MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-third Session
February 15, 2005

The Senate Committee on Judiciary was called to order by Chair Mark E. Amodei at 8:00 a.m. on Tuesday, February 15, 2005, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to the Grant Sawyer State Office Building, Room 4412, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file at the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Mark E. Amodei, Chair
Senator Maurice E. Washington, Vice Chair
Senator Mike McGinness
Senator Dennis Nolan
Senator Valerie Wiener
Senator Terry Care
Senator Steven Horsford

STAFF MEMBERS PRESENT:

Nicolas Anthony, Committee Policy Analyst
Kelly Lee, Committee Counsel
Ellen West, Committee Secretary

OTHERS PRESENT:

Gerald Gardner, Chief Deputy Attorney General, Criminal Justice Division, Office of the Attorney General
Stan Olsen, Las Vegas Metropolitan Police Department
Stacy M. Jennings, Executive Director, Commission on Ethics
Keith Munro, Deputy Chief of Staff, General Counsel, Office of the Governor
John L. Arrascada, Attorney
Dominic P. Gentile, Attorney
Robert List, Former Governor; the Robert List Company
Michael A. Bauser, Associate General Counsel, Nuclear Energy Institute, Inc.

Chair Amodei convened the meeting as a subcommittee due to the lack of a quorum.

Gerald Gardner, Chief Deputy Attorney General, Criminal Justice Division, Office of the Attorney General, stated current statutory provisions for conducting the impeachment process related to *Nevada Revised Statute* (NRS) 228.140. He noted NRS 228.140, subsection 2, paragraph (b), states, "The Attorney General shall assist in all impeachments which may be tried before the Senate." However, the statute did not provide additional guidance. Paraphrasing a February 15 letter from the Attorney General (Exhibit C), Mr. Gardner suggested the Legislature and the Committee explore further parameters for the Office of the Attorney General's role in impeachment trials.

Chair Amodei stated Stacy Jennings, Executive Director, Commission on Ethics, during her testimony, indicated the investigation was performed by her office, and the Ethics Commission had relied on information discovered by that investigation. Chair Amodei asked for Mr. Gardner's thoughts on these proceedings, including the Attorney General's role in supporting the Ethics Commission. He asked if Mr. Gardner had knowledge of interplay between investigative resources in this context. Chair Amodei asked whether it was the Ethics Commission, the Attorney General or the Nevada Division of Investigation who ought to be conducting the investigation.

Mr. Gardner replied the Ethics Commission was a separate commission, unrelated to the Attorney General's Office. The reason the Attorney General's Office began the investigation in this case was due to its primary jurisdiction over State employees under NRS 228.175. He said part of the Attorney General's fundamental jurisdiction was to investigate and prosecute crimes committed by State employees. The results of the investigation in this case were referred to the Commission on Ethics. Ms. Jennings then conducted her own follow-up investigation by interviewing all of the witnesses, thus confirming and clarifying some of the details of the report. He stated it was good practice for the Ethics Commission to conduct its own investigation after a complaint had been referred to them and to have independent investigatory authority. The problem was resources; the Ethics Commission did not have an investigator other than the executive director herself. He felt it was a good idea to conduct independent confirmation or review of the facts of each case.

Chair Amodei asked for additional information in the existing statute regarding the term “shall assist.” He asked for Mr. Gardner’s thoughts about adding a specific prosecutorial role that aided assistance. He noted there was an investigative function and a prosecutorial function, and asked if Mr. Gardner had any preferences, based on his experience. Mr. Gardner advised the statute should address the specifics of who would conduct the prosecution if it was going to be as it was in the Augustine matter. Whether the Attorney General’s job was to assist the special prosecutor in the prosecution, assist Legislative Counsel or assist the Senate, the specifics needed to be spelled out in the statute. He said he would not express any preferences about who should prosecute; it was a matter for the Senate to determine.

Senator McGinness asked Mr. Gardner if Ms. Jennings had the background to be the investigator and whether they should set up a whole investigative division. Mr. Gardner replied he knew Ms. Jennings had a master’s degree and had served as the primary investigator for the Ethics Commission, but was unsure if she had a law enforcement background. He said more investigative resources for the Ethics Commission would be welcomed.

Chair Amodei said they would begin the informational hearing on Clark County Advisory Question No. 9, the increase in the sales and use tax to support police. He stated the Judiciary Committee rarely heard testimony related to tax issues. The Committee’s purpose for asking Stan Olsen, Lieutenant, Las Vegas Metropolitan Police Department (Metro), to make a presentation, was to get an idea of what effect the passage of Question No. 9 would have, operationally, for Metro and any ripple effect it would create for policy decisions the Committee made regarding parole and probation, support to district attorneys, public defenders, corrections and forecasts for Metro’s facilities and corrections operations.

Mr. Olsen stated ballot Question No. 9 affected not only Metro, but also the Henderson Police Department, the North Las Vegas Police Department, the Mesquite Police Department and The Boulder City Police Department. He said there was a critical need for police officers in Clark County, and Senator Warren Hardy II began the effort two years ago with a bill that enabled Metro to go to the public for a vote to increase the number of police officers. He said calls waited for hours daily for officers to respond, and it was worse during a shift change when calls stacked into the double digits. Officers regularly called for immediate backup and the dispatchers had no available units to respond. He

said this was a critical issue for the continued safety of the community, the visitors and the police officers of southern Nevada. Mr. Olsen began a PowerPoint presentation (Exhibit D, original is on file at the Research Library). The presentation explained who was affected by Question No. 9, the officer ratios in Southern Nevada, why Clark County requested more officers, the cost to the community, the Uniform Crime Reporting Program and calls for service. The presentation concluded sales tax was the most reasonable solution to solve police manpower issues, and indicated the cost was shared by tourists, businesses and residents together. Mr. Olsen further concluded this did not push crime from one area to another.

