be entered into the Journal.

November 29, 2004

SENATOR TERRY CARE
Senate Chambers

Dear SENATOR CARE:

On the floor of the Senate on November 12, 2004, you asked this office to prepare a legal opinion concerning the appropriate standard of proof for an impeachment trial conducted in the Senate pursuant to Sections 1 and 2 of Article 7 of the Nevada Constitution. Specifically, you asked this office whether the Senate is constitutionally required to adopt a specific standard of proof for an impeachment trial, such as proof by a preponderance of the evidence, proof by clear and convincing evidence, proof beyond a reasonable doubt or some other standard of proof. In response to your question, we have provided a brief answer summarizing our legal opinion followed by a detailed and comprehensive discussion of the relevant law.

BRIEF ANSWER

After reviewing the decisions of the United States Supreme Court concerning the appropriate standard of proof under the Due Process Clause, and after considering case law, legal treatises and other legal sources concerning impeachment proceedings, there is no reasonable basis to conclude that the Senate is required, as a matter of constitutional due process, to adopt a specific standard of proof for an impeachment trial. Consequently, the plain language of Article 7 of the Nevada Constitution establishes the sole constitutional standard that each Senator must follow during an impeachment trial. Under that constitutional standard, each Senator must "do justice according to Law and Evidence." If the Framers of the Nevada Constitution had intended for the Senate to follow a specific standard of proof in addition to the constitutional standard of doing "justice according to Law and Evidence," the Framers could have simply expressed that specific standard of proof in the Constitution. They did not. Thus, in the absence of a specific standard of proof expressly set forth in the plain language of the Constitution, it is the opinion of this office that the Senate is not constitutionally required to adopt a specific standard of proof for an impeachment trial. Indeed, at the federal level, the United States Senate typically does not adopt a specific standard of proof for an impeachment trial. Instead, the general practice in the United States Senate is for each individual Senator to weigh the evidence under whatever standard of proof that the Senator deems appropriate.

DISCUSSION

In discussing your question in full, we first must consider the extraordinary, unique and special nature of impeachment proceedings and the constitutional power of the Senate to adopt rules, practices and procedures governing those proceedings. Second, we must consider case law, legal treatises and other legal sources to determine whether there is a constitutionally required standard of proof for an impeachment trial in the Senate. Finally, we must consider whether a decision by the Senate regarding the standard of proof would be subject to judicial review in a state or federal court.

I. Rules, Practices and Procedures Governing Impeachment Proceedings

Impeachment proceedings are *sui generis*; that is, impeachment proceedings are extraordinary, unique and special proceedings of their own kind or class, and such proceedings do not have a direct or close comparison in the civil or criminal law. See Hastings v. United States Senate, 716 F. Supp. 38, 41 (D.D.C. 1989), aff'd mem., 887 F.2d 332 (D.C. Cir. 1989); Mecham v. Gordon, 751 P.2d 957, 960-63 (Ariz. 1988). Thus, impeachment proceedings are not, by their nature, traditional civil or criminal proceedings. Instead, impeachment proceedings are "fundamentally political." Hastings, 716 F. Supp. at 41; Mecham, 751 P.2d at 962-63; Kinsella v. Jaekle, 475 A.2d 243, 252 (Conn. 1984), modified, Office of Governor v. Select Comm. of Inquiry, 271 Conn. 540 (2004); People ex rel. Robin v. Hayes, 143 N.Y.S. 325, 328 (N.Y. Sup. Ct. 1913), aff'd, 149 N.Y.S. 250 (N.Y. App. Div. 1914); Ritter v. United States, 84 Ct. Cl. 293, 299 (1936), cert. denied, 300 U.S. 668, 57 S. Ct. 513 (1937). As explained by acclaimed constitutional scholar Joseph Story, "an impeachment is a proceeding purely of a political nature. It is not so much designed to punish an offender as to secure the state against gross official misdemeanors." 1 Joseph Story, Commentaries on the Constitution of the United States § 803 (5th ed. 1905); see also id. at §§ 745, 749, 764, 785 & 797.

Under the Nevada Constitution, the Senate has the sole power to try impeachments. Nev. Const. art. 7, § 1. When the Senate is conducting an impeachment trial, "the Senators shall be upon Oath or Affirmation, to do justice according to Law and Evidence," and "[n]o person shall be convicted without the concurrence of two thirds of the Senators elected." Id. The Nevada Constitution does not contain any other specific provisions detailing the rules, practices and procedures which the Senate must follow during an impeachment trial, and the Nevada Supreme Court has not addressed this issue.

Under the Nevada Constitution, "[e]ach House shall … determine the rules of its proceedings." Nev. Const. art. 4, § 6. Based on similar constitutional provisions in the Federal Constitution and other state constitutions, courts have held that each House has great power and latitude to adopt its own rules, practices and procedures governing impeachment proceedings and that, absent a manifest and egregious constitutional violation, courts will not engage in judicial review of those rules, practices and procedures. See, e.g., Mecham v. Gordon, 751 P.2d 957, 960-63 (Ariz. 1988); Kinsella v. Jaekle, 475 A.2d 243, 253-57 (Conn. 1984); modified,

Office of Governor v. Select Comm. of Inquiry, 271 Conn. 540 (2004); In re Jud. Conduct Comm., 751 A.2d 514, 516-17 (N.H. 2000); Larsen v. Senate of Pa., 646 A.2d 694, 699-705 (Pa. Commw. Ct. 1994); see also Hastings v. United States Senate, 716 F. Supp. 38, 41 (D.D.C. 1989), aff'd mem., 887 F.2d 332 (D.C. Cir. 1989); In re Grand Jury Proceedings, 669 F. Supp. 1072, 1075-78 (S.D. Fla. 1987).

Given the weight of the foregoing authority, we believe the Senate enjoys great power and latitude to adopt its own rules, practices and procedures governing an impeachment trial. See 1 Joseph Story, Commentaries on the Constitution of the United States § 765 (5th ed. 1905). Moreover, because an impeachment trial is so unique and is fundamentally political, there tends to be little agreement among courts and commentators concerning the appropriate rules, practices and procedures for conducting an impeachment trial. The practical effect is that there is no general consensus of legal opinion to guide the impeachment process. Instead, the only requirement imposed on the Senate is that its rules, practices and procedures must provide a modicum of procedural due process so that the impeachment trial comports with the concepts of substantial justice and fundamental fairness.

