

COMMONWEALTH OF PENNSYLVANIA
HOUSE OF REPRESENTATIVES

JUDICIARY SUBCOMMITTEE ON COURTS
PUBLIC HEARING

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TUESDAY, FEBRUARY 23, 2016
10:35 A.M.

PRESENTATION ON
IMPEACHMENT INVESTIGATION

BEFORE:

HONORABLE TODD STEPHENS, MAJORITY CHAIRMAN
HONORABLE BARRY JOZWIAK
HONORABLE MIKE REGAN
HONORABLE MARK KELLER
HONORABLE RICK SACCONI
HONORABLE TEDD NESBIT
HONORABLE TARA TOOHIL
HONORABLE MIKE VEREB
HONORABLE TIM BRIGGS, DEMOCRATIC CHAIRMAN
HONORABLE JOSEPH PETRARCA
HONORABLE RYAN BIZZARRO
HONORABLE DOM COSTA
HONORABLE GERALD MULLERY

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*Pennsylvania House of Representatives
Commonwealth of Pennsylvania*

COMMITTEE STAFF PRESENT:

THOMAS DYMEK
MAJORITY COUNSEL AND EXECUTIVE DIRECTOR
MICHAEL KANE
MAJORITY COUNSEL
JEN DURALJA
MAJORITY COMMITTEE SECRETARY
MICHELLE MOORE
MAJORITY ADMINISTRATIVE ASSISTANT
MIKE FINK
MAJORITY RESEARCH
ANNA MALCEIN
MAJORITY COUNSEL

SARAH SPEED
DEMOCRATIC EXECUTIVE DIRECTOR
TIM CLAWGES
DEMOCRATIC COUNSEL
KRISTEN BERNARD
DEMOCRATIC LEGISLATIVE ASSISTANT

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1 P R O C E E D I N G S

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3 MAJORITY CHAIRMAN STEPHENS: All right. We'll
4 call the meeting to order. This is the public hearing of
5 the House Judiciary Subcommittee on Courts. We can start
6 by having the Members introduce themselves. I'm Todd
7 Stephens from Montgomery County, the Chair of the
8 Subcommittee on Courts.

9 DEMOCRATIC CHAIRMAN BRIGGS: I'm Tim Briggs from
10 Montgomery County, the Democratic Chair of the Subcommittee
11 on Courts.

12 REPRESENTATIVE PETRARCA: Joe Petrarca,
13 Democratic Chairman of the Judiciary Committee.

14 MS. SPEED: Sarah Speed, Democratic Executive
15 Director.

16 REPRESENTATIVE BIZZARRO: Good morning. Ryan
17 Bizzarro, Third District, Erie County, Member of the
18 Subcommittee of Courts.

19 REPRESENTATIVE SACCONI: Morning. Rick Saccone,
20 39th District, southern Allegheny County and northern
21 Washington County.

22 REPRESENTATIVE NESBIT: Tedd Nesbit, Mercer and
23 Butler Counties, a Member of the Subcommittee on Courts.

24 REPRESENTATIVE TOOHL: Tarah Toohil, 116th
25 Legislative District.

1 MR. DYMEK: Tom Dymek, Executive Director of the
2 Committee.

3 MAJORITY CHAIRMAN STEPHENS: We are getting
4 together today pursuant to the recently passed House
5 Resolution 659. This Subcommittee has been authorized to
6 conduct an investigation into whether Attorney General
7 Kathleen Kane is liable for impeachment.

8 The charge of this Subcommittee is to conduct a
9 fair, unbiased investigation into whether Attorney General
10 Kane engaged in misbehavior in office and to make
11 recommendations to the full House Judiciary Committee as to
12 whether or not to proceed with articles of impeachment.

13 The purpose of today's hearing is not to delve
14 into the specific allegations against Attorney General
15 Kane. Rather, it is instead meant to educate the Committee
16 Members and the public frankly about the power and process
17 of impeachment here in Pennsylvania.

18 For the House to even investigate impeachment is
19 a rare occurrence. There were several impeachment
20 investigations in the 1800s but there was only one
21 impeachment in the 20th century, and that was the
22 impeachment of Supreme Court Justice Rolf Larsen.

23 We are fortunate today to be joined by two
24 individuals who played key roles in the Larsen impeachment
25 proceedings: the current Minority Leader of the House,

1 Frank Dermody, as well as former State Representative and
2 State Senator Jeff Piccola. And we look forward to hearing
3 from them about their experiences and their perspectives
4 and the procedure they employed during the Larsen
5 impeachment. We certainly also appreciate any advice they
6 want to share on the way to conduct the investigation in
7 the most fair way possible.

8 We're also fortunate to be joined by Professor
9 Steve Ross, who's an expert in constitutional law from the
10 Pennsylvania State University School of Law. Professor
11 Ross previously served as staff to the Judiciary Committee
12 of the United States Senate, and he will share with us some
13 legal insights as it relates to the impeachment process and
14 procedure and standards here in Pennsylvania.

15 I would like to announce that the meeting is
16 being recorded and ask that you silence your cell phones,
17 and turn the meeting over to Representative Briggs for any
18 remarks he might have.

19 DEMOCRATIC CHAIRMAN BRIGGS: Thank you, Chairman.

20 I also want to acknowledge Representatives Dom
21 Costa and Representative Mike Vereb, Members of the
22 Judiciary Committee that have joined us.

23 I want to welcome and thank you. I appreciate
24 that everyone has taken the time to be here this morning.

25 One of the major themes for the 1994 impeachment

1 of Justice Larsen was the spirit of bipartisanship that
2 went through the process, and it is our intention to
3 provide similarly here.

4 Overturning the rule of people is a serious and
5 final step designed to protect the interests of the public.
6 We must proceed deliberately and keep a careful eye on the
7 trust of the taxpayer. I thank my colleagues and
8 testifiers for being here, and I look forward to hearing
9 about your experiences.

10 MAJORITY CHAIRMAN STEPHENS: And, Chairman
11 Petrarca, you had some remarks you wanted to share as well?

12 REPRESENTATIVE PETRARCA: Thank you. Yes, I too
13 would like to welcome everyone here, certainly appreciate
14 our testifiers spending the time to be here this morning
15 with us.

16 As we proceeded, I guess I just had a few
17 comments and thoughts. When we passed this resolution in
18 Committee and then before the full House, I guess things
19 have changed since that time obviously with General Kane
20 deciding not to seek reelection to the Office of Attorney
21 General. And I wonder what that means or what that should
22 mean to us as we proceed.

23 We certainly -- I think Chairman Marsico and I
24 have a lot of confidence in the Subcommittee on Courts and
25 the gentlemen here and the gentlemen and ladies on the

1 Committee that this process will be done in a fair and
2 bipartisan way. However, I still do have concerns and
3 maybe heightened concerns now regarding the timing of this
4 case or this inquiry. We have an Attorney General that has
5 a finite or specific time in office at this point.

6 My recollection of the Rolf Larsen impeachment in
7 1994, although I was not a part of that, I had clerked for
8 Justice Larsen while in law school in the mid-'80s so I
9 certainly followed those proceedings and that
10 investigation. And it seemed to me that it was a very
11 tedious, long and drawn-out process, and I wonder -- it
12 again gives me concern related to the time that General
13 Kane will be in office.

14 I also am cognizant of the fact that there is a
15 criminal case and investigation underway that has a date
16 certain later this summer, and I worry about proceedings
17 before this Subcommittee and our investigation into General
18 Kane's conduct and how it will affect that criminal case as
19 that proceeds.

20 Last question that I have or the last comment
21 that I would like to make is regarding the cost of this. I
22 think that, again, if you look back at what happened with
23 the Larsen investigation and the amount of time and work
24 that went into that, I think it was a tremendous amount of
25 money that was spent by the Commonwealth, and I worry about

1 how that should be viewed by us, again, with everything
2 that I had said and with the state of financial affairs in
3 Pennsylvania.

