STATE OF ILLINOIS
95TH GENERAL ASSEMBLY
HOUSE OF REPRESENTATIVES
SPECIAL INVESTIGATIVE COMMITTEE

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FINAL REPORT
OF THE
SPECIAL INVESTIGATIVE COMMITTEE

Issued January 8, 2009

REPORT OF THE SPECIAL INVESTIGATIVE COMMITTEE

TABLE OF CONTENTS

Table of Exhibits

I. Introduction

On December 15, 2008, the Illinois House of Representatives (the "House") unanimously adopted House Resolution 1650, which created the Special Investigative Committee (the "Committee") to investigate allegations of misfeasance, malfeasance, nonfeasance, and other misconduct of Governor Rod R. Blagojevich and to make a recommendation as to whether cause exists for the Governor's impeachment pursuant to Article IV, Section 14 of the Illinois Constitution. House Resolution 1650 called on the Committee to issue a report before the end of the 95th General Assembly.

The Committee consists of twenty-one members of the House, including the Chair, Barbara Flynn Currie, and the Minority Spokesman, Jim Durkin. The Committee convened on Tuesday, December 16, 2008 and conducted hearings on December 17, 18, 22, 29, and on January 7 and 8, 2009. This Report summarizes the pertinent findings from those hearings and includes a recommendation to the full House.

II. The Committee's Rules, Procedure, and Policy

A. The Rules and Procedure.

On December 17, 2008, the Committee adopted rules to govern its fact-finding hearings (the "Rules").[1] The Rules permitted the Governor to be present at all hearings, personally and through counsel. The Rules required that the Committee provide 24-hour notice of all public hearings. The Rules further permitted the Governor's counsel to ask questions of witnesses called by the Committee and to present any evidence of his own, be it witnesses or documentary material.

The Governor and his counsel were given the opportunity to attend every hearing, to ask questions of witnesses in response to their testimony, and to provide any relevant evidence they wished to submit for the Committee's consideration. The Governor requested, and was granted, seven days to gather evidence and present testimony.

B. The Policy Regarding the Federal Criminal Investigation of the Governor.

Recognizing the federal criminal investigation of the Governor, the Committee unanimously determined, at the outset, that it would not call any witnesses, nor pursue any lines of inquiry, that interfered with that investigation in the opinion of the United States Attorney for the Northern District of

[1] The vote of the Committee to adopt the Rules was 12 members voting aye, 9 members voting nay. (Tr. 70.)

Illinois. Thus, the Committee sent a letter to the U.S. Attorney requesting certain information from his investigation and informing him of areas of inquiry the Committee intended to pursue and witnesses the Committee wished to call. (Ex. 10.) The U.S. Attorney, in a written response, notified the Committee that, with one exception, he could not provide any materials obtained in the course of his criminal investigation.[2] He also notified the Committee of his request that the Committee "refrain from conducting any inquiry into the subjects" related to his criminal investigation and from "seeking information or testimony from the individuals" relevant to that investigation. (Ex. 30.)

As new avenues of inquiry have come to the Committee's attention, the Committee has continued to correspond with the U.S. Attorney to obtain his approval before calling witnesses or presenting information. The Committee has respected the U.S. Attorney's requests to the letter.

III. Overview of the Impeachment Process

Article IV, Section 14 of the Illinois Constitution provides:

> The House of Representatives has the sole power to conduct legislative investigations to determine the existence of cause for impeachment and, by the vote of a majority of the members elected, to impeach Executive and Judicial officers. Impeachments shall be tried by the Senate. When sitting for that purpose, Senators shall be upon oath, or affirmation, to do justice according to law. If the Governor is tried, the Chief Justice of the Supreme Court shall preside. No person shall be convicted without the concurrence of two-thirds of the Senators elected. Judgment shall not extend beyond removal from office and disqualification to hold any public office of this State. An impeached officer, whether convicted or acquitted, shall be liable to prosecution, trial, judgment and punishment according to law.

Ill. Const. 1970, Art. IV, § 14.