II. Standard of Proof for an Impeachment Trial

The Nevada Constitution and the Nevada Revised Statutes do not prescribe a specific standard of proof that is appropriate for an impeachment trial in the Senate. See Nev. Const. art. 7, §§ 1 & 2; NRS 283.140 to 283.290, inclusive. To date, the Nevada Supreme Court has not addressed this issue. In the absence of any controlling law in Nevada, we must consider case law from other jurisdictions, legal treatises and other legal sources for guidance in this area of the law. We begin by examining the standard of proof under the Due Process Clause.

A. Standard of Proof under the Due Process Clause

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides that a state may not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Under the Due Process Clause, each state must guarantee a minimum level of procedural due process during any proceeding in which a person is threatened with a significant deprivation of a constitutionally protected liberty or property interest. See Board of Regents v. Roth, 408 U.S. 564, 569-70, 92 S. Ct. 2701, 2705 (1972). Procedural due process is designed to promote fundamental fairness in the proceedings and to minimize the risk of an erroneous decision. See Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976). Procedural due process, however, "is not a rigid concept." Morrisey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600 (1972). Instead, procedural due process "is flexible and calls for such procedural protections as the particular situation demands." Id.; Burleigh v. State Bar of Nev., 98 Nev. 140, 145 (1982).

The purpose of a standard of proof is to instruct the trier of fact concerning the degree of confidence he must have in his factual conclusions. See Addington v. Texas, 441 U.S. 418, 423-25, 99 S. Ct. 1804, 1808-09 (1979). In a typical case, as the standard of proof increases, the risk of an erroneous decision decreases because the trier of fact must have greater confidence in his factual conclusions. Id. Thus, like other components of procedural due process, the standard of proof is designed to promote fundamental fairness in the proceedings by minimizing the risk of an erroneous decision. See Santosky v. Kramer, 455 U.S. 745, 755-57, 102 S. Ct. 1388, 1395-96 (1982).

Even though the standard of proof is an important procedural protection, the Due Process Clause does not require every proceeding to have the same standard of proof. Rather, the standard of proof required for a particular proceeding depends on the nature of the interests at stake and a determination of which party should bear the greater risk of an erroneous decision. See Addington v. Texas, 441 U.S. 418, 423-25, 99 S. Ct. 1804, 1808-09 (1979). As explained by the United States Supreme Court, "the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants." Santosky v. Kramer, 455 U.S. 745, 755, 102 S. Ct. 1388, 1395 (1982).

In judicial proceedings, there are generally three standards of proof used by the courts: proof by a preponderance of the evidence; proof by clear and convincing evidence; and proof beyond a reasonable doubt. See Addington v. Texas, 441 U.S. 418, 423-25, 99 S. Ct. 1804, 1808-09

(1979). Each standard of proof attempts to allocate the risk of error between the parties based on the importance of the interests at stake. Id.

At the upper end of the spectrum is proof beyond a reasonable doubt, which is the standard of proof used to determine whether a person is guilty of violating the criminal law. See In re Winship, 397 U.S. 358, 363-64, 90 S. Ct. 1068, 1072-73 (1970). The reasonable-doubt standard impresses upon the trier of fact the need to reach a subjective state of near certitude concerning the facts in issue. Id. By requiring the trier of fact to have such a high degree of confidence in his decision, the reasonable-doubt standard imposes almost the entire risk of error upon the prosecution. Id. This principle is best reflected in the legal maxim that "it is better for ten guilty people to be set free than for one innocent man to be unjustly imprisoned." Furman v. Georgia, 408 U.S. 238, 367 n.158, 92 S. Ct. 2726, 2792 n.158 (1972); Schlup v. Delo, 513 U.S. 298, 324-25, 115 S. Ct. 851, 866 (1995).

As a matter of constitutional due process, the United States Supreme Court has required the use of the reasonable-doubt standard only in criminal proceedings and in juvenile delinquency proceedings to determine whether the accused has violated the criminal law. See In re Winship, 397 U.S. 358, 363-68, 90 S. Ct. 1068, 1072-75 (1970). In such proceedings, the accused may not be found guilty of a criminal violation unless there is proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. Id. The reasonable-doubt standard is constitutionally required in such proceedings because the fundamental right to personal freedom and liberty is at stake. Id.

At the lower end of the spectrum is proof by a preponderance of the evidence, which is the standard of proof used for most issues arising in civil cases. See Addington v. Texas, 441 U.S. 418, 423-25, 99 S. Ct. 1804, 1808-09 (1979). Under the preponderance-of-the-evidence standard, the parties "share the risk of error in roughly equal fashion." Id. at 423, 99 S. Ct. at 1808. The preponderance-of-the-evidence standard is appropriate when there is a rough equality of interests between the parties, and neither party has a significant liberty interest at stake which requires imposition of a higher standard of proof. See Rivera v. Minnich, 483 U.S. 574, 577-82, 107 S. Ct. 3001, 3003-06 (1987).

In Nevada, a preponderance of the evidence has been defined as evidence which leads the trier of fact "to find that the existence of the contested fact is more probable than its nonexistence." Brown v. State, 107 Nev. 164, 166 (1991) (quoting E. Cleary, McCormick on Evidence § 339 (3d ed. 1984)). The preponderance-of-the-evidence standard asks the trier of fact to determine whether the plaintiff has presented the greater weight of the evidence. See McClanahan v. Raley's Inc., 117 Nev. 921, 925-26 (2001). Simply stated: "If the evidence of the plaintiff is more probable than that of the defendant, it certainly outweighs it, and if it outweighs it, the preponderance is with the plaintiff." Devencenzi v. Cassinelli, 28 Nev. 222, 234 (1905) (quoting Strand v. Chicago & W. M. Ry. Co., 34 N.W. 712, 715 (Mich. 1887)). Absent a constitutional requirement for a greater degree of certainty or a clear legislative intent to impose a higher standard of proof, a preponderance of the evidence is all that is needed in Nevada to resolve a civil matter in a judicial proceeding. See Mack v. Ashlock, 112 Nev. 1062, 1066 (1996); August H. v. State, 105 Nev. 441, 445 (1989).

In the middle of the spectrum is proof by clear and convincing evidence. See Santosky v. Kramer, 455 U.S. 745, 755-57, 102 S. Ct. 1388, 1395-96 (1982). Under this intermediate standard, the party who bears the burden of proof must also bear a somewhat greater risk of an erroneous decision. Id. The clear-and-convincing-evidence standard is used to protect particularly important individual interests in certain proceedings. Id.