4 So with that said, again, appreciate everyone
5 being here and look forward to the testimony. Thank you,
6 Chairman.

7 MAJORITY CHAIRMAN STEPHENS: Sure. Thank you,
8 Chairman Petrarca.

9 And, you know, just for the information of the
10 Members, Representative Briggs and I, along with Chairman
11 Marsico and Chairman Petrarca have been meeting just to
12 sort of lay out some of the procedures and some of the
13 background work that might need to be done in this regard,
14 and we are all very cognizant of cost and working to do
15 everything we can to ensure that we're working as
16 efficiently as possible so that we are keeping the
17 taxpayers in mind.

18 With that, I don't want to delay particularly our
19 Minority Leader, who I'm sure has a lot of other things on
20 his plate today. But, Leader Dermody, if you and
21 Mr. Piccola could join us to share some of your insights
22 from the Larsen investigation and impeachment, that would
23 be very helpful. We appreciate you being here this
24 morning. The floor is yours if you want to maybe offer
25 just some introductory remarks kind of about the process

1 and how you came to be a part of it in 1993 and '04, that
2 would be great. Thank you, Mr. Leader.

3 REPRESENTATIVE DERMODY: Thank you, Mr. Chairman.
4 Yes, Jeff and I lost about a year-and-a-half of our lives
5 in 1994 working on the Larsen case, and I became involved
6 because -- you're in the majority. I was Chairman of the
7 Subcommittee on Courts and Jeff was the Republican of the
8 whole Committee, yes.

9 And there's a reason that impeachment occurs
10 every 150 years because it ought to be rare. It's a very
11 serious case. Obviously, with impeachment you're
12 nullifying an election. And it needs to be reserved for
13 the most extreme cases, the most serious cases, and it
14 needs to be necessary to move forward.

15 It was a difficult time but, you know, the
16 investigation that we did and the research that we did made
17 it clear that due process is incredibly important. It has
18 to be preserved. It has to be honored. It has to be a
19 bipartisan effort. It cannot degenerate into a Democratic-
20 Republican issue, it can't be related to elections, and it
21 needs to be rare.

22 I'm happy to answer any questions you have today,
23 but generally in opening you have to move cautiously in my
24 view, and I think some of the changes that have happened
25 are of some concern to me also, and I can talk to you about

1 that. I think the fact that the General isn't running
2 should enter into any decisions that the Subcommittee
3 should make.

4 Thank you.

5 MR. PICCOLA: Thank you, Mr. Chairman, and
6 Members of the Committee. I discovered that you know when
7 you're getting old when you're asked to come and testify
8 about history, and that's exactly what Frank and I are here
9 to do today.

10 I do appreciate the opportunity because it really
11 was being part of history. In fact, I remember at the time
12 thinking when I was an attorney, politician, and a student
13 of history, you thought you died and went to heaven when
14 you were involved in that impeachment process because it's
15 something that is very rare in the political, legal, and
16 constitutional process.

17 As has been mentioned a number of times,
18 impeachment is very rare, but keep in mind it is a very
19 unique power of the House of Representatives solely. It's
20 a power that you have and that you need to guard jealously.
21 It is infrequently used, but it is asked for frequently. I
22 remember when I was Chairman of the Committee, we got
23 petitions for impeachment on a regular basis from private
24 citizens and others throughout the Commonwealth.

25 As has also been said, it was last used before

1 Larsen in the 19th century, successfully used, and the
2 question might be, well, why has it been so infrequently
3 used since that time? Number one, obviously, it is
4 cumbersome. It is a very difficult process to engage in.
5 Secondly, I think since the early 19th century, we have
6 expanded and refined quite significantly our criminal
7 justice system, which addresses a lot of what I believe was
8 intended by the impeachment process. The criminal justice
9 system -- and I don't have to tell this Committee that --
10 is quite large, detailed, and very refined.

11 In addition, we have something in place today --
12 in fact, we've had it for quite a number of years -- a
13 judicial discipline system, which doesn't really apply to
14 the case you're looking at but it did when we were looking
15 at a Justice of the Supreme Court. That system usually
16 takes care of the problems that might be the obvious use
17 for an impeachment proceeding.

18 Now, both of these, the criminal justice system
19 and the judicial discipline system, were in operation
20 during the Larsen situation and investigation. In fact,
21 before we culminated our process, Justice Larsen was in
22 fact removed from the Supreme Court and was convicted by
23 the Court of Common Pleas for various and sundry offenses.
24 And I didn't do the research to recall what all of those
25 were.

1 And we faced some of the same questions at that
2 time, and I think Frank would agree with this that, you
3 know, well, why are you proceeding? He's already removed.
4 He has been convicted of a crime. And the answer at that
5 time was, well, criminal justice is criminal justice and
6 they have rights of appeal, so we really don't know what
7 the end result of that whole process will be.

8 And the other reason is contained in our
9 Constitution, and that was Article VI, Section 6, which
10 lays out the punishment for impeachment, one of which is
11 removal from office, but the other -- and it's something to
12 keep in mind and put whatever emphasis you want on it --
13 disqualification to hold any office of trust or profit
14 under this Commonwealth. And that's presumably for all
15 time. So that is something that is very unique to the
16 impeachment process, and I really think that, as Members of
17 the House of Representatives, this power being unique to
18 the House, you need to take that into consideration.

19 I have only three points of advice that I would
20 give to the Committee. One has already been mentioned
21 several times, and that is bipartisanship. You simply
22 cannot go into this process without an atmosphere of
23 bipartisanship that both sides of the aisle have to want to
24 engage in the process. We had that in 1993 and '94, and
25 quite frankly, if you are not going to engage in that kind

1 of a process, then you're faced with a very difficult time
2 in the Senate, which requires a 2/3 majority to convict.
3 And last time I looked, nobody has that kind of majority in
4 the Senate.

5 The second thing that I would advise is if you
6 decide to go down this road, if you get into this process,
7 that you engage outside counsel. Frank and I engaged very
8 distinguished counsel, Clayton Undercofler of the law firm
9 of Saul Ewing and John Moses from, I believe, Lackawanna
10 County.

11 REPRESENTATIVE DERMODY: Wilkes-Barre, Luzerne
12 County.

13 MR. PICCOLA: Luzerne County.

14 REPRESENTATIVE DERMODY: Luzerne County.

15 MR. PICCOLA: Luzerne County. And we worked very
16 closely with both of those gentlemen.

17 Now, this is not to denigrate your staff. You
18 have great staff. We had great staff. But they are just
19 not capable of engaging in the kind of preparation that you
20 have to engage in to try an impeachment case not only
21 before the grand jury or the House but also before the
22 Senate. I mean there are untold numbers of hours of
23 research, reading documents, interviewing witnesses. We
24 interviewed at least three Supreme Court Justices, I think,
25 plus a number of other witnesses, and the documents were

1 voluminous.

2 So outside counsel, bipartisanship, and finally,
3 again, if you go down this road, examine your jury. You
4 don't have the right to engage in jury selection. Your
5 jury is going to be handed to you. I served in that jury
6 for a number of years. Read in detail and have your staff
7 read in detail the proceedings before the Senate in the
8 Larsen case. I think that will be revealing in terms of
9 how you would approach this particular case.

10 Senator Greenleaf was Chairman of the Judiciary
11 Committee back in those days, and he's still the Chairman
12 of the Judiciary Committee, so I would presume that he will
13 be presiding over the Senate trial. So read those
14 transcripts carefully. They will tell you a lot about how
15 the jury might be thinking on various points that you may
16 take before them.

17 But again, it's a long and arduous process, and
18 if you decide to go down this path, I wish you the best.
19 Thank you.

20 REPRESENTATIVE DERMODY: Mr. Chairman, just a
21 comment on the Larsen trial --

22 MAJORITY CHAIRMAN STEPHENS: Please.

23 REPRESENTATIVE DERMODY: -- his criminal trial
24 was in Allegheny County, and I had the opportunity because
25 of scheduling to attend most of it. He was charged, I

1 believe, as I recall, with having his staff get some
2 prescription drugs. He was being treated for depression
3 and some other things I think he wanted to keep a secret.