Pursuant to this exclusive grant of authority, the House of Representatives has the sole power to conduct legislative investigations to determine whether "cause" exists to impeach an Executive or Judicial officer. Our previous Constitution, adopted in 1870, provided for impeachment of an Executive or Judicial officer for "any misdemeanor in office." Ill. Const. 1870, Art. V, § 15. The framers of the current, 1970 Constitution deleted this phrase, primarily because the term "misdemeanor," in modern times, is understood as a petty criminal offense such as a parking violation, whereas in 1870 the phrase referred more generally to "misconduct." 6 Record of Proceedings, Sixth Illinois Constitutional Convention, 1310-1311. It is notable, however, that the framers did not replace this phrase with a

[2] At the time this report has been filed, the U.S. Attorney has sought court approval to disclose the contents of four intercepted conversations described in the Cain Affidavit. (Ex. 3.) The court action is still pending.

different one. They considered inserting the phrase "official misconduct," *id.*, but did not do so. The framers could have placed impeachment proceedings in the judiciary, together with its evidentiary rules and burdens of proof, but chose to keep these proceedings with legislators. Ultimately, they left determinations regarding impeachment in legislators' "exercise of their discretion." *Id.* at 1311.

Grounds for Impeachment. Thus, the framers made it clear that they did not consider minor and petty offenses to be grounds for impeachment, but neither did they wish to tie the hands of the Illinois House of Representatives in circumscribing what would, and would not, be grounds for impeachment. Instead, the framers simply left it to the discretion of the House members to determine whether "cause" exists for impeachment. The Committee, taking into account the change to the Impeachment Clause made by the framers in the 1970 Constitution, and recognizing that an impeachment, by definition, sets in motion the possible removal of a popularly-elected officer, does not take its task lightly. To the contrary, an impeachment inquiry is a time for grave and deep reflection. It should not be used to resolve policy disagreements. It should be reserved for serious abuses and misconduct. It should be, and in Illinois has been, rarely invoked.

It would be impossible to define the outer boundaries of what constitutes an impeachable offense. Then-Minority Leader of the U.S. House of Representatives, Gerald Ford, once famously said that an impeachable offense "is whatever a majority of the House of Representatives considers [it] to be at a given moment in history."[3] Supreme Court Justice Story remarked that impeachment applies to offenses of a "political character" and are "so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law."[4] Alexander Hamilton, in an essay known as Federalist No. 65, wrote that impeachable offenses "are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."[5] The Texas Supreme Court, in a comprehensive discussion of impeachment, wrote that impeachable offenses "cannot be defined, except in the most general way" and, therefore, "no attempt was usually made to define impeachable offenses, and the futility as well as the

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[3] 116 Cong. Rec. H3113-114 (1970) (statement of Rep. Gerald Ford). The comment was made during the debate over whether to initiate impeachment proceedings against Supreme Court Justice William O. Douglas.

[4] J. Story, *Commentaries on the Constitution of the United States*, § 764, at 559 (5th ed. 1965), *quoted in* Report by the Staff of the Impeachment Inquiry, Committee on the Judiciary, House of Representatives, 93rd Congress, February, 1974, "Constitutional Grounds for Impeachment" (the "Watergate Report"), at p. 16.

[5] *Federalist No. 65, The Federalist* 453-454 (1864) (capitalization in original), cited in Report of Special Counsel to the Select Committee of Inquiry on the Standards for Impeachment Under the Connecticut Constitution, March 5, 2004 ("Report of Conn. Spec. Counsel"), at p. 5.

unwisdom of attempting to do so has been commented upon."[6] Because the impeachment inquiry is a uniquely political exercise, courts have refrained from second-guessing the "sufficiency of charges"[7] or the "delineation of the offense" by the House.[8]

There seems to be near universal agreement, however, that certain conduct comfortably falls *within* the boundaries of an impeachable offense. First and foremost, impeachable offenses are not limited to violations of criminal law: "The American experience with impeachment ... reflects the principle that impeachable conduct need not be criminal."[9] The respected Watergate Report noted that, historically, less than one-third of the articles of impeachment drawn up by the U.S. House of Representatives have explicitly charged the commission of a criminal statute.[10] The Texas Supreme Court referred to impeachable offenses generally as "official wrongs" that "need not be statutory offenses or common-law offenses, or even offenses against any positive law."[11]

It would, in fact, be unreasonable to limit impeachable offenses to criminal conduct. An impeachment inquiry is not a criminal proceeding and its purpose is not punitive. Rather, impeachment is a remedial proceeding to *protect the public* from an officer who has abused his position of trust.[12] To limit the impeachment inquiry to criminal conduct would severely undermine its remedial purpose.