As a matter of constitutional due process, the United States Supreme Court has required the use of the clear-and-convincing-evidence standard only in a limited number of proceedings in which an individual is threatened with a significant deprivation of a liberty interest. Id. Those proceedings have involved the involuntary civil commitment of a person to a state mental hospital for an indefinite period; the permanent termination of parental rights; the deportation of a resident alien; and the loss of American citizenship through denaturalization. See Addington v. Texas, 441 U.S. 418, 99 S. Ct. 1804 (1979); Santosky v. Kramer, 455 U.S. 745, 102 S. Ct. 1388 (1982); Woodby v. INS, 385 U.S. 276, 87 S. Ct. 483 (1966); Chaunt v. United States, 364 U.S. 350, 81 S. Ct. 147 (1960). The Supreme Court has been reluctant to constitutionally require the

use of clear and convincing evidence in other proceedings. See Rivera v. Minnich, 483 U.S. 574, 577-82, 107 S. Ct. 3001, 3003-06 (1987).

In Nevada, clear and convincing evidence has been defined as "evidence which is beyond a mere preponderance of the evidence." Albert H. Wohlers & Co. v. Bartgis, 114 Nev. 1249, 1260 n.4 (1998). Whereas the preponderance-of-the-evidence standard requires the plaintiff to present evidence which makes each factual element more probable than not, the clear-and-convincing-evidence standard requires the plaintiff to present evidence which establishes each factual element to be highly probable or evidence which is so clear as to leave no substantial doubt. See In re Drakulich, 111 Nev. 1556, 1567 (1995).

Even though there are only a limited number of proceedings where clear and convincing evidence is constitutionally required, both the Nevada Supreme Court and the Nevada Legislature have established, as a matter of state law, clear and convincing evidence as the standard of proof for a number of legal issues. For example, as a matter of state law, clear and convincing evidence is required to prove common-law fraud; punitive damages; transmutation of separate property to community property; forfeiture of water rights due to nonuse; creation of a prescriptive easement; novation of a contract; and imposition of a constructive trust. See, e.g., Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110-11 (1992); Evans v. Dean Witter Reynolds, Inc., 116 Nev. 598, 612 (2000); Sprenger v. Sprenger, 110 Nev. 855, 858 (1994); Town of Eureka v. State Eng'r, 108 Nev. 163, 169 (1992); Jordan v. Bailey, 113 Nev. 1038, 1044 (1997); United Fire Ins. Co. v. McClelland, 105 Nev. 504, 509 (1989); Randono v. Turk, 86 Nev. 123, 128 (1970). Thus, even when the clear-and-convincing-evidence standard is not constitutionally required, its use may be appropriate based on considerations of public policy.

With this legal background in mind, we must consider whether the Due Process Clause requires the Senate to use a higher standard of proof, such as proof beyond a reasonable doubt or proof by clear and convincing evidence, as its standard of proof for an impeachment trial.

As discussed previously, the United States Supreme Court has required the use of the reasonable-doubt standard only in criminal proceedings and in juvenile delinquency proceedings because the judgment of the court in such proceedings may extend to institutionalization or incarceration of the accused and a concomitant loss of personal freedom and liberty. See In re Winship, 397 U.S. 358, 363-68, 90 S. Ct. 1068, 1072-75 (1970). Given the severe consequences that may result from a finding that the accused violated the criminal law, the Due Process Clause demands the greatest level of certainty in the standard of proof before the accused may be deprived of his personal freedom and liberty.

In stark contrast to the severe consequences that may result from a criminal conviction or juvenile delinquency adjudication, the consequences that may result from an impeachment conviction have been expressly limited by the State Constitution and may not "extend further than removal from Office and disqualification to hold any Office of honor, profit, or trust under this State." Nev. Const. art. 7, § 2. At one time in British parliamentary history, the severe consequences that could result from an impeachment conviction included capital punishment, perpetual banishment, forfeiture of goods and lands, fine and ransom, and imprisonment, as well as removal from office and disqualification to hold office in the future. See 1 Joseph Story, Commentaries on the Constitution of the United States § 784 (5th ed. 1905). When the impeachment process was incorporated into the American constitutional experience, the constitutional drafters purposefully eliminated any criminal punishments from the possible consequences of an impeachment conviction so that the impeachment process was no longer penal in nature. See id. at §§ 781-86. Thus, at its core, "[t]he primary purpose of an impeachment is to protect the state, not to punish the offender." Ferguson v. Maddox, 263 S.W. 888, 892 (Tex. 1924); see also Mecham v. Gordon, 751 P.2d 957, 963-64 (Ariz. 1988); Ingram v. Shumway, 794 P.2d 147, 152 (Ariz. 1990).

Because the impeachment process is not penal in nature and does not entail the loss of personal freedom and liberty, there is no reasonable basis to conclude that the Due Process Clause requires the Senate to use proof beyond a reasonable doubt as its standard of proof for an impeachment trial. As explained by one federal court considering the rights of a federal judge during an impeachment trial in the United States Senate:

> [I]n several instances in the Constitution, impeachment is distinguished from criminal proceedings. The accused has no right to a jury, and the President may not pardon a person

> convicted by impeachment. The Framers understood that impeachment trials were fundamentally political … It is clear that the federal rules of evidence do not apply in impeachment trials, and the Constitution itself does not require unanimity among the Senators sitting in judgment. Senators determine their own burdens of proof: they need not be persuaded beyond a reasonable doubt that the defendant committed each and every element of every Article … While some process is clearly due, rights are not necessarily compromised by varying from the rights and process accorded defendants in criminal proceedings.

Hastings v. United States Senate, 716 F. Supp. 38, 41 (D.D.C. 1989) (emphasis added and footnotes omitted), aff'd mem., 887 F.2d 332 (D.C. Cir. 1989).

Accordingly, given the nonpenal nature of impeachment proceedings, we do not believe the standard of proof for criminal proceedings and juvenile delinquency proceedings must be used as the standard of proof for impeachment proceedings to comply with constitutional due process. Therefore, it is the opinion of this office that the Due Process Clause does not require the Senate to use proof beyond a reasonable doubt as its standard of proof for an impeachment trial.

The next issue is whether the Due Process Clause requires the Senate to use proof by clear and convincing evidence as its standard of proof for an impeachment trial. As discussed previously, the United States Supreme Court has required the use of the clear-and-convincing-evidence standard only in a limited number of proceedings in which an individual is threatened with a significant deprivation of a liberty interest. See Santosky v. Kramer, 455 U.S. 745, 755-57, 102 S. Ct. 1388, 1395-96 (1982). Outside of these few instances, the Supreme Court has been reluctant to constitutionally require the use of clear and convincing evidence in other proceedings. See Rivera v. Minnich, 483 U.S. 574, 577-82, 107 S. Ct. 3001, 3003-06 (1987).