4 Our investigation had begun prior to that. We
5 continued it afterwards. But as Jeff has mentioned, we
6 continued. We moved forward. And I do believe he had
7 several years left on his term. It was a judge and this is
8 a big distinction here. And he wouldn't resign. And I
9 thought, watching that case, I was surprised he was
10 convicted. And it was still on appeal so we continued to
11 move forward with the impeachment on that basis.

12 MAJORITY CHAIRMAN STEPHENS: Along those lines --
13 before we do that, let me just recognize Representative
14 Keller, Jozwiak, and Regan have joined us.

15 And along those lines, if I could just jump in
16 with a question here, could you comment a little bit about
17 the decision-making to continue moving down -- I read the
18 journal entries from the House back in 1994, and I think
19 there was talk, and it may have been you, Leader Dermody,
20 that made the comment; I don't recall -- but about the
21 separate tracks of impeachment versus the criminal justice
22 system. Could you maybe expand upon that a little bit in
23 terms of your decision-making and how you thought through
24 that process about how the criminal justice charges may or
25 may not implicate the impeachment proceedings?

1 REPRESENTATIVE DERMODY: Well, obviously part of
2 it he was convicted of a crime, and also it didn't have
3 anything to do with his job performance really. And that
4 was also an issue. And we had started the investigation,
5 and prior to that I believe he had eight years left on his
6 pension, I think, in the courts. And he refused to resign.
7 And I do believe my thoughts at the time were -- I don't
8 know whether I even talked to Jeff about it. Probably we
9 all talked about it.

10 Had he resigned, you know, going through this
11 process wasn't worth it. I mean, it is a cumbersome,
12 difficult process and a costly process. And it should be.
13 It ought to be. But then when he would not resign, I think
14 we had no choice but to move forward. If the courts come
15 back and the conviction is overturned or he's back in file
16 again and then we abandon the process, then we have to
17 start over again probably because there were some other
18 serious issues there that we had to deal with that were
19 part of the -- I think there were seven articles of
20 impeachment, and they were serious issues, so we made sure
21 those serious issues were heard and we ought to move
22 forward.

23 MAJORITY CHAIRMAN STEPHENS: Do you have anything
24 to add there, Jeff?

25 MR. PICCOLA: Yes. I believe if he had resigned

1 early in the process, it probably would have evaporated.

2 That's my guess but --

3 REPRESENTATIVE DERMODY: Yes.

4 MR. PICCOLA: -- you know, anything is possible.

5 But the allegations initially were not criminally
6 related. They came out later as a result of the courts and
7 the district attorney's investigation, some of the
8 allegations that Justice Larsen made that turned out to be
9 false. And so we continued our investigation and
10 ultimately got to where we were before the Senate.

11 MAJORITY CHAIRMAN STEPHENS: And I think, if I
12 remember correctly, I know you mentioned seven articles of
13 impeachment. I think the Senate ended up finding on one of
14 them, and it was not the one that was based on the criminal
15 conduct if I'm not mistaken.

16 REPRESENTATIVE DERMODY: That's correct.

17 MAJORITY CHAIRMAN STEPHENS: It was totally
18 separate conduct.

19 REPRESENTATIVE DERMODY: It was based on what was
20 most related to his job. Clearly, he was favoring a
21 litigant involved in a case before the Supreme Court.

22 MAJORITY CHAIRMAN STEPHENS: Sure.

23 REPRESENTATIVE DERMODY: And that's the one they
24 convicted him on. You know, I was a little upset at the
25 time, but in hindsight that was the right thing to do. So

1 we were living that for a year-and-a-half.

2 MAJORITY CHAIRMAN STEPHENS: Sure. I'm sure.

3 MR. PICCOLA: The Senate believes that, too.

4 REPRESENTATIVE DERMODY: Well, the Senate always
5 believes that.

6 MAJORITY CHAIRMAN STEPHENS: Could you expand
7 maybe a little bit on just the process that you employed?
8 You know, how did you conduct your investigation? What
9 role did various Members of the Committee play? What role
10 did you play? I think you mentioned outside counsel. What
11 role did they play and how did you move forward?

12 REPRESENTATIVE DERMODY: We worked closely with
13 outside counsel and the Members of the Subcommittee, and we
14 traveled the State interviewing witnesses all across the
15 State, as Jeff has mentioned. I think it was three of our
16 Supreme Court Justices, several Common Pleas Court Judges,
17 and other witnesses. There were, I mean, very -- I forget
18 how many but there were several witnesses. And we
19 interviewed first, and then we would have -- if there was
20 worthwhile testimony, we would have a Committee hearing and
21 they'd be sworn in and, you know, we took testimony and
22 built a record and had that record in place when we
23 presented the articles of impeachment to the House of
24 Representatives.

25 MR. PICCOLA: Yes, ironically, we were -- the

1 Republicans were in the minority, but Frank and his folks
2 delegated a lot of the investigation to us. We had hired,
3 as I said before, Clayton Undercofler as our counsel, but
4 he brought with him all of the resources of a very large
5 Philadelphia-based law firm. John Moses had a smaller
6 firm.

7 REPRESENTATIVE DERMODY: Yes, John Moses --

8 MR. PICCOLA: I think it was just John Moses that
9 I recall. So a lot of the investigative tasks were
10 delegated to us. Now, Frank would accompany us or other
11 Members of the Committee. He managed to --

12 REPRESENTATIVE DERMODY: I attended most of them.

13 MR. PICCOLA: -- accompany us.

14 REPRESENTATIVE DERMODY: I went, I think, to all
15 of them really.

16 MR. PICCOLA: Probably you did, yes.

17 REPRESENTATIVE DERMODY: All of them.

18 MR. PICCOLA: But we delegated --

19 REPRESENTATIVE DERMODY: We split the work.

20 MR. PICCOLA: We delegated back and forth what
21 the various responsibilities were, the various interviews,
22 and shared the responsibilities.

23 I can probably count on one hand when even a hint
24 of partisanship, and it's kind of a funny story so I won't
25 go into it here, but it raised itself. But it really was

1 inconsequential in the great scheme of things.

2 MAJORITY CHAIRMAN STEPHENS: So you would conduct
3 sort of an off-the-record proffer session with the
4 witnesses and then make a determination about whether or
5 not you needed a full-blown hearing on the record under
6 oath to --

7 REPRESENTATIVE DERMODY: Correct. Correct. And
8 we did not just rely -- we interviewed the witnesses. We
9 didn't rely on prior hearings or any of the criminal trial
10 testimony. We obviously reviewed it, but we went and got
11 the witnesses and we interviewed them ourselves.

12 MAJORITY CHAIRMAN STEPHENS: So --

13 REPRESENTATIVE DERMODY: It's the House's
14 investigation. It's a political process.

15 MAJORITY CHAIRMAN STEPHENS: I guess that's what
16 I wanted to touch on a little bit because you had in that
17 case -- I think you mentioned you started the investigation
18 and then the criminal conduct --

19 REPRESENTATIVE DERMODY: That came after we
20 started our investigation. There was a couple of years of
21 things flying around with Justice Larsen and the court, and
22 it got very messy and there were a lot of issues out there
23 at the time.

24 MAJORITY CHAIRMAN STEPHENS: So you didn't have
25 the benefit of any of that criminal investigation when you

1 started out your investigation? You were starting with a
2 blank slate in essence?

3 REPRESENTATIVE DERMODY: It came later.

4 MAJORITY CHAIRMAN STEPHENS: Any other Members of
5 the Committee have questions? Chairman Briggs?

6 DEMOCRATIC CHAIRMAN BRIGGS: Thank you, Chairman.
7 And thank you very much. As someone who's interested in
8 the historical aspect of the job, it's definitely neat to
9 talk to you guys.

10 You both mentioned outside counsel. That's
11 definitely something that I think we were strongly
12 considering. You mentioned having your own outside
13 counsel, so one question, if you thought that was a
14 necessary or useful tool to have two separate counsel. And
15 also if you could address, if you recall, what the cost of
16 the '94 process, having two counsel. I realize it was 22
17 years ago. And the third thing -- I'll try to package it
18 all together -- you had mentioned '93, '94. Was it all
19 within one legislative session, the commencement of the
20 process to the hearing in the Senate and when the Senate
21 decided?