Senator McGinness asked if this issue would go to the Senate Committee on Taxation or Government Affairs. Mr. Olsen surmised it would go to Taxation. Chair Amodei asked Mr. Olsen for information that would extrapolate what he expected to happen if it passed, that Senator Joe Heck had said, initially, to expect arrests to increase. The Chair asked, during the build-up phase, putting more assets on the street, resulting in more contacts, arrests, prosecutions and convictions, what would the effect be on Metro's corrections functions and also those court and corrections functions where the State played a major funding role. Mr. Olsen answered he expected a spike in demand for services in other areas including jails, the district attorney's office, the courts and the public defender's office.

Ten years ago, former Sheriff Jerry Keller anticipated this and formed the Regional Jail Commission. This Commission got together and decided how they would share vacant bed space and it worked very well for the different entities. Clark County Sheriff Bill Young stated a year ago, he wanted to change the Jail Commission to a regional criminal justice commission to address these specific issues. He said the interested parties were working together toward solutions, and eventually, the crime rate would decrease after the initial spike in arrests because law enforcement would have more time to address proactive issues. He said he read an article in the paper stating the director of corrections was concerned about prisons becoming more overcrowded. However, Mr. Olsen pointed out, there was an empty prison in southern Nevada and the new officers could only be trained at the rate of about 200 per year over a 10-year period, so the impact would be gradual. He concluded law enforcement infrastructure could not keep up with the rapid growth rate in the region. Responding to Senator Horsford's request for an explanation of how the prevention programs would be enhanced, Mr. Olsen said Metro and the other

entities in southern Nevada embraced community policing some years ago. They used random patrol as a deterrent to crime and they had problem-solving units that addressed a specific issue in a specific neighborhood such as abandoned cars and drug houses. He explained they worked with the neighborhoods, the homeowners associations and other agencies that had the authority to clean up problems in communities. He said Neighborhood Watch and Secret Witness programs had been very effective in crime prevention. He emphasized there was a Web site and communication was paramount. The schools had the Drug Abuse Resistance Education program and programs to deter gang activity. Senator Horsford said the focus should be on prevention because it gave the best return on the taxpayers' money over time. He encouraged innovative community programs that demonstrated to residents the support of law enforcement. He had asked the sheriff, during his campaign, for assurances the communities needing resources the most would receive them, and was told it was a priority throughout the county.

Vice Chair Washington asked why the general public's feelings were closely divided toward the tax, and if the opposition was due to a lack of understanding about the increase in crime or just because it was another tax. Mr. Olsen responded the press was already writing about the increased property values and rising taxes, so the public felt, because of the property tax increase, there would be no need for an additional sales-tax hike. There was a lack of understanding by the public that the property taxes had been used to build roads, sewers, water facilities and schools. He emphasized the need for law enforcement to keep up with the demands of increased growth to maintain safety. Vice Chair Washington questioned whether there was a comprehensive infrastructure plan in place that dealt with the needs of the citizens, including building roads, law enforcement and education, projected out 10 to 15 to 20 years. Mr. Olsen answered, southern Nevada had a growth task force made up of people from the community, put together last year, that met regularly discussing those exact issues. Metro monitored those meetings and gave input. He clarified the sales tax would be used solely for law enforcement expansion, but he could not speak to the issues regarding roads and schools.

Vice Chair Washington observed representatives for the other entities were not here with Mr. Olsen in support of this tax. Mr. Olsen stated that it was his choice to appear alone on behalf of all the law enforcement agencies because it was an informational presentation only, although the other cities had offered to appear with him. Everyone will be here for the actual bill presentation, he said.

Vice Chair Washington stated the bill would go to Taxation and Mr. Olsen concurred, saying it would probably go through the infrastructure on the other side as well.

Senator McGinness commented that sales tax had been a volatile issue. He inquired what would happen if the sales tax failed to perform and asked if officers hired with the sales tax money would have to be laid off. Mr. Olsen referred to Karen Keller, director of Metro's finance office in Las Vegas, as the authority to contact. He stated if revenues went down, it meant tourism was going down and that growth might be going down, and Metro would, therefore, slow down. He commented the revenue initially coming in would exceed what could be used immediately due to the time required to train the new officers and it would be banked for the future. He stated that Metro had planned for that scenario. Metro's intention was to prevent criminals from jumping from one jurisdiction to another to avoid prosecution, he emphasized.

Chair Amodei closed the hearing on Clark County Advisory Question No. 9.

Chair Amodei said the Committee would now return to the informational hearing on the ethics and impeachment process opened earlier, due to Mr. Gardner's scheduling conflict.

Stacy M. Jennings, Executive Director, Commission on Ethics, pointed out some statutes that got her office involved in the impeachment process (Exhibit E). She referred to Exhibit E, citing NRS 281.465 regarding the Commission's jurisdiction. She said when a complaint was received by her office, they looked at two things: first, whether the person met the statutory definition of a public officer or a public employee, and second, if there was credible evidence with the complaint indicating a violation of Nevada statutes. An investigation was opened when these two criteria were met, she said. She cited NRS 281.465 in support of her office filing an opinion. She explained her office's process and stated once a request of opinion was filed, the public officer had a chance to respond and received everything on the complaint that the Ethics Commission had. A two-member panel determined whether there was just and sufficient cause to have a full hearing, and up until the panel met, everything remained confidential. Once the panel decided to move forward with the complaint, everything became public record and a hearing was scheduled. She referred to the last page of Exhibit E, and cited Nevada Administrative Code (NAC) 281.109, Stipulations. She read subsection 2 which states:

> At its discretion and with the agreement of the subject of an ethics complaint, the Commission may, in lieu of holding a hearing, resolve a matter before the Commission with a stipulated agreement. Such a stipulated agreement must be in writing or made by oral statement on the record.

She said the Commission's process was an administrative hearing process, subject to appeal under the Administrative Procedures Act as a civil decision of an administrative agency. Therefore, pursuant to the Administrative Procedures Act, anyone who came before the Commission had the option to settle the agreement by stipulation instead of a hearing. In that case, the evidence would be examined by the panel members, but not presented in a public hearing even though it was public information. That was what happened in a recent high-profile case. She referred to the middle page of Exhibit E, citing NRS 281.551 that dealt with penalty statutes, noting subsection 1 indicated the maximum penalties the Legislature had authorized the Commission to impose were $5,000 for the first willful violation, $10,000 for the second willful violation and $25,000 for the third willful violation. She explained this particular tier structure was put into statute in 1999, when Governor Kenny Guinn was elected, and passed an extensive ethics package that gave the Commission staff members. She continued, citing NRS 281.551, subsection 5, paragraph (a):

> A willful violation of this chapter has been committed by a public officer removable from office by impeachment only, the Commission shall file a report with the appropriate person responsible for commencing impeachment proceedings as to its finding. The report must contain a statement of the facts alleged to constitute the violation.