In the case of an impeachment trial in the Senate, there is no significant deprivation of a liberty interest at stake. At most, the accused officer is threatened with the loss of public office and the disqualification to hold public office in the future. Nev. Const. art. 7, § 2. It is true that the right to hold public office is an important right. See Nevada Judges Ass'n v. Lau, 112 Nev. 51, 55-56 (1996); Mosley v. Nevada Comm'n on Jud. Discipline, 117 Nev. 371, 378 (2001). However, courts generally have not characterized the right to hold public office as a fundamental right. See Nevada Judges Ass'n, 112 Nev. at 56-58; see also Gregory v. Ashcroft, 501 U.S. 452, 470-71, 111 S. Ct. 2395, 2406 (1991); Clements v. Fashing, 457 U.S. 957, 963, 102 S. Ct. 2836, 2843 (1982). On the contrary, courts have generally found that the right to hold public office is a highly circumscribed property interest which is subject to considerable control and regulation by the state. See Sweeney v. Tucker, 375 A.2d 698, 712-13 (Pa. 1977); see also Foley v. Kennedy, 110 Nev. 1295, 1305 (1994); McCarley v. Sanders, 309 F. Supp. 8, 9-12 (M.D. Ala. 1970); 63C Am. Jur. 2d Public Officers and Employees §§ 11-12 (1997). Because an accused officer is not threatened with a significant deprivation of a liberty interest in an impeachment trial, there is no reasonable basis to conclude that the Due Process Clause requires the Senate to use proof by clear and convincing evidence.

Moreover, regardless of the type of interest that a public officer has in his office, the private interest of the officer does not outweigh the public interest of the state in protecting and safeguarding the integrity of government. The primary purpose of an impeachment proceeding is to protect the public from unworthy public officers who have committed official wrongs. See Ferguson v. Maddox, 263 S.W. 888, 892 (Tex. 1924). In this regard, an impeachment proceeding is intended less as a punishment of the individual officer and more as means of protecting and safeguarding the integrity of government. Id. Thus, in an impeachment proceeding, the private and public interests at stake are entitled to roughly equal weight. When each of the parties to a proceeding "has an extremely important, but nevertheless relatively equal, interest in the outcome," the clear-and-convincing-evidence standard is not constitutionally required. Rivera v. Minnich, 483 U.S. 574, 581, 107 S. Ct. 3001, 3005 (1987); August H. v. State, 105 Nev. 441, 445 (1989).

Finally, in the decisions of the United States Supreme Court concerning the appropriate standard of proof for judicial proceedings, "a principal reason for any constitutionally mandated departure from the preponderance standard has been the adoption of a more exacting burden of proof by the majority of jurisdictions." Rivera v. Minnich, 483 U.S. 574, 581, 107 S. Ct. 3001, 3005 (1987). In the case of an impeachment trial conducted in a legislative body, there is no

national consensus of opinion regarding the appropriate standard of proof. See Mark R. Slusar, Comment, The Confusion Defined: Questions and Problems of Process in the Aftermath of the Clinton Impeachment, 49 Case W. Res. L. Rev. 869, 898-901 (1999). On the contrary, courts and commentators have recognized that each legislative body, if not each individual legislator, generally acts independently to decide the appropriate standard of proof. See id.; Hastings v. United States Senate, 716 F. Supp. 38, 41 (D.D.C. 1989), aff'd mem., 887 F.2d 332 (D.C. Cir. 1989). Given the absence of a national consensus of opinion regarding the standard of proof for an impeachment trial, it is the opinion of this office that the Senate is not constitutionally required to use proof by clear and convincing evidence as its standard of proof for an impeachment trial.

In sum, after reviewing the decisions of the United States Supreme Court concerning the appropriate standard of proof for judicial proceedings, and after considering case law, legal treatises and other legal sources concerning impeachment proceedings, it is the opinion of this office that the Due Process Clause does not require the Senate to adopt any of the higher standards of proof for an impeachment trial. Therefore, it is the opinion of this office that the Senate is not required, as a matter of constitutional due process, to adopt proof beyond a reasonable doubt or proof by clear and convincing evidence as its standard of proof for an impeachment trial.

Because we believe the Senate is not required, as a matter of constitutional due process, to adopt proof beyond a reasonable doubt or proof by clear and convincing evidence as its standard of proof for an impeachment trial, the question that remains is whether the Senate is constitutionally required to adopt proof by a preponderance of the evidence or any other standard of proof for an impeachment trial. To answer that question, we must consider the plain language of Article 7 of the Nevada Constitution, and we must also consider historical precedents from the United States Senate and other State Senates.

B. Standard of Proof under the Nevada Constitution and Historical Precedents from the United States Senate and other state senates

The plain language of Article 7 of the Nevada Constitution provides that "[a]ll impeachments shall be tried by the Senate, and when sitting for that purpose, the Senators shall be upon Oath or Affirmation, to do justice according to Law and Evidence." Nev. Const. art. 7, § 1 (emphasis added). On its face, the plain language of Article 7 establishes the sole constitutional standard that each Senator must follow during an impeachment trial. Under that constitutional standard, each Senator must "do justice according to Law and Evidence." The Constitution requires nothing more.

Under well-established rules of construction, when the Framers of the Nevada Constitution intended to limit the constitutional power of the Legislature, they provided for those limitations in specific terms. See Sarkes Tarzian, Inc. v. Legislature, 104 Nev. 672, 674-75 (1988). Thus, unless there is a specific limitation contained in the plain language of the constitution, "the authority of the legislature to act is practically absolute." Id. at 675.

Had the Framers intended for the Senate to follow a specific standard of proof in addition to the constitutional standard of doing "justice according to Law and Evidence," the Framers could have simply expressed that specific standard of proof in the Constitution. They did not. Thus, in the absence of a specific standard of proof expressly set forth in the plain language of the Constitution, there is no reasonable basis to conclude that the Senate is constitutionally required to adopt proof by a preponderance of the evidence or any other specific standard of proof for an impeachment trial. Rather, the only standard that is constitutionally required is that each Senator must "do justice according to Law and Evidence." Beyond that standard, the determination of whether any other specific standard is necessary or appropriate is a matter entrusted entirely to the power and discretion of the Senate. This conclusion is supported amply by historical precedents from the United States Senate and other state senates.