22 REPRESENTATIVE DERMODY: As I recall, it was one
23 session but it took about the whole session.

24 DEMOCRATIC CHAIRMAN BRIGGS: Yes.

25 REPRESENTATIVE DERMODY: We didn't finish up

1 until October.

2 MR. PICCOLA: I think there was some discussion
3 because, as Frank said, the controversy over Justice Larsen
4 had been swirling for a couple of years and there were
5 allegations being thrown back and forth between members of
6 the court about you did this or you do that, but I think we
7 settled in on the process right after the beginning of the
8 session in January of 1993 with various resolutions to
9 investigate. And early on we decided if your question -- I
10 don't know what we spent, but I'm sure it was a lot of
11 money. That was --

12 MAJORITY CHAIRMAN STEPHENS: We looked it up. It
13 was about \$1.5 million.

14 MR. PICCOLA: Is that what it was? I mean, that
15 was --

16 MAJORITY CHAIRMAN STEPHENS: That's '90s dollars.

17 MR. PICCOLA: That's low. That was low. I
18 always thought more, but at any rate, it is definitely a
19 commitment of resources and, you know, I can understand
20 watching you guys from the outside that money is a big
21 issue here in Harrisburg right now.

22 But again, this is a unique power to the House of
23 Representatives so you have to weigh those judgments as you
24 decide whether you're going to go down this path or not.

25 REPRESENTATIVE DERMODY: And with counsel,

1 Representative Briggs, we had to then -- it worked out
2 well. I mean, we worked closely together and it was
3 bipartisan all the way. But I do believe that if you go
4 that route that if you can agree on an outside counsel, one
5 counsel would work if you could get that done. The way we
6 worked it, it worked out fine --

7 MR. PICCOLA: Yes, I mean, if you could find
8 somebody that meets the unique criteria for both sides of
9 the aisle, I don't think that's a problem, but we were old
10 back in those days and stuck in our ways, so everything was
11 done in two different caucuses. So maybe you guys are a
12 little more modern than we are.

13 DEMOCRATIC CHAIRMAN BRIGGS: I'm not going to
14 comment on that, but Chairman Stephens and I are committed
15 to doing this, I think, together -- I know together. And
16 I'm not going to ask what the specific instance was, but
17 the number of times on one hand that you counted that
18 partisan-ness came in or difficulty? I mean, that's
19 something that I think both of us have talked about. You
20 know, honesty and communication is something that we have
21 to strive. So having separate counsel I can see definitely
22 benefits to that, but I could see it being a little bit
23 setting yourselves up for already having a little bit of an
24 adversarial relationship.

25 MR. PICCOLA: It was kind of a humorous story and

1 I'll share it with you off the record, but --

2 DEMOCRATIC CHAIRMAN BRIGGS: It was --

3 MR. PICCOLA: -- I don't remember. I'll share it
4 with you, too, Frank, but --

5 DEMOCRATIC CHAIRMAN BRIGGS: Maybe in the
6 Leader's office this afternoon.

7 MR. PICCOLA: But it really resolved itself. I
8 mean it was resolved fine. In the ultimate scheme of
9 things it didn't even matter because the issue was resolved
10 without any action on our part.

11 MAJORITY CHAIRMAN STEPHENS: Well, I think I just
12 do want the record to show that the Committee has our first
13 "I don't remember, I don't recall," which, you know, as a
14 prosecutor I remember interviewing folks and getting a lot
15 of that.

16 Representative Nesbit, I think you had a
17 question.

18 REPRESENTATIVE NESBIT: Going back to Leader
19 Dermody, you had said you were surprised that he was
20 convicted in the criminal case?

21 REPRESENTATIVE DERMODY: After attending the
22 trial, yes.

23 REPRESENTATIVE NESBIT: Okay. But you still felt
24 that it was important to go forward with the impeachment
25 even though the criminal case --

1 REPRESENTATIVE DERMODY: The criminal case was
2 not a big factor in the ultimate decision to move ahead
3 with impeachment with Justice Larsen.

4 REPRESENTATIVE NESBIT: And I was based in part
5 because of actions that actually included things in his
6 job?

7 REPRESENTATIVE DERMODY: That's correct.

8 REPRESENTATIVE NESBIT: Okay. The other thing
9 that I was curious about, especially with you being a
10 former prosecutor, how did you balance the investigation of
11 the impeachment versus the criminal in terms of, you know,
12 making sure you didn't interfere in any way with witnesses
13 giving statements or conflicting statements and transcripts
14 and those kind of things that would be difficult? Is there
15 any advice on how we make sure that we don't tread into the
16 criminal or make their job more difficult?

17 REPRESENTATIVE DERMODY: I think you need to be
18 very careful, and that's the part of the problem here.
19 That trial was over before we really got to the meat of the
20 whole investigation. It was over earlier so that we could
21 move forward and we can talk to the people who were
22 involved with the criminal case because it was over. It
23 was done for the most part. Now, you're facing the issue
24 that the criminal cases pending here aren't until August,
25 and you've got to be careful. I'm assuming the DA doesn't

1 want the Judiciary Committee snooping around until they're
2 done. I mean, you're not going to be able to go out, I
3 don't think, and interview witnesses, those types of things
4 until those cases are completed.

5 REPRESENTATIVE NESBIT: Well, and I think that's
6 one of the things we have to be careful, of but I think
7 we're also exploring. So that was the only question.
8 Thank you, Mr. Chairman.

9 MAJORITY CHAIRMAN STEPHENS: I had sort of a
10 follow-up to that. In terms of the balance of the
11 confidential sort of off-the-record proffer communications
12 versus the public hearings, can you share a little bit
13 about how that played out and why that approach you think
14 was helpful as you conducted your investigation?

15 MR. PICCOLA: My recollection is that most of
16 that was conducted by our outside counsel working in
17 tandem. I think Frank and I attended some of the more
18 significant interviews, but a lot of the review of the
19 documents was handled by counsel. Frank had the benefit of
20 being a former prosecutor. I am not even a trial lawyer,
21 let alone a prosecutor even though I am an attorney and
22 I've done a few trials.

23 And that's one of the reasons if you're going to
24 get outside counsel, you better get somebody who has some
25 trial experience because they've got to prepare for the

1 trial. I mean, that's basically what you're talking about.
2 I can remember when we made the decision to hire outside
3 counsel, the sigh of relief that came from our staff at the
4 time. They were just afraid they were going to have to do
5 it. And you and they have a whole lot of other
6 responsibilities outside of that impeachment process, so
7 you have to continue doing those. You just can't devote
8 100 percent of your time to the impeachment. They can't
9 devote 100 percent of their time to it.

10 So experienced outside counsel is essential. And
11 if you get the right people, they will do a lot of that
12 trial preparation.

13 REPRESENTATIVE DERMODY: You know, we had to make
14 some decisions of whether or not the various witnesses,
15 whether testimony was relevant, whether we thought it was
16 substantial enough to move forward with, and that's why
17 those interviews were done prior to a hearing.

18 MAJORITY CHAIRMAN STEPHENS: In terms of the
19 criteria for counsel, I think you both touched on a couple
20 different pieces. What would you recommend in terms of,
21 you know, what experiences, what biographical background
22 should be looked at?

23 REPRESENTATIVE DERMODY: I think Jeff is right.
24 You need somebody who has courtroom experience. It's a
25 trial and you've got to prepare witnesses, you've got to

1 get witnesses ready. You've done that if you've been in
2 the DA's office and you've gotten ready to go to trial.
3 You're preparing for trial. You've got to make sure you
4 have a case and then you've got to make sure you can put
5 that case together and that you've got witnesses that are
6 prepared to testify. So you need somebody who has
7 courtroom experience for sure.