Under the English parliamentary experience, after which the U.S. Constitution's impeachment provision was patterned, allegations of impeachable offenses generally fell into the categories of "abuse of official power; neglect of duty; encroachment on the legislature's prerogatives; corruption; and betrayal of trust."[13] The Watergate Report's summary of American federal impeachments, while noting the difficulty of fitting impeachment charges "neatly into categories," essentially categorized impeachable offenses the same way: exceeding the constitutional bounds of office in derogation of another branch; behaving in a manner grossly incompatible with the powers of office; and employing the power of the office for an improper purpose or for personal gain.[14]

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[6] *Ferguson v. Maddox*, 263 S.W. 888, 892 (Tex. 1924).
[7] *Kinsella v. Jaekle*, 475 A.2d 243, 253 (Conn. 1984) (quoting *People v. Hayes*, 143 N.Y.S. 325 (Sup. Ct. 1913)).
[8] *Larsen v. Senate of the Commonwealth of Pennsylvania*, 152 F.3d 240, 251 (3rd Cir. 1998).
[9] Watergate Report, p. 24.
[10] *Id.* at p. 21.
[11] *Ferguson*, 263 S.W. at 96.
[12] *Id.* at 98; *Kinsella*, 475 A.2d at 252; Watergate Report, p. 24; Report of Conn. Spec. Counsel, p. 9.
[13] Watergate Report, p. 7.
[14] *Id.* at p. 18.

Pattern of Abuse as a Single Ground for Impeachment. Historically, many of the impeachment charges have explicitly rested on a "pattern" of abuse or "course of conduct" that combined disparate acts of abuse into a single article.[15] Indeed, in the early American experience, articles of impeachment were drafted *after* the House had voted to impeach, thus making it "probable that the decision to impeach was made on the basis of all the allegations viewed as a whole, rather than each separate charge."[16] The Watergate Report noted that, historically, "the House appears to have considered the individual offense less significant than what they said together about the conduct of the official in the performance of his duties."[17]

When one considers that the purpose of impeachment is to protect the public from official abuses, the notion of "pattern of abuse" as a ground for impeachment is very sensible. When an official commits a series of misdeeds, the injury to the public is not segregated into individual harms considered in isolation. It is the overall effect of the official's misbehavior that a legislator must judge in protecting the interests of his or her constituents. Moreover, impeachment, by its very nature, tests the fitness of a person to continue in office, which is best measured by the overall pattern of that official's conduct, not by segregating various acts of abuse and judging them without regard to the others.[18]

The Watergate Report noted that historically, some of the acts of misbehavior included in a charge of pattern of abuse would not, alone, constitute impeachable offenses.[19] Indeed, the special counsel to a Connecticut impeachment inquiry regarding Judge James Kinsella, discussing the notion of a pattern of misconduct, concluded that "each element by itself need not justify impeachment."[20] Moreover, in considering a pattern-of-abuse charge, it is not necessary that every single act of misconduct presented for consideration be established to the satisfaction of the House member; what is important is that each member be satisfied that *sufficient* acts of misconduct have been established to justify a pattern of abuse. If, for example, ten acts of abuse were presented for consideration, one House member might find that all ten acts have been established to his or her satisfaction; another might be satisfied that only eight have been established; another, two. Yet any of those members, if they believed that a sufficient number of acts were established to show a pattern of abuse, could vote for impeachment

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[15] *Id.* at 21.
[16] *Id.*
[17] Watergate Report, p. 21.
[18] The Governor's counsel, in a written submission, stated that he "agree[s] ... that this Committee should consider the totality of the evidence" in deciding whether to recommend impeachment and "advocate[s] a totality of the circumstances approach to the evidence presented." (Ex. 35, January 2, 2009, at 2.)
[19] Watergate Report, p. 21.
[20] Report of the Conn. Spec. Counsel at p. 9 (quoting Final Statement of Information, April 17, 1984, at p. 28).

in their discretion. The Constitution places no formulaic rule on the House members in making the determination as to "cause" for impeachment.[21]

Required Procedures. The Governor was given a fundamentally fair opportunity to present his position before the Committee. As previously noted, he was given notice of all hearings, the right to be present, copies of all documents, a copy of each day's transcript, the right to question witnesses, the right to present relevant evidence, and the opportunity to testify on his own behalf. A recurring theme of the Governor's counsel, however, was that he was denied "due process" before this Committee. The Committee believes that the Governor was given more than sufficient procedural safeguards.