At the federal level, the United States Senate typically does not adopt a specific standard of proof for an impeachment trial. See Report of the National Commission on Judicial Discipline & Removal, 152 F.R.D. 265, 317-18 (1993). Instead, the general practice in the United States Senate is for each individual Senator to weigh the evidence under whatever standard of proof that the Senator deems appropriate.[1] As described by one legal commentator, "each Senator must find his own standard in his own conscience." Charles L. Black, Jr., Impeachment: A Handbook

17 (1974). Thus, as a matter of historical practice in the United States Senate, "a basic principle recognized in every impeachment trial conducted thus far is that each senator must ultimately decide for himself on which rules of evidence or burden of proof to apply." Michael J. Gerhardt, Rediscovering Nonjusticiability: Judicial Review of Impeachments After *Nixon*, 44 Duke L.J. 231, 267 (1994).

At the state level, this office has examined senate rules governing impeachment trials that have been conducted by the Arizona Senate, the Kentucky Senate, the Pennsylvania Senate and the New Hampshire Senate. From an examination of those rules, it appears that each state senate has determined for itself whether to adopt a specific standard of proof for an impeachment trial.

For example, in 1964, the Arizona Senate adopted rules governing the impeachment trial of two members of the Corporation Commission. The rules adopted by the Arizona Senate for that impeachment trial did not provide for a specific standard of proof. However, in 1988, the Arizona Senate adopted rules governing the impeachment trial of Governor Evan Mecham, and those rules expressly provided for clear and convincing evidence as the specific standard of proof.

In 1991, the Kentucky Senate adopted rules governing the impeachment trial of the Commissioner of Agriculture. Like the rules adopted by the Arizona Senate in 1988, the rules adopted by the Kentucky Senate expressly provided for clear and convincing evidence as the specific standard of proof.

During the 1993-1994 legislative session, the Pennsylvania Senate adopted rules governing the impeachment trial of a justice of the Pennsylvania Supreme Court. The rules adopted by the Pennsylvania Senate for that impeachment trial did not provide for a specific standard of proof.

Finally, in 2000, the New Hampshire Senate adopted rules governing the impeachment trial of a justice of the New Hampshire Supreme Court. The rules adopted by New Hampshire Senate for that impeachment trial did not provide for a specific standard of proof. Instead, those rules provided that "[t]he basis upon which the articles of impeachment shall be judged shall be that set forth in the Constitution of the State of New Hampshire." Under the New Hampshire Constitution, the standard for judging the articles of impeachment is that "the members of the senate shall respectively be sworn truly and impartially to try and determine the charge in question, according to evidence." N.H. Const. pt. II, art. 38.

In sum, based on the plain language of Article 7 of the Nevada Constitution and based on historical precedents from the United States Senate and other state senates, we believe the determination of whether any specific standard of proof is necessary or appropriate for an impeachment trial is a matter entrusted entirely to the power and discretion of the Senate. Given that the Senate possesses such power and discretion, it is the opinion of this office that the Senate is not constitutionally required to adopt proof by a preponderance of the evidence or any other specific standard of proof for an impeachment trial. Rather, the only standard that is constitutionally required is that each Senator must "do justice according to Law and Evidence." If the Senate chooses not to adopt a specific standard of proof, then each Senator may apply his or her own standard of proof as is necessary to "do justice according to Law and Evidence."

Even though we believe the Senate is not constitutionally required to adopt a specific standard of proof for an impeachment trial, the Senate may nevertheless choose to adopt a specific standard of proof for such a trial. If the Senate is inclined to adopt a specific standard of proof, in doing so the Senate may wish to consider the standards of proof used in removal proceedings prosecuted before the Nevada State District Courts and the Nevada Commission on Judicial Discipline.

C. Standard of Proof for Removal Proceedings Prosecuted before the Nevada State District Courts and the Nevada Commission on Judicial Discipline

The Nevada Constitution and the Nevada Revised Statutes contain several different proceedings to bring about the removal of a public officer for official misconduct. The constitutional and statutory removal proceedings differ depending on whether the public officer is a state executive branch officer, a judicial officer or a local officer.[2]

In Nevada, a state executive branch officer who has been elected or appointed to office for a definite term may be removed from office for official misconduct only through impeachment proceedings conducted by the Legislature pursuant to Sections 1 and 2 of Article 7 of the Nevada Constitution. See Robison v. First Jud. Dist. Ct., 73 Nev. 169, 170-75 (1957). Such an

officer may not be removed from office by a district court through the statutory removal proceedings codified in NRS 283.440. Id.

A judicial officer in Nevada, other than a justice of the peace, may be removed from office for official misconduct through impeachment proceedings conducted by the Legislature pursuant to Sections 1 and 2 of Article 7 of the Nevada Constitution. In addition, a justice of the Nevada Supreme Court or a judge of the district court may be removed from office, "[f]or any reasonable cause to be entered on the journals of each House, which may or may not be sufficient grounds for impeachment … on the vote of two thirds of the Members elected to each branch of the Legislature," through removal proceedings conducted pursuant to Section 3 of Article 7 of the Nevada Constitution. See State ex rel. O'Neale v. McClinton, 5 Nev. 329, 333-36 (1869). Finally, a judicial officer may be removed from office for official misconduct through removal proceedings conducted by the Nevada Commission on Judicial Discipline pursuant to Section 21 of Article 6 of the Nevada Constitution and NRS 1.425 to 1.4695, inclusive. See In re Fine, 116 Nev. 1001, 1021-23 (2000).

Although the Nevada Constitution does not contain any specific proceedings for the removal of a local officer for official misconduct, the provisions of Section 4 of Article 7 of the Nevada Constitution authorize the Legislature to provide by statute for the removal of a local officer for "Malfeasance, or Nonfeasance in the Performance of his duties." Pursuant to this constitutional authority, the Legislature has enacted statutory provisions in chapter 283 of NRS to provide for the removal of a local officer for official misconduct. See Schumacher v. State ex rel. Furlong, 78 Nev. 167, 170 (1962); Ex Parte Jones and Gregory, 41 Nev. 523, 525-29 (1918); Gay v. District Ct., 41 Nev. 330, 336-44 (1918).