8 MR. PICCOLA: And I think maybe a little bit
9 broader court experience than just simply criminal
10 justice --

11 REPRESENTATIVE DERMODY: Absolutely. I agree
12 with that.

13 MR. PICCOLA: -- because while that's going to be
14 important, I think you have to have a little bit more broad
15 outlook because this is impeachment. This is not, strictly
16 speaking, a criminal trial.

17 REPRESENTATIVE DERMODY: It's not a criminal
18 trial. You run it. There's no rules of evidence other
19 than what you determine fairness is. The rules of evidence
20 are what --

21 MAJORITY CHAIRMAN STEPHENS: Any other questions
22 from any Members of the Committee?

23 Representative Bizzarro?

24 REPRESENTATIVE BIZZARRO: Thank you.

25 We've touched on procedure, we've touch on cost,

1 but I want to go back to time now. Given the dynamics of
2 this case ahead of us, do you think that we will get this
3 properly solved in eight months? We're looking at eight
4 months until the current Attorney General's term expires.
5 She is not running for reelection. Do you think it is
6 possible to get this process done in the eight-month
7 timeline that we have?

8 REPRESENTATIVE DERMODY: I think it's difficult
9 and I do have some doubts as to whether it's necessary, and
10 I think that's crucial. I think it's important before you
11 proceed on an impeachment of any type that it's absolutely
12 necessary. And if you have a situation where you have an
13 election coming up and you don't want it to appear that
14 there's any -- trying to get a leg up in an election, you
15 know, we have significant elections coming up, including
16 for Attorney General, and you have an Attorney General
17 who's leaving and the criminal cases are still pending. I
18 think it's going to be difficult to, I think, comply with
19 the rules and what you would want to happen with regards to
20 due process in an impeachment proceeding. To get that done
21 in that period of time is most difficult.

22 REPRESENTATIVE BIZZARRO: Thank you.

23 MR. PICCOLA: I think it's possible. It'd be
24 difficult but it would be possible. I think the issues --
25 and again, I don't know any inside information except what

1 I read in the public media -- the issues are a little bit
2 less complex in the case facing you than -- I mean, we had
3 allegations from criminal justice on through improper
4 influencing of the judge through contact with litigants and
5 allegations of attempted hit and run and --

6 REPRESENTATIVE BIZZARRO: Yes.

7 MR. PICCOLA: -- all kinds of allegations. I
8 mean, they were very, very wide and dispersed in the Larsen
9 case. So I think it's possible but it's going to be very
10 difficult. You better get cracking.

11 REPRESENTATIVE BIZZARRO: So we start now then?

12 MR. PICCOLA: Well, it sounds like you have.

13 MAJORITY CHAIRMAN STEPHENS: Representative
14 Briggs and then we'll get to Representative Saccone.

15 DEMOCRATIC CHAIRMAN BRIGGS: Senator, you had
16 mentioned the complexity of the Larsen situation. I mean,
17 one of the challenges that we have -- and I know we're not
18 talking about specific things -- is you don't know what
19 you're going to uncover. You know, I don't know if you
20 knew everything you are going to find --

21 MR. PICCOLA: We did not.

22 DEMOCRATIC CHAIRMAN BRIGGS: -- in '93 and '94.

23 MR. PICCOLA: We did not.

24 DEMOCRATIC CHAIRMAN BRIGGS: In '93 and '94 as
25 the complexity developed and the Senate, you know, found

1 one article of impeachment as worthy, do you think looking
2 back on it you should have continued to develop the whole
3 case? I don't know if I'm articulating right. Did it need
4 to be as complex or do you think if you had just found the
5 one or two or three things that were slam dunks that, you
6 know, you could have ended the investigation and filed?

7 MR. PICCOLA: Well, in hindsight that's probably
8 possible, but I don't think looking from the perspective we
9 were in early '93 that -- I mean, as we got into it, we
10 started to uncover things like peeling an onion, I mean,
11 you had different layers. We uncovered some stuff that
12 actually never even came out in the public record because
13 it was stuff that was -- we had to make judgments on
14 whether to put it in or not put it in to the proceedings.

15 So it turned out to be extremely -- and, as you
16 know, the court, especially back in those days, was a very
17 secretive body. They don't publish their deliberations and
18 their communications with each other. I guess they do now.
19 But getting into that was a difficult process. I don't
20 know what you're going to be faced with here. I mean, I
21 haven't even thought that through yet.

22 DEMOCRATIC CHAIRMAN BRIGGS: I don't know if you
23 have any --

24 REPRESENTATIVE DERMODY: No, I agree. I think we
25 had to go through it all. I mean, as a Jeff has mentioned,

1 we both mentioned, there was a lot swirling around with
2 Justice Larsen for a couple of years, and I think to go to
3 the court we needed to make sure we investigated all those
4 areas, and we would have made a mistake if we hadn't. So
5 it just takes time.

6 MR. PICCOLA: Right. While we had the judicial
7 discipline process in place, there was a lot of questions
8 whether the court would even enforce it against one of
9 their own, so we felt the impeachment process was the
10 safety belt there. So that's another reason I think we
11 continued to move forward.

12 MAJORITY CHAIRMAN STEPHENS: Representative
13 Saccone?

14 REPRESENTATIVE SACCONI: Thank you, Mr. Chairman.

15 So I know you didn't face this particular
16 question that I'm about to ask because in the Larsen case
17 he had eight years left and, you know, you wanted to make
18 sure that this was dealt with. But I keep hearing that
19 because, you know, there's only a few months left and the
20 term is about to expire, that that might be one
21 consideration as to why we would not proceed. And I'm
22 interested in your comments on whether, as the impeachment
23 process -- as a matter of principle, if we have found
24 issues that are worthy of impeachment, whether as a matter
25 of principle we shouldn't proceed no matter what the time

1 is because it is a matter of principle. If there are
2 issues that are worthy of impeachment, we should just
3 ignore them and say, well, you know, time's running out,
4 let's just let it go, that because if there are issues that
5 we've identified that are worthy of impeachment that we
6 should proceed on principle. Do you have any comments on
7 that?

8 MR. PICCOLA: Well, that's a judgment you are
9 going to have to make. I would base it on two
10 constitutional provisions: number one, that impeachment is
11 unique to the House of Representatives, and if you give it
12 up, in this particular case you've given it up for all
13 time. Secondly, the punishment for impeachment is not just
14 removal from office. It is a preclusion from serving in
15 any position, appointed or elected, a position of trust or
16 profit under the Commonwealth. I think those are the
17 constitutional words.

18 So you have to make that decision, too, whether
19 the person upon whom the impeachment is focused, whether
20 you feel it necessary as a protection to the people of the
21 Commonwealth to prevent that person from ever serving in
22 public office, either appointed or elected, again. And
23 that's a judgment you all have to make. And there's
24 nothing that, say, couldn't spill over into another term.
25 I mean, there's nothing that precludes any of that.

1 REPRESENTATIVE SACCONI: Thank you. I appreciate
2 that.

3 REPRESENTATIVE DERMODY: Well, I mean, I think
4 you have to be careful. You have criminal trials that
5 haven't started yet, and after November, if the Attorney
6 General doesn't run, can no longer be a civil officer. So
7 there's not going to be any carryover to another term.
8 You're not a civil officer, you can't be impeached. So, I
9 mean, it's a difficult process and it has to be done
10 correctly, as I've stated. It's got to be fair, it has to
11 be done right, and it needs to be necessary, I think, to
12 move forward. That's a determination you have to make as a
13 Committee, a Subcommittee, and a Judiciary Committee, and
14 maybe the whole House. We'll see.

15 We did not have the benefit of the criminal
16 investigation. We started our process. It became
17 available later, but you have to do your own independent
18 investigation because it's an impeachment. And it's rare,
19 it ought to be rare, but when you do it, it needs to be
20 done right.

21 MAJORITY CHAIRMAN STEPHENS: Along those lines, I
22 mean, I think from what I understand, you guys were the
23 trailblazers in terms of creating the procedure that
24 Representative Briggs and I are hoping to follow. I mean,
25 the Constitution provides very little guidance in terms of

1 the actual procedure.