She said this particular statute originated in 1991. Ms. Jennings said she asked Legislative Counsel Brenda J. Erdoes for an opinion on the above referenced statute and was told that particular section of statute applied to constitutional officers and Legislators. All other elected public officials would fall under the categories listed under NRS 281.555, subsection 5, paragraphs (b) and (c). Ms. Jennings further stated if there was evidence of criminal wrongdoing, her office was required to refer the information to the appropriate entity for investigation and potential prosecution. Summarizing, a complaint had been filed, they investigated, it was resolved by stipulation and provisions of

paragraph (a) of subsection 5 of NRS 281.551. That stipulation, entered into by the Commission and State Controller Kathy Augustine, was filed with the Assembly, which Ms. Jennings understood was appropriate.

Chair Amodei called for questions and explained this hearing was scheduled to find out what was learned from the impeachment process. Although there was some statutory guidance and some Constitutional guidance, the procedures had many voids. The Chair asked if there was a consensus for adding improvements to the process. Vice Chair Washington commented, in retrospect, regarding the impeachment process, very few understood the beginning of the process, how it worked and the stages necessary to reach the point of impeachment. He said without that knowledge, it was difficult to work through the process of impeachment. What an allegation is, who investigates, what the investigation consists of, and if there is a rebuttal for information the investigation discovers, he noted, contributed to his concern about gaps in the process. He expressed a desire to pinpoint the Senate's role in the impeachment process and emphasized the prospect of going through this process again would not be pleasant. Chair Amodei said Vice Chair Washington's feelings would be noted for the record. He then asked Nicholas Anthony, Committee Policy Analyst, to put together one page of information for the Committee based on the existing regulations and statutes to clarify the process.

Chair Amodei affirmed to Ms. Jennings that the process for impeachment could be clearer in statute, and the Ethics Commission's investigative assets were, basically, her. He asked what Ms. Jennings' credentials were as an investigator, and whether they wanted to mandate the Attorney General's Office to do the investigations. He said the Legislature certainly did not want to create a whole investigative wing in Ms. Jennings' office, in case there was another constitutional officer who needed to be investigated. He stated since this situation does not happen often, it would not be cost-effective to have such assets sitting idle. He asked her to address Vice Chair Washington's concerns about how this worked in an impeachment process.

Ms. Jennings explained that most of the information the Senate saw was provided to her office. She said she spent a great deal of time reviewing the information and reinterviewed four of the witnesses who she felt had the most information after she reviewed their depositions. She stated there were seven witnesses who were actually deposed. She verified information with the witnesses and concluded there could be violations of NRS 281.481,

subsection 7 and NRS 281.481, subsection 9 which dealt with influencing a subordinate, and NRS 281.481, subsection 2 which was using your office to grant an unwarranted benefit. In her analysis, some work done in the Controller's Office was an unwarranted benefit to Ms. Augustine's reelection campaign.

Chair Amodei asked her to explain the process she used to review what the Attorney General provided. He also asked her about legal support. She responded the Ethics Commission had an in-house counsel. The Chair asked her if she did her review in conjunction with that person, and she replied affirmatively. Chair Amodei then inquired if her conclusions were based on what the Attorney General's Office provided her concerning violations. She responded yes, and added her conclusions were also based on her own interviews with the witnesses. Chair Amodei questioned her about her training regarding investigatory procedures. She replied that in both her current position as executive director of the Commission on Ethics and in her previous position at the State Dairy Commission, she was responsible for looking into potential violations of State law and making recommendations to her bosses.

Senator Nolan expressed that the impeachment process was painful for everyone involved and further acknowledged an understanding of what her constraints were in the process. He stated it was a draconian event, having to convene the entire Legislature to review the actions of one individual. He expressed hope these deliberations would help avoid such a scenario in the future. He said his real disappointment was with the investigation process. He asked Ms. Jennings if she had the opportunity to participate with the Attorney General in his investigation and the opportunity to ask him to question or investigate further. She replied her office had no contact with the Attorney General's Office other than the filing of the complaint. Her office treated the complaint as confidential until the panel met. The only people contacted were those necessary during the course of the investigation. There was no communication back and forth between the two offices.

Senator Nolan asked if it would have been helpful to her if there had been communication between the two offices, allowing her to have some input before formal charges were filed. Ms. Jennings replied it might have been, but the Legislature had separated the Ethics Commission from the Attorney General's Office in 1999. She stated the reason they did that was because her office could conceivably have to investigate the Attorney General's Office. If a

partnership was structured between the two, a provision had to be made to avoid a conflict of interest in a situation where the Commission on Ethics had to investigate the Attorney General's Office. Senator Nolan requested Chair Amodei ask Mr. Anthony to prepare a flowchart providing visual clarification. Ms. Jennings suggested the Committee consult her office's Web site for something comparable.

Chair Amodei asked if the four witnesses she interviewed ultimately testified. She responded in the affirmative. Chair Amodei queried who the four witnesses were. Ms. Jennings said it was Ms. Normington, Ms. Howard, Mr. Wells, and she had forgotten the name of the fourth witness. Vice Chair Washington asked her if she investigated not only allegations but the facts presented, and if she had considered the motives submitted before making recommendations. She replied 80 percent of the complaints were dismissed at the panel level, which was like an arraignment where evidence was brought forth and charges made. She responded they do look at motives, and sometimes they are a lot clearer to spot than other things.