The Committee afforded Governor all of the aforementioned rights, even though the Committee was not required to do so. The Arizona Supreme Court, during Governor Evan Mecham's impeachment inquiry, held that the concept of "due process" "does not protect the right to hold office as Governor"[22] and "the rights of a person [criminally] accused are not co-extensive" with the rights of a Governor facing impeachment.[23] The U.S. Supreme Court refused to "impose limitations on the Senate proceedings" considering an impeached judge because if it did so, "it is difficult to see how the Senate would be functioning ... independently and without assistance or interference."[24] An impeachment proceeding "can never be tied down by ... strict rules"[25] because the courts "have no jurisdiction in impeachment proceedings, and no control over their conduct."[26] The Connecticut Supreme Court, while refusing to even consider a claim that a judge standing impeachment was denied due process, nevertheless pointed favorably to a set of procedural safeguards in the House Select Committee that were virtually identical to those given the Governor before this Committee.[27]

Thus, the Committee provided the Governor procedural rights and safeguards that far exceeded anything the Committee was required to give him. The Committee afforded the Governor these protections because of the gravity of the inquiry and because of the Committee's desire to have a fair hearing of all relevant and available evidence.

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[21] Ill. Const. 1970, Art. IV, § 14; 6 Record of Proceedings, Sixth Constitutional Convention, 1311 (framers stated that they wished to leave the impeachment inquiry to the "exercise of [legislators'] discretion.").
[22] *Mecham v. Gordon*, 751 P.2d 957, 962 (Ariz. 1988).
[23] *Id.* at 963-64.
[24] *U.S. v. Nixon*, 506 U.S. 224, 231 (1993); *see also id.* at 239 (White, Blackmun, JJ., concurring) ("the Senate has very wide discretion in specifying impeachment trial procedures").
[25] *Larsen*, 152 F.3d at 251.
[26] *Kinsella*, 475 A.2d at 722 (quoting *Dauphin County Grand Jury Investigation Proceedings (No. 2)*, 332 Pa. 342, 345 (1938)).
[27] *Kinsella*, 475 A.2d at 256 n.15.

Burden of Proof. As already explained, the Illinois Constitution places no constraints on a House member's determination of whether "cause" exists to justify impeachment. The question of the burden of proof a House member employs, not answered by the Constitution, is thus left to the individual judgment of the member. In fact, if anything is clear on this issue, it is that the "appropriate" standard for proof is left to an individual member's determination. Speaking of the burden of proof applicable to impeachment trials in the *Senate*, the Congressional Research Service summarized that:

> an examination of the constitutional language, history, and the work of legal scholars provides no definitive answer to the question of what standard is to be applied. In the final analysis, the question is one which historically has been answered by individual Senators guided by their own consciences.[28]

This point is undoubtedly true for the House as well; the Constitutions of both Illinois and the United States are equally silent as to the Senate's and House's evidentiary burden.[29]

Although it is beyond debate that the appropriate evidentiary burden is up to a member's own judgment, a few comments are appropriate here. First, as stated earlier, impeachment is not a criminal proceeding. An impeached official in Illinois does not lose his life or liberty. He does not even lose his office; at the point an officer is impeached, that officer merely stands accused by the House, awaiting trial in the Senate for possible removal. The official remains in office (barring resignation or some disqualification) unless and until the Senate votes to remove him. However unfavorable it may be to be impeached, there is no official sanction attached to it; its only constitutional effect is to trigger a trial in the Senate on the accusations leveled by the House.

Moreover, just as an individual member is not limited by the Constitution in determining what is necessary to convince him or her that "cause" exists to impeach, likewise the member is not bound by any prior decisions of individual House members. The Governor's counsel makes much of the fact that a Special Investigative Committee conducting an impeachment inquiry into Illinois Supreme Court Justice Heiple, 11 years ago, collectively decided on a standard of proof of "clear and convincing evidence," which is something more than a "preponderance of the evidence" (more likely than not) but less than "beyond a reasonable doubt." It is important to note, first, that this was a decision made only by a ten-person committee. The full House never considered articles of impeachment against Justice

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[28] Congressional Research Service, Library of Congress, "Standard of Proof in Senate Impeachment Proceedings," Summary.
[29] The Governor's counsel agrees that the Constitution imposes no required burden of proof (Tr. 61-62) and that "each and every one" of the Committee members must decide "what's the standard you have to look at." (Tr. 185-186.)