

**MINUTES
of the
SECOND MEETING
of the
HOUSE SPECIAL INVESTIGATORY COMMITTEE**

**January 28, 2016
Room 309, State Capitol
Santa Fe**

The second meeting of the House Special Investigatory Committee (HSIC) was called to order by Representative Zachary J. Cook, co-chair, on January 28, 2016 at 11:22 a.m. in Room 309 of the State Capitol in Santa Fe.

Present

Rep. Gail Chasey, Co-Chair
Rep. Zachary J. Cook, Co-Chair
Rep. Jim Dines
Rep. Kelly K. Fajardo
Rep. Sarah Maestas Barnes
Rep. Javier Martinez
Rep. William "Bill" R. Rehm
Rep. Patricio Ruiloba
Rep. Tomás E. Salazar
Rep. Jeff Steinborn

Absent

Staff

John Yaeger, Assistant Director for Legislative Affairs, Legislative Council Service (LCS)
Douglas Carver, Staff Attorney, LCS
Nancy I. Martinez, Intern, LCS

Minutes Approval

Because the committee will not meet again, the minutes for this meeting have not been officially approved by the committee.

These minutes are not a verbatim record of the meeting.

Thursday, January 28

Co-Chair Cook opened the meeting giving an overview of the formation of the committee, the retention of Robert Gorence as special counsel for the committee and the resignation of the Secretary of State. Co-Chair Chasey noted that the intent of the committee's meeting on this day was to hear from Mr. Gorence concerning the actions he was prepared to

recommend to the committee and to get a sense from the committee of what procedural recommendations might be made in the event of a future impeachment investigation.

Motion: Co-Chair Cook made a motion, seconded by Representative Fajardo, that the minutes of the first meeting of the HSIC be approved. Representative Dines objected to the format of the minutes, recommending that they be revised to reflect the names of each individual member. Mr. Carver noted that while his notes likely permitted him to put names to comments, this was not the normal custom of LCS minutes as there was no verbatim record for meetings. Representative Fajardo recommended that disclaimer language be included on the minutes, indicating that there was not a verbatim record. Co-Chair Chasey noted her concerns that statements would be misattributed to someone or what someone said would not be properly reflected in the minutes. Representative Steinborn also commented that his concerns about webcasting were not reflected in the minutes.

At the conclusion of the discussion, the motion to approve the minutes was approved with no objections, on the condition that the minutes be amended to include names of speakers, a note on webcasting and a disclaimer about there being no verbatim record.

Mr. Gorence told the committee that he appreciated his selection as special counsel for the committee. He said that he would cover issues concerning the rules that he would have recommended to the committee as its work moved forward; would give a brief procedural history from the time of the filing of the criminal information against the Secretary of State to her plea to today; would cover what he was prepared to present at the canceled October 27, 2015 meeting of the committee, the meeting that was canceled due to the former Secretary of State's resignation, including a discussion of what might be considered a high crime or misdemeanor for the purposes of an impeachment proceeding; and would discuss impediments to his investigation, including positing certain issues for the committee to think about for the future.

Mr. Gorence noted that the rules that were proposed were largely based on those used in the 2005 proceeding concerning the impeachment of the State Treasurer, with the principal difference being the quantum of evidence to be used. Mr. Gorence explained to the committee that in an impeachment proceeding, the full House of Representatives sits, effectively, as a grand jury, and then, presuming Articles of Impeachment are forwarded, the Senate conducts a trial. The HSIC's role would have been to examine whether there was enough evidence to go forward with a full investigation. He noted that in 2005, the standard of proof was "clear evidence", so that there would not be confusion between the civil standard of "preponderance of the evidence" or the criminal standard of "beyond a reasonable doubt". Mr. Gorence stated that he did not see any significant difference between the 2005 "clear evidence" standard and the 2011 "credible evidence" standard. What was evident was that what the previous committees required was a substantial amount of evidence to be provided in order to move the investigation to the full House of Representatives. Mr. Gorence also made the distinction between the quantum of proof that would be required for the committee to recommend that the House take up an impeachment

matter and the quantum of proof the House would require before transmitting Articles of Impeachment to the Senate.

Mr. Gorence then briefly discussed the procedural history of the Dianna Duran case, noting that the criminal complaint was amended two times, both times expanding the charges against her. He informed the committee that he had close communication with the Assistant Attorney General conducting the Duran investigation, but that he had no access to the Attorney General's files as they were not a public record.