Vice Chair Washington inquired if, as the investigator, she investigated at the panel level and if she could make recommendations to the panel. She iterated that 80 percent of the time her recommendation was to dismiss. She said she wrote a report before going to the panel stating the complaint, what the public officer said and anything else she discovered through record searches, witness interviews and other means allowing her to get more information. The Commission counsel always reviewed her report before going to the panel, which consisted of two people, one from each major political party. Then, the Commission made its own determination whether the evidence was credible, and whether a violation of law might have occurred. The Commission's standard used a preponderance of the evidence, a higher threshold, and it also had the opportunity, in a hearing, to question people. The public officer can submit additional evidence after he sees the outcome of the investigation, she said.

In this particular case, there was no public hearing because of the stipulation for settlement offered to and accepted by the Commission. Vice Chair Washington asked if the same evidence was reviewed by Ms. Jennings. She replied yes. He asked if she went further, noting none of the computers were gathered to determine whether the information was duplicated or contrived. She stated the complaint was not filed with her until a year after the events occurred, so it was not possible by then to get that information. She said she went through all the

binders and noted duplicate information and blank pages. She said she gave everything to the Legislature.

Vice Chair Washington concluded Ms. Jennings was confined to whatever the statutes said or whatever the NACs asked her to regulate at that time. She agreed, adding if the Legislature wanted to change the standard in the statute, the Ethics Commission would enforce it. Vice Chair Washington asked if an accused official was given an opportunity to face his or her accusers. Ms. Jennings replied, when something goes to a hearing, witnesses are questioned by the Commission chair and anyone on the Commission desiring to do so. The accused and his or her legal counsel have the opportunity to cross-examine them as well.

Chair Amodei referred to Exhibit E, paragraphs (a), (b) and (c) of subsection 5 of NRS 281.551 and annotations added in 1991 and 1999, and asked if that was a reference to legislative history. Ms. Jennings responded yes. Chair Amodei asked Ms. Jennings, in light of subsection 5 of NRS 281.551, if she had any doubt about who the appropriate person to commence impeachment proceedings was. Ms. Jennings responded she had asked Legislative Counsel Erdoes who the appropriate person to file with was. Ms. Erdoes' staff researched the issue, and advised her who the appropriate person to file with was the Chief Clerk of the Assembly. Chair Amodei asked if she forwarded her recommendation for impeachment under paragraph (a) of subsection 5 of NRS 281.551 to the Chief Clerk of the Assembly. Ms. Jennings replied her office did not file a recommendation for impeachment. What was filed, she said, was a transmittal letter stating that here was the stipulation entered into, and pursuant to paragraph (a) of subsection 5 of NRS 281.551, the Ethics Commission was providing the Assembly a copy.

Chair Amodei asked why the court function was not identified as available for this instance. Without impinging upon the Assembly's ability to handle affairs, constitutionally and statutorily assigned to it as it sees fit, ultimately, the impeachment process is a trial. The first time the "trial" and the due process protections inherent in that were rolled out, was when the impeachment process was quite a ways down the road. He asked Ms. Jennings her opinion about keeping the statutes and the regulations the same or if she wanted changes. Ms. Jennings said she had treated this case as any other, adding her job was not to make a recommendation for impeachment. She said if the Legislature wanted to put a provision into statute that changed her Office's

process to include impeachment as a possible ramification of statute, it certainly could. Chair Amodei stated the record would reflect the Ethics Commission as not having any strong feelings one way or the other, if that was what they wanted. Chair Amodei stated that if this happened again, there needed to be more guidelines.

Ms. Jennings said language changes regarding the definition of a "willful" violation of statute would probably be debated. She said the Commission did not like a strict liability statute because they thought you must look at intent, as Vice Chair Washington observed. She continued, the Commission felt the word "willful" was an important standard to keep in statute.

> If you want to redefine the way we look at 'willful,' you can do that, we do not want to be put in a position where we have to recommend anyone for anything. The way we interpret the statute is, if we find a violation, we are supposed to make that filing and then it is up to the court or the Assembly. ... That is because you designed our body to be nonpolitical. You prohibited our staff and our Commissioners from political activity, running for office [or] holding any other public office. They have to agree to do that when they are on the Commission.

It had always been the position of the Commission that it would not be appropriate to make political recommendations. Chair Amodei asked Ms. Jennings if, after she had consulted with Ms. Erdoes on how to process the case, she discussed the decision to proceed with the Commission's in-house counsel. She replied they had reviewed Ms. Erdoes' information and concluded they were complying with what they were told was the appropriate action. Chair Amodei expressed interest in knowing why the district court was either deemed not to be applicable, or if applicable, not chosen in favor of calling the Legislature into the Twentieth Special Session. Ms. Jennings commented that to be fair to Ms. Erdoes, she did not know whether Ms. Erdoes recommended one way or the other. Ms. Erdoes had just defined for them who those persons were that would fall under NRS 281.551, subsection 1, paragraph (a) versus paragraphs (b) or (c).

Vice Chair Washington commented Ms. Jennings had hit a chord and the word "appropriate" was vague in NRS 281.551, subsection 1, paragraph (a), and rhetorically asked who the appropriate persons were, what the appropriate court

was, and if the Legislative body became the appropriate court, or if Ethics counsel became the appropriate people. Ms. Jennings said the research provided indicated that, according to Articles of the Nevada Constitution, impeachment began in the Assembly. She said they were advised to submit the information to the Chief Clerk of the Assembly. Vice Chair Washington followed up saying the impeachment proceedings were conducted by the Assembly, but before they got there, the proceedings began with the Ethics Commission administrator being the investigator going before the two-man panel, and sending the letter to the appropriate next stage which, counsel advised, was the Assembly. They were the ones that sent the Articles of Impeachment to the Senate to deal with from there. He asked if he was correct in his understanding. Ms. Jennings said apparently that was the way it happened. Vice Chair Washington queried whether the Ethics Commission was the appropriate body to begin with. He said he was trying to determine what was in between, such as due process afforded that individual, before the case went to the next appropriate body.

Chair Amodei asked Keith Munro, Deputy Chief of Staff, General Counsel, Office of the Governor, to testify. Mr. Munro stated he recently saw an ethics proceeding take place in a public fashion and realized these cases were difficult, and never worked flawlessly, because there was too much at stake for the participants and all the people involved. He referred to the case in question today, stating he believed the Legislature, the Ethics Commission and the Attorney General conducted themselves very well, and the system worked. An impeachment proceeding would never be perfect, as seen on the national level with former Presidents Richard Nixon and Bill Clinton. Because the process worked, he had no bold recommendations for overhauling the process.