Pursuant to NRS 283.440, any person may file a complaint with the district court alleging that a local officer has been guilty of malfeasance or nonfeasance in the performance of his duties. Once a complaint is filed, NRS 283.440 requires the district court to hear the complaint "in a summary manner," and the statute does not provide the accused officer with the right to a jury trial. See Jones v. Eighth Jud. Dist. Ct., 67 Nev. 404, 417-18 (1950). Because of the summary nature of the removal proceedings under NRS 283.440 and because of the absence of the right to a jury trial, the Nevada Supreme Court has held that to sustain a complaint for removal of a local officer under NRS 283.440, "proof of the accusations should attain the dignity of exceeding a reasonable doubt." Id. at 418 (quoting Ex Parte Jones and Gregory, 41 Nev. 523, 533 (1918) (McCarran, C.J., concurring)). Thus, with respect to the summary removal proceedings conducted in the district courts pursuant to NRS 283.440, the Nevada Supreme Court has adopted proof beyond a reasonable doubt as the appropriate standard of proof for those removal proceedings.

In addition to the summary removal proceedings set forth in NRS 283.440, a local officer may be removed from office based on an accusation presented by the grand jury alleging that the officer has committed "willful or corrupt misconduct in office." NRS 283.300. The trial of the grand jury accusation is prosecuted in the district court. NRS 283.300 to 283.430, inclusive. The accused officer has the right to a jury trial, and the trial must be conducted in the same manner as the trial of a criminal indictment. NRS 283.390. Under title 14 of NRS, which is known as the Nevada Criminal Procedure Law, the standard of proof for the trial of a criminal indictment is proof beyond a reasonable doubt. NRS 175.191, 175.201 & 175.211. Thus, with respect to the removal proceedings conducted in the district courts pursuant to NRS 283.300 to 283.430, inclusive, the Nevada Legislature has adopted proof beyond a reasonable doubt as the appropriate standard of proof for those removal proceedings.

Although proof beyond a reasonable doubt has been adopted for the statutory removal proceedings conducted in the district courts pursuant to chapter 283 of NRS, the Nevada Supreme Court has rejected that standard of proof for the constitutional removal proceedings conducted by the Nevada Commission on Judicial Discipline. See Goldman v. Nevada Comm'n on Jud. Discipline, 108 Nev. 251, 263 n.11 (1992), disapproved in part on other grounds, In re Fine, 116 Nev. 1001, 1022 (2000).

The Nevada Commission on Judicial Discipline is a constitutionally created court of judicial performance and discipline. Nev. Const. art. 6, § 21; Mosley v. Nevada Comm'n on Jud. Discipline, 117 Nev. 371, 378 (2001). The Commission is authorized to remove a judicial officer from office for willful misconduct, willful or persistent failure to perform the duties of the

office, or habitual intemperance. Nev. Const. art. 6, § 21; NRS 1.425 to 1.4695, inclusive; In re Fine, 116 Nev. 1001, 1021-22 (2000). Even though the Commission possesses considerable authority over its removal proceedings under the Nevada Constitution, the Nevada Supreme Court retains supervisory power over the Commission to ensure that its proceedings are fundamentally fair and consistent with public policy. See Mosley v. Nevada Comm'n on Jud. Discipline, 117 Nev. 371, 376-83 (2001).

In exercising its supervisory power, the Nevada Supreme Court has adopted the clear-and-convincing-evidence standard as the appropriate standard of proof for the constitutional removal proceedings conducted by the Nevada Commission on Judicial Discipline. See Goldman v. Nevada Comm'n on Jud. Discipline, 108 Nev. 251, 263 (1992). In Goldman, the court provided the following reasons for its decision:

> The "clear and convincing" standard governs judicial disciplinary proceedings in a majority of jurisdictions. By requiring a lesser degree of proof than the reasonable doubt standard, the standard acknowledges the non-criminal and non-punitive nature of judicial disciplinary proceedings. At the same time, however, it is deferential to the severity of the sanctions that the commission may impose by requiring a higher degree of proof than the "mere preponderance of the evidence" standard that governs most civil proceedings. Therefore, pursuant to the applicable Nevada rules and in light of the persuasive authorities from other jurisdictions, we conclude that factual findings of the commission constituting grounds for censure, removal or retirement of a judicial officer must be premised upon clear and convincing evidence.

Id. (footnotes and citations omitted).

Finally, we note that in exercising its supervisory power over the practice of law, the Nevada Supreme Court has adopted the clear-and-convincing-evidence standard as the appropriate standard of proof for disciplinary proceedings brought against attorneys who violate the Nevada Rules of Professional Conduct. See In re Drakulich, 111 Nev. 1556, 1566-67 (1995). In adopting the clear-and-convincing-evidence standard for such proceedings, the court has explained that "a higher degree of proof should be, and we believe is, required in a proceeding such as this, involving the right and high privilege to continue to engage in the practice of the law, than is required to determine questions of fact in the ordinary civil case." Copren v. State Bar of Nev., 64 Nev. 364, 380 (1947).

In the same way that the Nevada Supreme Court exercises supervisory power over removal and disciplinary proceedings in the judicial branch of government, the Senate exercises supervisory power over impeachment trials in the legislative branch of government. Thus, in its sole discretion, the Senate may choose to adopt a specific standard of proof for an impeachment trial even though it is not constitutionally required to do so.

D. Standard of Proof for an Impeachment Trial in a State Supreme Court

Based on our research, we have found several cases discussing the standard of proof for an impeachment trial conducted in a state supreme court. See, e.g., In re Impeachment of Moriarty, 902 S.W.2d 273, 277 (Mo. 1994); State v. Douglas, 349 N.W.2d 870, 874 (Neb. 1984); State ex rel. Martin v. Tally, 15 So. 722, 725 (Ala. 1894). To complete our discussion, we will provide a brief overview of the cases from Missouri and Nebraska.

Under the Missouri Constitution, the Missouri House of Representatives has been given the power of impeachment, and the Missouri Supreme Court has been given the power to try impeachments. In re Impeachment of Moriarty, 902 S.W.2d 273, 277 (Mo. 1994). Due to a volatile political history surrounding a particular impeachment trial in the Missouri Senate, the people of that state eliminated the Missouri Senate from the impeachment process by constitutional amendment. Id. Based on this change in constitutional law, an impeachment trial in Missouri is no longer a political function. Id. Instead, the role of the Missouri Supreme Court is to act "as a court, not as a substitute political body." Id. Thus, under Missouri's constitutional scheme, the Missouri Supreme Court conducts an impeachment trial as a traditional judicial proceeding in a court of law. Id. In performing its unique function in the impeachment process, the Missouri Supreme Court has adopted clear and convincing evidence as its standard of proof for an impeachment trial. Id.