Mr. Gorence then gave the committee an overview of the three areas of inquiry he had intended to pursue. The first involved the conversion of campaign funds for personal use; the second involved violations of the Campaign Reporting Act, specifically documents created authorizing fictitious campaign expenses; and the third concerned the former Secretary of State's noncompliance with the enforcement requirements of the Campaign Reporting Act, specifically concerning a member of the House of Representatives. He noted that the second and third lines of inquiry would not have required a subpoena, as the documents that would be required to investigate these matters were all public, and other information could have been obtained through interviews. What would have been difficult, he continued, would have been to prove the conversion of campaign funds. The Attorney General would not release his files under the investigatory exception to the Inspection of Public Records Act due to concerns that the investigation would be jeopardized if the entire file was released. What Mr. Gorence would have needed in particular was former Secretary of State Duran's bank records. At the October 27, 2015 meeting, Mr. Gorence would have informed the committee that he required a subpoena, which would have necessitated the convening of the Legislature to issue a subpoena. It was expected that the Legislature would have convened itself into session at some point in November. Mr. Gorence had retained a forensic accountant to review the bank records that would have been produced. The plan was that Mr. Gorence would have been able to make a full presentation to the committee, possibly with the idea of creating a preliminary draft of Articles of Impeachment, by mid-December.

Mr. Gorence concluded his presentation by noting that it was necessary to begin the impeachment process when the committee did as the criminal process could have taken well over a year and there would have been a shadow over the Secretary of State as she supervised campaigns in an election year. He added that he believed that the criminal process may have gone on for longer than it did but for the impeachment committee process.

Representative Steinborn mentioned that one of the things that the committee was going to address was changing the requirements for issuance of a subpoena, and he asked Mr. Gorence about the records he had wished to access. Mr. Gorence indicated that he would have obtained the same records that the Attorney General had obtained from various financial institutions. In addition, he would have requested information from six Native American gambling casinos. He added that in the 2011 investigation of the former Public Regulation Commissioner Jerome

Block, Jr., the timing was such that the Legislature was already in session at the point when a subpoena was required.

Representative Dines asked two questions. The first concerned the documents that Mr. Gorence wanted to obtain through use of a subpoena. Mr. Gorence said that he would have preferred the entire file from the Attorney General, but what he really needed were the underlying financial documents. Representative Dines then asked Mr. Gorence what he would have recommended as the quantum of proof. Mr. Gorence started his answer by noting that he would have asked the committee for permission to proceed with his investigation, with the idea that he would not have conducted a full airing of the type of presentation he would have made to the full House to the committee, but rather he would have made a presentation laying out the evidence he had gathered. He said that he believed the 2011 standard of credible evidence of high crimes or misdemeanors was a good standard, but clarified that the quantum of proof the committee would have needed to advance the investigation to the House of Representatives was a different question than the standard required to advance Articles of Impeachment from the House to the Senate. Representative Dines noted that the committee had struggled with the ideas of "clear" versus "credible" evidence, and he asked why Mr. Gorence would have chosen "credible". Mr. Gorence explained that he saw the committee as performing a role similar to that of the screening committees used when he was a federal prosecutor, where the decision was made whether an investigation should move forward, whether there was a sense of confidence — whether clear or credible — that an investigation should progress. He noted that the HSIC's process was not a criminal, but a constitutional, proceeding. What he felt the committee would need to decide was whether the preliminary evidence was sufficiently compelling to expend the resources to conduct a full investigation. Mr. Gorence stated that he liked the term "credible", and simply using the Attorney General's charging documents was not sufficient, but after a fairly detailed investigation and presentation, using a forensic accountant, the committee could have decided whether to move forward. Representative Dines noted that he felt "sufficiently compelling" might work for the committee, although this was not the impeachment standard.

Representative Martinez asked that as the process for conducting an impeachment investigation was not written down, how the discussions on process for the Duran investigation would affect a future investigation, were one to occur. Co-Chair Chasey noted that the committee intended to discuss with Mr. Gorence procedural recommendations. Mr. Gorence stated that this case was different from the Jerome Block, Jr., proceeding in that Dianna Duran's criminal case would have gone to a preliminary hearing. He then clarified that there was one quantum of evidence to move forward with an investigation, versus a different quantum of evidence to vote to forward Articles of Impeachment to the Senate. Mr. Gorence reiterated that the standard of "credible evidence" would be what he recommended for use in the future, meaning that one has confidence in the evidence and witnesses. Co-Chair Chasey noted that, procedurally, the committee might recommend that the "credible" standard be adopted, meaning that the committee has to determine that there is credible evidence to recommend that an investigation go to the full House.