He offered a couple minor suggestions, such as learning the facts early because the facts were determined quickly when a contested case was before the Ethics Commission. However, where there was a guilty plea, as in this case, it was more difficult. He suggested the Judiciary Committee explore firming up the factual basis for a plea. He said he meant if dates, times, events, places and people involved were required to be spelled out clearly by the Ethics Commission, it would help this body get to the facts and get to them early.

He offered a second suggestion regarding the standard for impeachment as being misdemeanor or malfeasance, which meant criminal conduct or extremely bad judgment. He stated that information was needed before the case got started, which would help in following the evidence. For those cases before the

Ethics Commission that may result in impeachment, he suggested Legislators may want to consider allowing the Ethics Commission to stay a case and allow criminal conduct to be cleared up by a prosecuting attorney. He suggested that then, when a case came before the Legislature, they would know right away whether they were talking about a crime or about bad judgment.

His third suggestion was to require the accused state officer to keep the public informed. He said they should come forward and present their sides of the cases. He further suggested the state officer could be required to testify in his or her own impeachment proceeding. He said it would help the Legislature and the public understand what was going on with something so important. He spoke to Chair Amodei directly, and said he would have to think through the Fifth Amendment privileges and legislative immunity.

Chair Amodei asked John L. Arrascada, Attorney, to give testimony. Mr. Arrascada stated the Committee was focused on making the process easier, and that was not the goal. He said they were talking about the ultimate sanction of an elected public official, and if the Legislature became involved in the removal of an official from office when the will of the people placed that person in office, it would do a disservice to the people of the State of Nevada, and it would also do a disservice to the Legislature because it would create more of the same thing experienced in December 2004. Regarding the process itself, one of the issues brought up by Ms. Jennings was the definition of "willful." The definition of willfulness in the ethics statute, NRS 281.551, was not the same definition of willfulness in criminal statutes because it states a public official knew or should have known they were committing an offense. A public official, especially someone who is the leader of an office, theoretically should have known any activities their employees did and looked for a willful violation. He urged the Committee to redefine "willfulness" under the ethics statutes. He suggested doing away with "willfulness" and making it strict liability, which would result in removal of anyone who committed any violation of the ethics statutes. He said "willful" should receive the specific intent definition that it was an intentional act by the person accused.

His next suggestion was in reference to clarifying the process of impeachment Vice Chair Washington had touched upon. The statute noted it shall be referred to the appropriate persons, and he said it appeared the interpretation was "shall be impeached" not "shall be referred to for review." The potential to have some nonpartisan apolitical body established to review the charges before they ended

up in the Assembly would be beneficial, he noted. He said there was not a thoughtful review of all of the evidence presented. Vice Chair Washington asked what he meant by "review," if it was review of facts, or information, or the allegation or was it a component of putting due process in place. Mr. Arrascada replied it could be an element of due process. Some nonpartisan body or appointed group established by some totally independent committee could accomplish that, but not an independent counsel because they were most often politically charged. He noted it would give some level of filtering of the evidence before it appeared in front of the Assembly, to be presented for what seemed to be the Assembly "we-shall-impeach" session. Then, the Assembly moved it to the Senate for the trial.

Dominic P. Gentile, Attorney, said the impeachment process the State just experienced was not the type it would see in the future because of how it began. He stated his focus would be on a more ordinary set of circumstances. The recent impeachment hearing began in the Assembly with a challenge to the Attorney General's participation in the presentation. He said the Assembly was the body most in need of direction that could have most affected the outcome, but did not rise to that level. Under normal circumstances where there was no dispute as to whether there was a conflict of interest by the Attorney General, there was no reason why the Attorney General should not present evidence to the Assembly, he noted. The Attorney General's Office had the resources and expertise to decide to go forward. Mr. Gentile suggested the reason the impeachment went forward was because of the involvement of the Attorney General prior to the presentation of evidence to the Assembly. He said the Assembly's function was to screen evidence and determine whether or not to issue Articles of Impeachment. The closest thing to that function was the screening process the prosecutor's office did.

On the next level, he continued, a prosecutor determined whether a case should go to the next step and made a choice to either present it to a grand jury or go through a preliminary hearing. Both steps existed to make a determination of probable cause. Mr. Gentile stated the determination of probable cause was the function of the Assembly. At that point, the Attorney General should be at arm's length with the Assembly, he said. The Attorney General ought not treat the Assembly as a grand jury, since in this instance they were dealing with an elected official who had not been convicted of a crime, they were only asked to consider returning Articles of Impeachment. In the vast majority of cases, the

Attorney General or a specially appointed prosecutor would be involved rather than the Assembly.

A special prosecutor should have been appointed to test the reliability of the evidence, examine whether there were biased witnesses and whether there existed motives to falsify or exaggerate. Mr. Gentile said although the Assembly required the witnesses to be presented, the prosecutor should be obligated, as he is in Nevada's grand juries, to advise the Assembly of any biases and motives to falsify. Then, the Assembly would be enabled to do something.

Mr. Gentile stated the Assembly did nothing in the case regarding Ms. Augustine; they applied a rubber stamp. The Assembly members received binders at 2 p.m. on the first day of the hearings and voted on the Articles of Impeachment at 10 a.m. the next morning. It was fraudulent if there was any semblance or attempt to pretend they actually considered the information presented in those binders, he said. He acknowledged what he was saying was pretty damning, and stated he was not doing it out of a desire to condemn but out of a desire to build for the future.

Another problem that needed to be avoided concerned witnesses who testified in tandem, with other witnesses sitting in chambers, listening to what had been said before their testimony, Mr. Gentile asserted. When you combined the bias and motive issues with the fact it was rehearsed and they actually heard it presented, it was an abomination, he declared, and there was no way to arrive at a fair decision with that kind of process. The insulation of witnesses from each other was essential for meaningful prosecution, he continued.