Under the Nebraska Constitution, the unicameral Nebraska Legislature has been given the power of impeachment, and the Nebraska Supreme Court has been given the power to try

impeachments. State v. Douglas, 349 N.W.2d 870, 873-75 (Neb. 1984). In describing its role in the impeachment process, the Nebraska Supreme Court has stated that "the provision for the trial of impeachments before the supreme court was to insure a strictly judicial investigation according to judicial methods. It cannot be successfully maintained that this court has succeeded to any of the political functions of the senate as a court of impeachment under the first constitution." State v. Hastings, 55 N.W. 774, 780 (Neb. 1893). Thus, like the Missouri Supreme Court, the Nebraska Supreme Court conducts an impeachment trial as a traditional judicial proceeding in a court of law. Douglas, 349 N.W.2d at 874-75. In performing its unique function in the impeachment process, the Nebraska Supreme Court has adopted proof beyond a reasonable doubt as its standard of proof for an impeachment trial. Id. at 874; accord State ex rel. Martin v. Tally, 15 So. 722, 725 (Ala. 1894) (adopting proof beyond a reasonable doubt as the standard of proof for an impeachment trial conducted in the Alabama Supreme Court).

Because an impeachment trial conducted in a state supreme court is inherently different from an impeachment trial conducted in a state senate, we believe the foregoing cases provide very little guidance for the Nevada Senate in conducting an impeachment trial pursuant to Article 7 of the Nevada Constitution.

III. Judicial Review of Impeachment Proceedings

The Nevada Supreme Court has not addressed the issue of whether state impeachment proceedings in the Nevada Legislature are subject to judicial review. Therefore, it is appropriate to consider cases from the federal courts and cases from other state courts for guidance in this area of the law.

The starting point for any discussion concerning judicial review of impeachment proceedings is the decision of the United States Supreme Court in Nixon v. United States, 506 U.S. 224, 113 S. Ct. 732 (1993). Nixon involved federal impeachment proceedings against Walter Nixon, who was a United States District Judge before he was impeached by the United States House of Representatives and tried, convicted and removed from office by the United States Senate. Id. at 226-28, 113 S. Ct. at 734-35. Judge Nixon brought an action in federal court claiming that he was improperly convicted in his impeachment trial because the United States Senate authorized a committee of Senators to hear evidence against him and to report that evidence to the full Senate for its vote on whether to convict. Id. Judge Nixon contended that this action by the Senate violated his constitutional right to be "tried" by the Senate because the full Senate did not take part in the evidentiary hearings conducted by the committee. Id.

The United States Supreme Court held that it would not review Judge Nixon's constitutional claims because those claims were nonjusticiable issues under the political question doctrine. Id. at 228-38, 113 S. Ct. at 735-40. In reaching its holding, the Court found that the United States Constitution gave the Senate the sole power to determine which procedures to use during an impeachment trial. Id. The Court also found that there was a lack of judicially discoverable and manageable standards for reviewing the Senate's exercise of its constitutional power. Id. Because of this constitutional commitment of power to the Senate, the Court concluded that it would be inappropriate for the judicial branch to review constitutional claims arising from federal impeachment proceedings. Id. Therefore, the Court held that it would not review Judge Nixon's constitutional challenges because they created nonjusticiable issues under the political question doctrine. Id.

Although the Nixon case is informative, the Nixon case dealt strictly with impeachment proceedings at the federal level. The Nixon case did not decide any issues with respect to impeachment proceedings at the state level. Thus, the Nixon case does not provide any controlling authority concerning two important questions. First, may a state court review impeachment proceedings in the Nevada Legislature for claimed constitutional violations? Second, may a federal court review impeachment proceedings in the Nevada Legislature for claimed constitutional violations?

A. Judicial Review in State Court

With regard to constitutional matters which are not controlled by federal law, the final arbiter of the meaning of the Nevada Constitution is the Nevada Supreme Court. See Guinn v. Legislature, 119 Nev. Adv. Op. 34, 71 P.3d 1269, 1274 (2003). Because impeachment proceedings conducted under the United States Constitution are strictly a matter of the internal political workings of the federal government, the decision in Nixon did not establish any

controlling principles of federal law which must be applied to state impeachment proceedings conducted under state law. Accordingly, while the Nevada Supreme Court is free to follow the reasoning in Nixon, it retains the power to undertake a more exacting review of state impeachment proceedings conducted under the Nevada Constitution.

Most state courts have followed the general principles articulated in Nixon and have held, as a general rule, that constitutional challenges to the procedures used in impeachment trials are nonjusticiable political questions which are not reviewable by the state courts. See, e.g., Mecham v. Gordon, 751 P.2d 957, 960-63 (Ariz. 1988); Kinsella v. Jaekle, 475 A.2d 243, 253-57 (Conn. 1984), modified, Office of Governor v. Select Comm. of Inquiry, 271 Conn. 540 (2004); Horton v. McLaughlin, 821 A.2d 947, 949-50 (N.H. 2003); Larsen v. Senate of Pa., 646 A.2d 694, 699-705 (Pa. Commw. Ct. 1994).

Nevertheless, state courts have also recognized that there could be unusual circumstances where judicial review of impeachment proceedings would be appropriate. See In re Jud. Conduct Comm., 751 A.2d 514, 516-17 (N.H. 2000). For example, the Connecticut Supreme Court has noted that a court may exercise jurisdiction over impeachment proceedings "if the legislature's action is clearly outside the confines of its constitutional jurisdiction to impeach any executive or judicial officer; or egregious and otherwise irreparable violations of state or federal constitutional guarantees are being or have been committed by such proceedings." Kinsella v. Jaekle, 475 A.2d 243, 253 (Conn. 1984) (citation omitted), modified, Office of Governor v. Select Comm. of Inquiry, 271 Conn. 540 (2004). As further explained by the Texas Supreme Court:

> The courts, in proper cases, may always inquire whether any department of the government has acted outside of and beyond its constitutional authority. The acts of the Senate, sitting as a court of impeachment, are not exempt from this judicial power; but so long as the Senate acts within its constitutional jurisdiction, its decisions are final. As to impeachment, it is a court of original, exclusive, and final jurisdiction.

Ferguson v. Maddox, 263 S.W. 888, 893-94 (Tex. 1924).

In sum, although most state courts have been reluctant to interfere with impeachment proceedings conducted in the state legislature, those courts have acknowledged that judicial review of impeachment proceedings may be appropriate in the face of manifest and egregious constitutional violations.

B. Judicial Review in Federal Court

As discussed previously, the Nixon case was limited to deciding the issue of whether a federal court may review federal impeachment proceedings under the political question doctrine. The Nixon case did not decide the issue of whether a federal court may review state impeachment proceedings under the political question doctrine.