2 And just correct me if I'm wrong, but the
3 procedure you employed was to conduct your investigation
4 first as a Subcommittee and then make recommendations to
5 the House Judiciary Committee, who would then -- those
6 articles of impeachment, those recommendations will go
7 before the full House of Representatives, and then the
8 final step is the trial over in the Senate. So this is
9 just the very beginning part of what may or may not,
10 depending -- I mean, each step of the way you may reach a
11 conclusion that it doesn't make sense or it isn't
12 appropriate to move forward for whatever reason.

13 That's a long-winded question, but my ultimate
14 question is is that cost-benefit analysis that you seem to
15 be referring to, I mean, that's appropriated every step
16 along the way, am I right? In other words, until you
17 investigate to understand what the benefit might be or what
18 the issues may be or may not be, it's hard to draw a
19 conclusion about whether it's worthwhile proceeding. Do
20 you understand?

21 REPRESENTATIVE DERMODY: Yes. You know, I agree.
22 I mean, we had to go back. We looked at the 1700
23 impeachments and we had better records there, I think, in
24 the early 1800s, back to read the Federalist Papers because
25 Hamilton wrote about impeachment.

1 Then, we went to Washington because obviously we
2 met with the staff of the Judiciary Committee in the House
3 because they've done several. And we tried to replicate
4 what was done earlier in Pennsylvania and worked with the
5 Judiciary Committee in Washington and followed some of
6 their steps about how we proceed, have the Subcommittee do
7 the work, a very thorough investigation.

8 I think we had a report that -- we sent around a
9 filing in the court, the case on researching impeachment,
10 and you remember the Washington -- the staff of the House
11 Judiciary Committee said the Subcommittee on Courts should
12 do this, it needs to be thorough, and it needs to be their
13 own investigation. You can't rely on outside folks. You
14 can rely on them for part of it but you have to do your own
15 investigation. And you should.

16 MR. PICCOLA: Yes, I think you had one advantage
17 that we didn't have, and Frank's summarized it, and that is
18 we didn't have a template of any sort. We were making
19 things up as we went. At least you guys and gals have the
20 benefit of our procedure that we set up, and I think Frank
21 would agree --

22 REPRESENTATIVE DERMODY: We worked hard on it.

23 MR. PICCOLA: -- it was a good procedure. But
24 that took time to develop. I mean, that wasn't something
25 that, you know, we started out of the box with. That was

1 something that developed the early part of '93 before we
2 got actually into the drafting of resolutions and articles
3 of impeachment. I mean, setting up that template was a
4 time-consuming process. So you can probably discount our
5 time a little bit. And again, I have to go back and look
6 at the whole record, but you can discount the time it took
7 us a little bit because hopefully you would use our
8 template.

9 MAJORITY CHAIRMAN STEPHENS: Well, I know that
10 from my personal perspective we're hoping to and we're
11 certainly trying to, and I think Representative Briggs
12 shares that concern. It seemed to work out well in terms
13 of getting to the truth, which is our goal. And, you know,
14 there's no need to reinvent the wheel in that regard if
15 what you do got to the truth. And, you know, we hope to
16 achieve the same result following the same procedure.

17 Any other questions? Yes, Representative Toohil.

18 REPRESENTATIVE TOOHL: Thank you. This could be
19 for either of you, Leader Dermody or Senator Piccola. For
20 those of us that aren't familiar with the Larsen case, do
21 you think that it was the gravity of the offenses that were
22 coming up or the type of misconduct? What was it about
23 that case that made you decide to proceed with the
24 impeachment?

25 REPRESENTATIVE DERMODY: It became clear that --

1 and this is my view; I think Jeff feels the same way about
2 that -- that he was involved with litigants before the
3 court, and they got favors. They got help that they should
4 not have received from a Justice of the Supreme Court.
5 That goes to the heart of fairness and our judicial system
6 so that we had to address that.

7 MR. PICCOLA: Yes, I remember coming to a
8 conclusion that something had to be done when there were
9 conflicting allegations coming out of the mouths -- I mean,
10 these were quotations coming out of the mouths of Supreme
11 Court Justices, and I commented to somebody at the time,
12 well, somebody's lying.

13 When that happened, it was apparent to me that
14 the whole credibility of our judiciary was being undercut
15 and that obviously impeachment is one of the potential
16 remedies for addressing that issue if it can't be addressed
17 by the court itself. Well, you had to almost be living at
18 the time to understand how remarkable it was that this was
19 happening with our court --

20 REPRESENTATIVE DERMODY: And that we had to go
21 through this. I mean, I think we said earlier, had he
22 resigned, we wouldn't have to go through all of this, but
23 we had no choice. I mean, he was a Supreme Court Justice
24 with eight years left.

25 REPRESENTATIVE TOOHLIL: Okay. I guess that kind

1 of helps, but I'm looking for some sort of standard or
2 benchmark where it rises to this level where you would
3 begin the impeachment process.

4 And then I don't know if you would agree that
5 when you look at -- or not in the criminal context, but
6 when you look at criminal cases and prosecutorial
7 discretion, that sometimes you have a prosecutor that goes
8 after a case and it's not necessarily the outcome but it's
9 more of what you were looking at where you're searching for
10 justice or searching for truth.

11 I don't know if in this case that you would look
12 at it in the same -- I mean, in the Larsen case would you
13 look at it and think that it was something that you had to
14 do to pursue and it wasn't necessarily going to matter what
15 the outcome would be at the end of the day, that a person
16 wasn't in office or -- I mean, he could have resigned at
17 any point during the time that you were doing your
18 investigation, your impeachment --

19 MR. PICCOLA: Well, let me put it this way. The
20 people of Pennsylvania and the people of the United States
21 have a very healthy skepticism about elected officials.
22 But with House Members, Senators, Governors, they get to
23 voice their opinion on those folks, us, every two or four
24 years.

25 There is, I think, a less-than-healthy skepticism

1 about our judicial system and our criminal justice system,
2 and both the case you're faced with today and the one we
3 were faced with reflect on a possible undermining of -- and
4 it certainly was an undermining in our situation --
5 possible undermining of the credibility in the minds of the
6 public of the fairness and objectivity of that judicial
7 system, the justice system if you will, the criminal and/or
8 civil.

9 So I think that's where I think -- at least from
10 my perspective, that's what raised my level of concern that
11 we needed to go beyond just what we would typically do and,
12 you know, just count on elections to solve the problem,
13 because certainly with our case we couldn't count on
14 elections.

15 REPRESENTATIVE DERMODY: I mean, the voters only
16 get a chance every 10 years, and it's a retention vote.

17 REPRESENTATIVE TOOHL: Okay.

18 REPRESENTATIVE DERMODY: I mean, these other
19 elected offices, they have a chance to fix thing every two
20 or four years, the voters do.

21 MAJORITY CHAIRMAN STEPHENS: All right. Any
22 other questions?

23 I do want to acknowledge Representative Mullery,
24 who's joined us. Thank you.

25 And, gentlemen, thank you so much for taking the

1 time to join us today and share some insights and
2 suggestions and thoughts.

3 MR. PICCOLA: Thank you.

4 MAJORITY CHAIRMAN STEPHENS: We appreciate it.
5 We hope that you will be available for us as needed through
6 this process if necessary.

7 REPRESENTATIVE DERMODY: I'll be around.

8 MR. PICCOLA: You have my number.

9 MAJORITY CHAIRMAN STEPHENS: Thank you very much.

10 REPRESENTATIVE DERMODY: Thanks.

11 MAJORITY CHAIRMAN STEPHENS: Next, we'd like to
12 have Professor Stephen Ross.

13 Good morning, Professor. Thank you so much for
14 joining us. We appreciate you taking time from your
15 schedule to share some of the legal perspectives and
16 insights as it relates to impeachment here in Pennsylvania
17 and some of the things that we should be mindful of as we
18 move down this journey.

19 MR. ROSS: Thank you, Chairman Stephens. If any
20 of my first-year law students whose class has been
21 rescheduled until this afternoon are any of your
22 constituents, I'll be sure to --

23 MAJORITY CHAIRMAN STEPHENS: Well, that's a long
24 commute.

25 MR. ROSS: I'm happy to be here and happy to

1 provide whatever resources or expertise I can to your
2 venture.