Mr. Gentile suggested Mr. Munro had good intentions, but to require the presentation of a defense by the impeached official did away with any kind of a presumption, firstly; and secondly, the burden of proof should definitely fall on the party bringing the action for impeachment. In all instances, that should be either the Attorney General or the special prosecutor. He emphasized that nowhere in the law did a proceeding go forward where there was no burden of proof. It became an inquisition if the Attorney General or whoever was presenting evidence had no burden of proof, he continued. He said he had witnessed two inquisitions, one in Italy and one in Jamaica, and they were not pretty. In an inquisition, the judge did the questioning and there was no burden of proof. He pointed out the grand jury in our country was essentially an inquisition, but the accused did not have to testify. He suggested the official

whose impeachment was being considered be given the opportunity, at the Assembly level, to testify, to designate witnesses and present the witnesses through their own counsel or have the Attorney General present them, but he said it should not be required. Deliberations cannot be done by caucus, he said.

Everything done until the impeachment proceeding was political, and it was their role, as politics was what the Legislature was all about, he said. Impeachments ought to be guided and deliberations ought to take place among the entire body, which could be very unwieldy at the Assembly level. There should be instructions defining the law and a threshold level of evidence such as probable cause that everyone was aware of, he proposed. Regarding the Senate hearing, the Senators took an oath in the impeachment proceeding, separate from the one taken when elected. That oath was to do justice according to the law and the evidence. This meant impeachment proceedings were not political, in his opinion, and should not be political. Because judgment was passed on a person who was elected by the people of the State of Nevada, the impeachment had to be based on deliberations, the law and the evidence, not on the politics, he concluded.

Senator Wiener asked when considering if there should be a review prior to the consideration of the charge by the Assembly, what would happen if a conflict arose involving the Attorney General's Office. She asked how the Attorney General would be disengaged and who would pick up the investigation. A couple of suggestions made were to form a subcommittee of the Assembly to be an intermediate filter, and the other was the special prosecutor, she added. Senator Wiener stated she had avoided all contact she could with any media regarding the proceeding, including radio, television and newspapers. She said, based on her oath, it was her duty not to have conversations with counsel. For the record, she stated, "We have a responsibility to that oath to not have those conversations." She said it was important to keep at arm's length from counsel and any other input. She cautioned all counsel should stay away from the Senators during such proceedings, so the integrity of the process would be maintained. Mr. Gentile said, doing it inversely, there was no conversation regarding the merits of anything and that also included the Assembly. He said counsel, as a matter of habit, abided by that. The screening process was intended to be done by a committee appointed by the Assembly, he elaborated. They could make a recommendation to the Assembly to either hear evidence or to omit it, he explained, which would equate to the prosecutor's screening function before he filed a case. Regarding the question of misdemeanor or

malfeasance Mr. Munro spoke to, Mr. Gentile said it was required by the Constitution. If a person was unethical, but had not committed a misdemeanor or malfeasance, it was over. It could save a lot of time and money to proceed that way, he concluded.

Senator Wiener questioned counsel regarding the investigatory powers of a subcommittee with full subpoena power. She asked, based on the fact a referral would be made to the larger body and that body had the authority to appoint subcommittees, whether such a referral had to be statutorily defined or if it was inherent in the ability of that body to do that ordinarily. She asked Kelly Lee, Committee Counsel, since there was a referral requirement, under certain circumstances, to the Assembly for review regarding whether impeachment charges should be determined, if it was possible to have an investigation by a subcommittee or a specially appointed committee because those powers were already in the Assembly to appoint special committees. She also asked if that would require special statutory language under such circumstances or if it was inherent in the authority of the Assembly. Also, did it have to be defined statutorily for those special circumstances even though they could already do it under ordinary circumstances, she inquired.

Mr. Arrascada noted the Controller's defense team could have hired a lobbyist to lobby individual Senators because lobbying was not precluded by the rules. He stated those proceedings needed to be treated uniquely, with special rules to prevent lobbyist influence in the future. He said there needed to be special rules for conducting the proceedings in the Assembly. He said his defense had been told many special procedures were being established and that the Legislative Counsel Bureau had prepared a special way to address the issues coming before the Assembly. On the day of the proceedings, he said, they were told it would be conducted like any other hearing in front of the Assembly, and this troubled him because of the special circumstances. It created a situation where he said he could not challenge a witness's credibility. Challenging their biases and motives was not possible, since they testified in tandem, able to listen to other's testimony and had stood in the back with their arms crossed, glaring at the testifier, making sure they continued lockstep with what the group wanted to present. He said he was disgruntled that the impeachment hearing was treated just like any other hearing.

Senator Nolan stated they needed to determine whether they wanted the proceedings in the Assembly to take the form of a preliminary hearing, a

prescreening hearing or a grand jury. He stated he understood Mr. Arrascada and Mr. Gentile were afforded the opportunity to present a defense before the Assembly and chose not to. He asked why they declined the chance, since it could have resulted in avoiding the Senate hearings.

Mr. Arrascada replied, they were offered an opportunity to present a defense, but not the opportunity to cross-examine or challenge witnesses' biases, motives or beliefs in the Assembly, which was the key in the defense for the State Controller. This interfered with their prepared legal strategy, he said. Mr. Gentile stated if they had been able to cross-examine in the Assembly, without all the witnesses in the room together, then the Assembly hearing probably would have proceeded like the one before the Senate. He complained defense attorneys had been lied to and told there were going to be special rules; then two days before, they were told there were no special rules; and at the last minute, they were notified that the Attorney General was not going to present the case, and the Speaker of the Assembly was going to conduct the hearing. He continued, the proceedings were so polluted by the way they were approached and the way they were conducted, that, frankly, the defense team wanted to preserve whatever legal arguments they had to challenge the ruling in the courts.

Senator Nolan commented he was impressed within his own caucus with the emphasis placed on the facts and the law rather than on the politics of the issue. He said he disagreed with Mr. Gentile that constructing an organized debate among 21 Senators on the issue would be wise. Perhaps, deliberations amongst the body as a whole, much as a jury did, could be a solution, he suggested. Mr. Arrascada stated, regarding the Assembly process, given all the tools of cross-examination, it was important to note in the Assembly, a simple majority was required, creating the potential for an apolitical policy to potentially become a political process by virtue of the accused possibly being in the minority party. In the Senate, a two-thirds majority vote was required, causing some bipartisan union for a conviction or an acquittal.