As a general rule, the political question doctrine is concerned only with the relationship between the federal judiciary and the other branches of the federal government; it is not concerned with the relationship between the federal judiciary and the states. Baker v. Carr, 369 U.S. 186, 210, 82 S. Ct. 691, 706 (1962). Thus, the political question doctrine generally does not bar a federal court from reviewing federal constitutional claims arising from proceedings conducted in a state legislature. Cf. Bond v. Floyd, 385 U.S. 116, 87 S. Ct. 339 (1966).

With regard to impeachment at the state level, at least one federal court has held that the political question doctrine does not bar a federal court from reviewing federal constitutional challenges to state impeachment proceedings. Larsen v. Senate of Pa., 152 F.3d 240, 245-48 (3d Cir. 1998), cert. denied, 525 U.S. 1145, 119 S. Ct. 1041 (1999). In Larsen, a justice of the Pennsylvania Supreme Court brought an action in federal court against the Pennsylvania Senate and the individual state Senators claiming that his conviction in an impeachment trial before the Pennsylvania Senate violated his federal constitutional rights under the Due Process Clause, the First Amendment and the Sixth Amendment. Id. at 243-45. The United States Court of Appeals for the Third Circuit held that the political question doctrine did not bar the federal courts from reviewing the impeached justice's federal constitutional claims. Id. at 245-48.

However, despite the court's holding on justiciability, there were other jurisdictional barriers which precluded the federal courts from reaching the merits of the impeached justice's federal constitutional claims. First, the Pennsylvania Senate, as an arm of the state, was immune from

suit in federal court under the Eleventh Amendment. Larsen v. Senate of Pa., 955 F. Supp. 1549, 1559-61 (M.D. Pa. 1997), rev'd in part on other grounds, 152 F.3d 240 (3d Cir. 1998). Second, the individual Senators were immune from suit in federal court because their actions in conducting the impeachment proceedings and voting to convict on the articles of impeachment were core legislative functions protected by the federal common-law doctrine of legislative immunity. Larsen, 152 F.3d at 249-54.

Thus, based on the decision in Larsen, we believe the political question doctrine would not bar the federal courts from reviewing federal constitutional claims arising from state impeachment proceedings conducted in the Nevada Legislature. However, based on that same case, we believe the federal courts would nevertheless lack jurisdiction to consider the merits of those constitutional claims because of the state's immunity from suit in federal court under the Eleventh Amendment and because of the individual legislators' immunity from suit in federal court under the federal common-law doctrine of legislative immunity.

CONCLUSION

After reviewing the decisions of the United States Supreme Court concerning the appropriate standard of proof for judicial proceedings, and after considering case law, legal treatises and other legal sources concerning impeachment proceedings, it is the opinion of this office that the Due Process Clause does not require the Senate to adopt any of the higher standards of proof for an impeachment trial. Therefore, it is the opinion of this office that the Senate is not required, as a matter of constitutional due process, to adopt proof beyond a reasonable doubt or proof by clear and convincing evidence as its standard of proof for an impeachment trial.

Furthermore, based on the plain language of Article 7 of the Nevada Constitution and based on historical precedents from the United States Senate and other state senates, it is the opinion of this office that the Senate is not constitutionally required to adopt proof by a preponderance of the evidence or any other specific standard of proof for an impeachment trial. Rather, the only standard that is constitutionally required is that each Senator must "do justice according to Law and Evidence." Beyond that standard, the determination of whether any other specific standard is necessary or appropriate is a matter entrusted entirely to the power and discretion of the Senate. If the Senate chooses not to adopt a specific standard of proof, then each Senator may apply his or her own standard of proof as is necessary to "do justice according to Law and Evidence."

Even though we believe the Senate is not constitutionally required to adopt a specific standard of proof for an impeachment trial, the Senate may nevertheless choose to adopt a specific standard of proof for such a trial. If the Senate is inclined to adopt a specific standard of proof, in doing so the Senate may wish to consider the standards of proof used in removal proceedings prosecuted before the Nevada State District Courts and the Nevada Commission on Judicial Discipline.

Ultimately, the Nevada Constitution gives the Senate the exclusive power to try impeachments and to determine the rules, practices and procedures governing an impeachment trial. Because the Senate enjoys such great power and latitude over the rules, practices and procedures governing an impeachment trial, it is the opinion of this office that the judiciary would likely defer to the judgment of the Senate as to whether to adopt a specific standard of proof for an impeachment trial.

If you have any further questions regarding this matter, please do not hesitate to contact this office.

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[1] See Stanley N. Futterman, The Rules of Impeachment, 24 U. Kan. L. Rev. 105, 136-37 (1975); Michael J. Gerhardt, The Historical and Constitutional Significance of the Impeachment and Trial of President Clinton, 28 Hofstra L. Rev. 349, 370 (1999); Michael J. Gerhardt, Rediscovering Nonjusticiability: Judicial Review of Impeachments After *Nixon*, 44 Duke L.J. 231, 267 (1994); Peter M. Shane, Who May Discipline or Remove Federal Judges? A Constitutional Analysis, 142 U. Pa. L. Rev. 209, 229 n. 69 (1993); Rose Auslander, Note, Impeaching the Senate's Use of Trial Committees, 67 N.Y.U. L. Rev. 68, 74 n.34 (1992); Jennifer L. Blum, Comment, How Much Process Is Due: The Senate Impeachment Trial Process After *Nixon v. United States*, 44 Cath. U. L. Rev. 243, 261-62 (1994); Mark R. Slusar, Comment, The Confusion Defined: Questions and Problems of Process in the Aftermath of the Clinton Impeachment, 49 Case W. Res. L. Rev. 869, 898-901 (1999).

[2] In addition to being subject to removal from office for official misconduct, every public officer in Nevada is subject to recall from office by a special election held pursuant to Section 9 of Article 2 of the Nevada

Constitution. Recall from office by a special election does not have to be based on official misconduct. See Batchelor v. Eighth Jud. Dist. Ct., 81 Nev. 629, 632-33 (1965).

Very truly yours,
BRENDA J. ERDOES
Legislative Counsel
SCOTT G. WASSERMAN
Chief Deputy Legislative Counsel
By KEVIN C. POWERS
Principal Deputy Legislative Counsel

Senator Raggio moved that the Senate adjourn until Wednesday, December 1, 2004, at 8 a.m.

Motion carried.

Senate adjourned at 2:45 p.m.

Approved:

LORRAINE T. HUNT
President of the Senate

Attest: CLAIRE J. CLIFT
Secretary of the Senate