3 Those of you who graduated from law school no
4 doubt remember, or at least when prompted, the famous line
5 from Chief Justice John Marshall's decision in *Marbury v.*
6 *Madison*, "It is emphatically the province of the Judicial
7 Department to say what the law is." That sentence, which
8 is oft quoted, is often taken out of context. With regard
9 to impeachment, Chief Justice Marshall made it clear even
10 in *Marbury v. Madison* that only applied to cases properly
11 before the courts. With regard to impeachment, which is a
12 non-justiciable issue, it is emphatically the Legislature's
13 job to say what the law is.

14 I borrow from both the decision and scholarship
15 of Chief Justice William Rehnquist in my testimony in
16 suggesting that the key precedent in the Federal level for
17 impeachment was the failure of 2/3 of the Senate to impeach
18 Supreme Court Justice Samuel Chase in 1805. Justice Chase
19 was a Federalist Judge at the time the Senate was
20 overwhelmingly Jeffersonian, 22 to 9 in the Senate at the
21 time. And the Senate could have impeached him for simply
22 making bad decisions as a Federalist Judge. Indeed, that
23 seems to be what President Jefferson in retirement in
24 Monticello actually thought should happen. But they
25 didn't. And if they did, as Chief Justice Rehnquist

1 observes, we would have a very different constitutional
2 structure in our country because we would no longer have an
3 independent judiciary.

4 Justice Chase could have been impeached for
5 severe ethical issues. Among the things that Justice Chase
6 did was, while sitting as a Supreme Court Justice, actively
7 campaigned for John Adams over Thomas Jefferson in the 1800
8 election and presided while riding circuit over a criminal
9 trial of a Jeffersonian activist whose prosecution he had
10 initiated by writing the U.S. Attorney, conduct that
11 probably would not be tolerated today.

12 But the idea of impeaching a Judge for severe
13 ethical issues is open to kind of political manipulation.
14 The vote has been understood as a precedent, just like
15 *Brown v. Board of Education* or *Marbury v. Madison*, that the
16 constitutional term under the U.S. Constitution of good
17 behavior means that Judges have life tenure, absent a
18 conviction for criminal offenses or the commission of
19 serious equivalent acts.

20 Another precedent was set in 1974 by the United
21 States House Judiciary Committee and its impeachment
22 proceedings against President Richard Nixon. He was
23 impeached by the -- articles of impeachment were voted out
24 by the House Judiciary Committee for various quasi-criminal
25 conduct relating to the Watergate affair.

1 There were two other articles of impeachment,
2 which the House Judiciary Committee voted not to recommend
3 impeachment on. One was President Nixon's abuse of the
4 Internal Revenue Service to target his political enemies.
5 The second was his deliberate lying to Congress about the
6 war in Cambodia. It was called the Secret War, although it
7 probably wasn't very secret to the people in Cambodia.

8 What these precedents reveal is something that in
9 the British Commonwealth is called a constitutional
10 convention. That is a rule that is accepted as
11 constitutional law but it is not judicially enforced or
12 decreed by the Supreme Court.

13 As I tell my class when I teach this concept, as
14 a matter of legally as opposed to constitutionally, I could
15 turn on my phone at the end of this hearing and see a call
16 from Buckingham Palace where Her Majesty has decided to
17 sack David Cameron and appoint me Prime Minister. That is
18 within her powers, but it would be seen as unconstitutional
19 for her to do so, based on a convention.

20 To give a more American tune to the concept of
21 constitutional convention, it is the pretty well-
22 established constitutional convention, both in Washington
23 and in Harrisburg, that the Senate will confirm qualified
24 nominees of the executive of another party. Now, that is
25 not the way things have to work. That is not the way it

1 works in France. In France if the legislature has a
2 majority that is the party opposite the President, the
3 President and the leader of the legislative majority works
4 out a deal they call it, have occasion where each side gets
5 their share. That is not our convention, our tradition
6 here either in Washington or Harrisburg.

7 A leading British scholar has set forth three
8 criteria for determining what is a constitutional
9 convention. One is to examine what the precedent is, what
10 has happened in the past; second, whether actors believe
11 they are bound by the rule. Is this just a deal between
12 Chairman Stephens and Chairman Briggs so next time it comes
13 up it could be another deal, or is this a principle that
14 Chairman Stephens and Chairman Briggs believe they are
15 bound to?

16 And then finally, is there a good reason for the
17 rule?

18 What does this mean? What this means is there's
19 a variety of options that this Committee could take in
20 determining what constitutes misbehavior under the
21 Constitution worthy of impeachment. And I just want to
22 sketch out -- Leader Dermody has already indicated his
23 views, which would seem to reject the first two, but that's
24 up to the Committee to work on.

25 One option is misbehavior as a purely political

1 decision. That is, impeachment for misbehavior of an
2 executive branch officer is any grounds that you can get a
3 majority of the House and 2/3 of the Senate to pass.
4 There's no principle involved. It's just politics.

5 Option B is a parliamentary system of no
6 confidence. If the Legislature lacks confidence in the
7 ability of the executive branch officer to carry out their
8 duties, then they can be impeached.

9 A third example, which will be illustrated by
10 President Nixon's treatment with the IRS, is gross abuse of
11 power. It's not something that is necessarily criminally
12 liable, but it is something that is considered to be so
13 abusive that we do not want that person to be holding
14 office.

15 And then option D would be serious criminal
16 conduct or misconduct of a similar nature.

17 There are also procedures that you could adopt as
18 precedent. One idea that just occurred to me, I confess,
19 in light of the professions of desire for bipartisanship,
20 would be to adopt a version of the Good Friday Agreement
21 that Senator George Mitchell brokered in Northern Ireland,
22 which is to say that on something this important where we
23 claim we need bipartisanship, in advance the Committee
24 could decide we would not move forward unless we get at
25 least some fixed percentage, 35 or 40 percent of both

1 parties, to support it. If that doesn't happen, then we're
2 just not going to move forward. So that's another option
3 for the Committee to decide.

4 If the Committee decides to exercise -- and I
5 thought Representative Toohil's phrase of prosecutorial
6 discretion was apt. It's prosecutorial discretion not to
7 move forward. You have the discretion to do that for any
8 reason, and it really doesn't set a precedent. It's purely
9 discretionary in the same way that those of you who are
10 former prosecutors, you decide because of nine different
11 circumstances you're not going to prosecute somebody for a
12 crime. That says nothing about the crime the next time
13 around or anything else. And so you could decide to
14 exercise your prosecutorial discretion because it's going
15 to take too long, time's running out, we're in a budget
16 crisis, whatever reason you want that is within your
17 discretion to do.

18 However, if you decide not to exercise a pure
19 question of prosecutorial discretion, I would strongly urge
20 you to regard your decision precedential like courts. In
21 the House report, your report to the Committee, the
22 Committee reports to the full House, you should carefully
23 explain your rationale if you are assuming that you're
24 going to pursue anything other than a purely political
25 option to clearly state your own views on what is the

1 appropriate standard for impeachment, and, if you recommend
2 articles of impeachment, why you think the particular
3 officer ought to be impeached and, if you recommend not
4 proceeding with impeachment, why you feel that the standard
5 you have established was not met.

6 That will not only serve your process and
7 certainly Chairman Stephens' and Chairman Briggs' goal of
8 bipartisanship, but also serve another template for future
9 Legislatures to consider, and I would suggest because of
10 the rarity of the act not only in the Commonwealth of
11 Pennsylvania but throughout the Nation.

12 I appreciate your attention and look forward to
13 answering any questions I have now and serving as a
14 resource to you or your staffs moving forward.