Senator Horsford clarified, stating all the processes for this Legislative body were new to him. He continued, the Ethics Commission executive director followed what the statute told her to follow, with the stipulation of a willful violation the State Controller had admitted. He said there was not any obvious political bent on either side of the Houses of this Legislature, and in the end, fair due process and an ultimate decision was given to the State Controller.

Mr. Arrascada replied he had given testimony today to find a way to make the process fairer and more balanced for all parties. He continued to explain his goal was to provide some commentary to this Committee on issues that arose which were fundamentally unfair, or issues that could have made the process more effective, providing more due process to prevent this from occurring again. Senator Horsford agreed and emphasized some Legislators believed counsel could have done things prior to and during the Ethics Commission proceedings to avoid this issue from being brought before the Legislature at taxpayers' expense. He said he wanted to be clear that he believed nothing was overly political during the Assembly process. He reminded Mr. Arrascada that based on his legal strategy, the defense team had chosen not to pursue arguments in the Assembly. As a consequence of the Twenty-first Special Session, there were six bills proceeding through both Houses, and the ultimate political judgment of all 63 people would be used. He assured Mr. Arrascada and Mr. Gentile that their perspective would be considered by this Committee and others when they took a look at those pieces of legislation.

Vice Chair Washington said he used the Controller's case as a template for addressing the issues Mr. Arrascada, Mr. Munro and Mr. Gentile had presented. He enumerated the steps taken to reach the Assembly for the impeachment hearing, noting Mr. Arrascada had said the prosecutor should have been the Attorney General's Office if there was criminal intent or allegations of criminal intent. Mr. Gentile clarified there ought not to be anything going forward unless it was a misdemeanor. He continued, the Attorney General should always make the presentation to the Assembly as the prosecutor, unless he himself was under investigation. Vice Chair Washington said whether it was willful intent or a misdemeanor, it should always be the Attorney General's case.

Mr. Gentile responded, he thought there was a different situation if a criminal conviction already existed. Vice Chair Washington continued on that point, noting Ms. Augustine had been fined $15,000 by the Ethics Commission, constituting an admission of guilt. In the legal sense, Mr. Gentile explained, it was not an admission of guilt, but an admission of some facts. Vice Chair Washington said the case moved to the Attorney General's Office, which began its investigation based on the recommendation of the Ethics Commission. He said he understood Ms. Augustine had stipulated she would be willing to step down. "Never, no!" Mr. Gentile said. "It was requested and bargained for, but rejected at every stage on her part." Mr. Gentile clarified that making an admission at the Ethics Commission level was merely an admission they could

prove their charges by a preponderance of the evidence. Vice Chair Washington suggested, hypothetically, a subcommittee of the Assembly could review the evidence regarding the legitimacy of charges and a stipulation which would merit going forward with an impeachment.

Mr. Gentile suggested, let a committee of the Assembly look at the allegation and determine a finding of preponderance of the evidence, and if it was more than that, ask if it rose to the level of an impeachable event. If it did not, then do not continue; if it might, then you have to continue the process, he said. Vice Chair Washington interjected, it would allow the due process to take effect because there would be a prosecutor and a defense attorney. Mr. Arrascada added, Ms. Augustine should have known these acts occurred, which was different than her admitting she intentionally caused these things to happen. The standard a public official should be held to is an act of intentional wrongdoing, he clarified.

Vice Chair Washington continued, there were two separate issues: one being the malfeasance and the misdemeanor, which is criminal intent, and then second, the willful intent; so, the Attorney General's Office should be prosecuting counsel. Mr. Arrascada said the Attorney General's Office had the obligation to present the evidence and to do the first level of screening, then make a recommendation to the Assembly. He said this could save the taxpayers a lot of money, as well as saving the Legislature a lot of time.

Senator Care said he was concerned that the complaint given to the Ethics Commission was a criminal investigation which was supposed to be confidential. He recalled asking Ms. Jennings what the standard was for entertaining a complaint from a law enforcement or prosecutorial agency, and she said it had never happened before. He said he would like the Ethics Commission to have the discretion to refuse the complaint. He continued that any law enforcement agency, under current law, could take a criminal investigation and turn it over to the Ethics Commission. He pointed out Mr. Gentile knew that sometimes these agencies had a political agenda, so if the agency could not get the evidence for a criminal conviction, it would be convenient to turn what evidence it had over to the Ethics Commission. He asked for thoughts on the propriety of a law enforcement branch or a prosecutorial agency turning over an investigation to the Ethics Commission and stated he was uncomfortable with the possibility.

Mr. Gentile reminded Senator Care that the motion he filed prior to the Assembly hearing zeroed in on that issue. There was no provision under current Nevada law for a law enforcement agency to make a complaint with the Ethics Commission. Mr. Gentile said the statute clearly says the Attorney General and other public officials are not to make such presentations, and that was the reason he challenged the Attorney General's participation in the impeachment proceedings. Given the amount of protection of records gathered in a criminal investigation, it made no sense to allow law enforcement to make the presentation to the Ethics Commission, he continued. There was great law enforcement pressure placed on the Ethics Commission and its members and employees when they were asked to take an issue forward. Chair Amodei stated the hearing on ethics and the impeachment process would be continued rather than adjourned to allow other testimony later.

Robert List, Former Governor, the Robert List Company, stated he was here on behalf of his client from the Nuclear Energy Institute, Inc. He said he and Michael A. Bauser, Associate General Counsel, Nuclear Energy Institute, Inc. were not here to criticize, but to explain how they felt about the litigation regarding the Yucca Mountain Project, and to give an objective analysis of where it stood. He noted State officials and Nevada's Congressional Delegation had fought a valiant fight to save Yucca Mountain; however, he said the prognosis for that litigation and for the project was quite different from the portrayal by the State representatives. Congress, overwhelmingly with bipartisan majorities, overrode the Governor's veto on the project. The State had increasingly pinned its hopes on the litigation to be victorious, he continued. He said the litigation and its outcome were different than what had been characterized by the opponents of the project, specifically the State's legal counsel. He said he believed, along with many Nevadans, that this project was inevitable and despite the millions of dollars spent, an objective analysis of the project would demonstrate the likelihood this project was greater than it had ever been. He introduced Mr. Michael A. Bauser from the Nuclear Energy Institute, Inc.