Mr. Gorence continued by stating that he recommended that the committee consider whether the Legislature should amend the statute concerning subpoenas to allow the issuance of subpoenas in cases of impeachment. Representative Fajardo mentioned that she was concerned that an amendment to the statute might take away the ability of a chamber of the Legislature to issue a subpoena while it was in session. She continued that this was a conversation that the Legislature needed to have, though perhaps not during a 30-day legislative session; she would like to hear what other members of the House have to say on the matter. Co-Chair Chasey mentioned the subpoena power granted to the Legislative Finance Committee (LFC) and raised the issue of members of the Senate being on the LFC. She noted that it would be of concern to have members of the trier of fact being involved in the issuance of a subpoena, and there would also be concerns surrounding the circumstances under which the Legislature would delegate its subpoena power.

Representative Steinborn asked whether the subpoena issued by the Legislature in the past had been broad or specific. Mr. Gorence answered that the subpoena was not like a federal grand jury, broad in scope to compel testimony, but was narrow and limited to documentary evidence. Representative Steinborn expressed concerns about how broad the subpoena power might be, where would it begin or where it would end. Mr. Gorence answered that what is interesting about the Legislature's subpoena power is that it is transparent, which is not the case with normal prosecutorial subpoenas; this transparency would help to minimize any chances of abuse. Representative Steinborn noted that there was nothing to prevent special counsel from expanding its authority. Representative Dines noted that proposed Rule 3(f) reads: "special counsel is authorized to request the issuance of subpoenas on behalf of the HSIC", which allows the committee to set the area of definition or scope of an investigation or a subpoena.

Representative Dines then noted that he remembered reading a recommendation concerning the subpoena power that seems to have gone into a black hole. Mr. Carver directed the attention of the committee to the appendix to the *Final Report of the Investigatory Subcommittee of the House Rules and Order of Business Committee*, the report issued at the conclusion of the Jerome Block, Jr., impeachment investigation. That memorandum listed a series of recommendations for future impeachment proceedings. At the request of the committee, Mr. Carver gave an overview of these recommendations, which included examining the type of committee to best handle impeachment; investigating the applicability of the Inspection of Public Records Act to impeachment proceedings; considering a change to the power to issue subpoenas; examining how the statute on the swearing of oaths to legislative committees would apply in impeachment proceedings; examining how the statutes on perjury and contempt would apply in impeachment proceedings; considering how the Open Meetings Act would apply to impeachment proceedings; considering the attendance of other members of the Legislature at committee meetings and the issue of *ex parte* communications; and researching what court challenges might be brought against impeachment proceedings. Representative Fajardo asked whether any of these recommendations had been taken up. Mr. Carver answered that they had not been taken up in any formal manner and nothing introduced on any of these issues had made it through the Legislature.

Co-Chair Chasey asked that the full committee and Mr. Gorence review the final report before it is published. Representative Fajardo asked that the committee recommend some action items. She requested follow-up on the recommendations from the Jerome Block, Jr., report, and she stated that she did not want just another report. Co-Chair Cook stated that the recommendations in the Jerome Block, Jr., report could be taken up in the interim by the Courts, Corrections and Justice Committee (CCJ) and that there would be follow-up this time. Co-Chair Chasey noted that although the committee's authority had now ended, the committee can recommend that the House of Representatives discuss these matters further. She added that it was a good idea to have the interim committee address them.

Representative Ruiloba noted that it was apparent that there was a need to have a structure, an ability to have an outline and some guidance for the future. He added that he would like to be part of the process in the interim, and he recommended that there be statutory language created around the impeachment process. Representative Fajardo noted that she was not part of the CCJ. Co-Chair Cook assured the members of the committee that all members would be invited to the CCJ meeting when the impeachment matter was discussed, and he noted that the interim committee was bicameral. Co-Chair Chasey noted that senators would want to weigh in on the process as well.

Co-Chair Cook asked Mr. Gorence for his thoughts. Mr. Gorence replied that while this committee's work was done, he thought it was a good idea to have another committee examine the various issues raised by the recent impeachment proceedings. Co-Chair Cook thanked Mr. Gorence for his time, his good work and for setting aside his busy practice to assist the Legislature in this matter.

Motion: Co-Chair Cook asked if there might be a motion by the committee to allow the co-chairs to work with the LCS on the committee's final report. Representative Salazar made that motion, which was seconded by Representative Ruiloba. The motion passed with no objections.

The committee adjourned at 12:13 p.m.