Mr. Bauser read from his written remarks (Exhibit F) regarding Yucca Mountain. He added, the United States relied on nuclear energy for 20 percent of its electricity and needed nuclear power to meet future demands. Electricity from nuclear power represented more than 70 percent of all clean energy production in the United States and it was necessary to provide secure management of the

waste material captured in used fuel. Since 1982, all administrations, Congresses and courts have agreed.

Chair Amodei asked if Mr. Bauser was indicating the Environmental Protection Agency (EPA) was reviewing its options for compliance under the court order. Mr. Bauser replied in the affirmative. Chair Amodei asked him to clarify their options and wanted to know the range of potential EPA action resulting from this court order. Mr. Bauser said he did not speak for the EPA, but understood it could seek to have compliance evaluated for a longer period than 10,000 years out to peak dose, or the EPA could follow the road map laid out in the decision, beginning with a more specific, focused analysis of compliance at peak dose and then apply policy considerations which could result in a period of compliance less than at the time of peak dose, maybe even 10,000 years. Chair Amodei asked if he had an idea of the time frame regarding the EPA's response to the contents of the court order. Mr. Bauser explained, the EPA intended to propose a rule this coming summer, and he felt there would be a final rule by year-end. Chair Amodei asked if the process indicated by the rules published in the Federal Register was the same as any other federal regulation. Yes, Mr. Bauser responded, saying he was talking about compliance with the rule-making process as prescribed in the federal Administrative Procedure Act.

Senator Care asked if the Nuclear Waste Policy Act of 1982 required any action regarding Yucca Mountain to be filed in federal court and then in the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit. He said it was his assumption as the project progressed, there would continue to be lawsuits on grounds not yet annunciated. Considering the threat of numerous lawsuits in the future, he asked if everything would be adjudicated in the district court in D.C., and if something in that act addressed a statute of limitations prohibiting a new lawsuit every time the project progressed, assuming it did. Section 119 of the Nuclear Waste Policy Act of 1982 prescribed actions challenging the Yucca Mountain Project be brought in a United States Court of Appeals, he explained. Some cases have been brought in the U.S. Court of Appeals for the Ninth Circuit, but most have been brought in the U.S. Court of Appeals for the District of Columbia Circuit, he said. Courts of Appeals are the proper venue for these cases, he continued. Section 119 of the Nuclear Waste Policy Act also prescribed that cases must be brought within 180 days from the action challenged. Senator Care commented actions into the future could invite more lawsuits. Mr. Bauser replied, "That is correct."

Senator McGinness said he served on a high-level radioactive waste committee and asked when the proposed licensing would occur. The U.S. Department of Energy (DOE) had originally intended to submit its application in December 2004, and has now announced its intent to submit an application sometime this calendar year, he said. Mr. Bauser responded that one reason for the delay was the Department's failure to certify documents to the Nuclear Regulatory Commission's licensing support network. This certification process essentially substituted for the normal discovery process and was a prelude to licensing, he continued. The DOE was now in the process of recertifying documents. Senator McGinness said Margaret Chu, Director of the Office of Civilian Radioactive Waste Management, U.S. Department of Energy, had tendered her resignation, partially because there were tons of paper, numerous e-mails and vast numbers of documents and asked if she had just had enough of that. Mr. Bauser responded, no, he had no reason to believe Ms. Chu's stated reason for leaving was inconsistent with what she said. He did concede the production of these documents was a daunting task. Senator McGinness asked if the production of these documents would hold up the licensing deadline. Mr. Bauser said it was one of the stated reasons DOE offered, and another one was to allow the response of the EPA to proceed to a point where the application could be attuned to whatever the EPA proposes in response to the court's decision.

Senator Nolan said the date for shipping high-level nuclear waste to Yucca Mountain had been pushed back to 2012. Mr. Bauser concurred. Senator Nolan asked about progress made regarding routing into the repository and if there would be additional rail lines. He asked for an update and wanted to know if there were still plans to route high-level waste through urban areas, and if so, how would it be accomplished. Mr. Bauser referred to the fiscal budget for 2006, stating it was $561 million, up 14 percent over the amount appropriated last year, and that it compared to a flat DOE budget overall. A large portion of the increase was targeted for transportation planning, he stated. The mostly rail option was still the preferred option to date, he explained.

Senator Nolan asked what was being done on a federal level and what was the strategy dealing with independent state sovereignty rights to transport from the East Coast to the West Coast, going through a dozen states that have negative views of the plan. Mr. Bauser replied the DOE plans to continue to work with states and other jurisdictions through which transportation will occur, using cooperative agreements and training of first responders who would be on the

scene in the event of an accident. Also, the Hazardous Materials Transportation Act preempted regulation of transportation activities referenced, he explained.

Senator Nolan stated the people of Nevada were not happy about this predicament, but hoped there was an upside. We know what the innate detractors are in the process and the whole downside, but wonder whether reasonable restitution can be expected, or if there is any benefit to being the country's nuclear waste depository, he queried. Mr. Bauser replied, absolutely, and we would encourage the State to engage in obtaining the types of benefits which are very much on the table under the Nuclear Waste Policy Act. More fundamentally, the safe, environmentally sound disposal of nuclear material was in the interest of the industry and, more importantly, in the interest of the State of Nevada regarding Yucca Mountain, he said.

Chair Amodei said the Committee would continue the hearing on the Yucca Mountain litigation on February 16, and the hearing on impeachment would be continued for supplementing the record.

Chair Amodei adjourned the meeting at 10:59 a.m.

RESPECTFULLY SUBMITTED:

_____
Ellen West,
Committee Secretary

APPROVED BY:

_____
Senator Mark E. Amodei, Chair

DATE: _____