15 MAJORITY CHAIRMAN STEPHENS: Any Members of the
16 Committee have any questions?

17 Chairman Briggs.

18 DEMOCRATIC CHAIRMAN BRIGGS: Thank you very much,
19 Professor.

20 You kind of came up with Senator Piccola and
21 Leader Dermody about the removal but then also the
22 prohibition from further office. If our timeline gets us
23 to a point if we proceed and take it all the way to the end
24 to a Senate hearing and it's past the point of the current
25 officeholder's term in office and, you know, in January and

1 February there's a hearing, could you impeach at that
2 point?

3 MR. ROSS: You've gone beyond my -- one of the
4 things I've always prided myself is on providing my
5 expertise when I have expertise and not providing my
6 expertise when I don't. You've asked me a particular
7 question about the particular nature of the Pennsylvania
8 Constitution which provides for the impeachment of civil
9 officers, and that is something -- I can frame the issue
10 for you, like issue-spotting in a law school exam, but I
11 have no idea -- I do not know what the answer is to that
12 question.

13 DEMOCRATIC CHAIRMAN BRIGGS: Another reason why
14 good outside counsel would be helpful during this process.

15 And this may be the same sort of question, if the
16 House majority decides to send the matter to the Senate,
17 does the Senate -- are they required to have a hearing, a
18 trial?

19 MR. ROSS: Okay. Well, when we use the word
20 "required" here, we normally in law think about somebody is
21 required to do something as a Judge will tell them that
22 they have to do it if they don't. So in essence the Senate
23 is not required to do anything.

24 In fact, the U.S. Supreme Court, again, in an
25 opinion by Chief Justice Rehnquist made this clear. They

1 impeach a Federal Judge for criminal activity and the full
2 Senate did not actually try the case. They designated a
3 committee to try the case. They then presented the entire
4 transcript to the full Senate and then they gave the
5 manager's and the defendant's counsel an opportunity to
6 argue the case before the entire Senate.

7 And the issue that was before the Supreme Court
8 was whether that was a breach of the U.S. Senate's
9 constitutional responsibility to try all impeachments. And
10 the Supreme Court said the U.S. Senate has the sole power
11 to try, which means they have the sole power to determine
12 what they should do.

13 So I would say that in the sense that we normally
14 think of it, there is no outside remedy if the Senate were
15 to choose not to do this. But they are making the
16 constitutional law.

17 I would say that, in making the constitutional
18 law, that that's up to the Senate to decide to do and then
19 they are setting the law. Just like a Judge in a criminal
20 case, I would presume that the Senate would have the option
21 to, for example, say we are not -- I would assume they'd
22 have to vote on the -- but we are not going to proceed with
23 the articles of impeachment because it would not be in the
24 interest of justice, just as -- and my understanding is
25 that a Court of Common Pleas Judge has the authority if a

1 prosecutor has properly charged someone before they even
2 try the case to decide, for some compelling reason, that
3 they're just going to dismiss the case in the interest of
4 justice. And that would be an option for the Senate.

5 Consistent with my testimony here, I would hope
6 that the proponents would set forth very clearly what the
7 standards are and why they are doing it, and it would be
8 because it would be setting a precedent for the future.
9 But in terms of what their options are, that is something
10 the Senate has to decide for itself.

11 DEMOCRATIC CHAIRMAN BRIGGS: And one final
12 question, I mean, obviously this is a rare instance that
13 impeachment is pursued. Through the Federal court process
14 or anything, do you have a sense of how many impeachments
15 there have been that have gone all -- you know, you
16 mentioned a couple of them.

17 MR. ROSS: Yes. I mean, it's public. You could
18 probably look it up on Wikipedia, it's so easily available,
19 but it is a rare number of Judges who have been impeached
20 and almost always following a criminal conviction where the
21 Judge refuses to step down from the bench even though
22 they've been convicted.

23 There is one famous case, Judge Alcee Hastings,
24 who was criminally convicted, would not step down, was
25 impeached, and then ended up running and winning a seat in

1 the House of Representatives because the U.S. Congress does
2 not have the provision of disqualification for office.

3 But it is certainly rare in the sort of same
4 nature as the rare event here. The reality is that most
5 people in this situation want to contest it criminally, and
6 if they're convicted, they resign. I mean, that's just the
7 historical reality of what happens in the Federal system.

8 Once the constitutional convention was created
9 that we only do impeach for criminal or quasi-criminal
10 action, then that's why I think it is so rare.

11 MAJORITY CHAIRMAN STEPHENS: Let me just follow
12 up on that, and correct me if I'm wrong because you're the
13 professional here. The Pennsylvania Constitution is
14 different from the U.S. Constitution in that regard,
15 though, if I'm not mistaken, as it relates to non-judicial
16 officials. In other words, misbehavior in office within
17 our Constitution is very clearly not limited to strictly
18 criminal conduct. Is that right?

19 MR. ROSS: Well, this has come up -- certainly,
20 this came up in the Chase impeachment because the U.S.
21 Constitution's term is "good behavior." And it came up in
22 various impeachments most directly with President Nixon
23 with regard to the constitutional phrase "high crimes and
24 misdemeanors." And it is pretty clearly recognized that
25 the phrase "high crime," which had an English origin, did

1 not refer to criminal felonies. It was not just an old,
2 antiquated term for felonies. So it's clear that the term
3 is not intended to limit you to criminal offenses.

4 And it is also pretty well accepted that it would
5 be a breach of convention to -- you know, for example, I
6 think it is almost certain if not admitted that President
7 Obama has violated Federal law when he uses the email or a
8 phone to participate in the March Madness betting pool,
9 which he usually does. That is, if you look at the Wire
10 Act, that's technically a violation. I would think that
11 most people would regard it as unconstitutional if the
12 House of Representatives impeached President Obama for
13 betting on the NCAA pool even though it's a misdemeanor and
14 therefore literally in the Constitution.

15 On the other hand during the Nixon impeachment, I
16 think it was clear, although they decided that the
17 particular offenses should not be used, that noncriminal
18 activity that are grossly abused power is the sort of thing
19 that is inappropriate.

20 I mean, one of the things I think that is useful
21 -- another thing is you don't have to set precedents when
22 they're not relevant. So as your investigation into the
23 Attorney General's conduct continues, one of the things you
24 might answer is, are the accusations involved conduct where
25 we just want to use the criminal standard? So if in fact

1 -- and again, I take no position on the actual issues; I am
2 just going by what I read -- if in fact the sole reason to
3 impeach her is because she engaged in leaking materials
4 from a secret grand jury, and if that's the sole basis that
5 you want to -- and we have a criminal law against it, you
6 might decide that the appropriate standard is the criminal
7 standard.

8 On the other hand, if your investigation develops
9 other concerns, it is your prerogative to determine
10 anything. And literally, you could decide as a matter of
11 constitutional law that misbehavior means whatever you want
12 it to -- hey, you could decide if it turns out that she
13 participated in a March Madness betting pool and you say
14 that is misbehavior, well, you can do that. You're now
15 setting an incredibly high standard for conduct of all
16 civil officers of the Commonwealth.

17 Next time around, it's a different political
18 dynamic. Every civil officer is now going to be liable for
19 impeachment for the slightest criminal activity, but that's
20 the precedent you set if, in your judgment, you want to set
21 it. There are reasons for you not to set that precedent,
22 but you are basically setting the precedent in the same way
23 that when the U.S. Supreme Court decides what is the
24 appropriate standards under the equal protection clause for
25 treatment of various groups, they are setting the standard.

1 That's really up to you to set in this case.

2 MAJORITY CHAIRMAN STEPHENS: Okay. So it would
3 be your recommendation that we consider our action or
4 inaction as precedent-setting as we move forward?

5 MR. ROSS: My recommendation is that you, in your
6 minds, clearly delineate between am I exercising
7 prosecutorial discretion? You're sort of the prosecutor
8 and the Supreme Court Judge in this matter. So I think
9 it's important -- my recommendation would be to separate in
10 your minds are we exercising a pragmatic small-p political
11 discretionary decision not to move forward or not?

12 And if you are not exercising a discretionary
13 decision -- sort of if you do not go down the line of
14 Chairman Petrarca and ask a number of questions and if you
15 answered every one of them in a particular way, you would
16 say this is discretion. But if you decide not to go the
17 discretionary route and you decide not to prosecute because
18 your investigation determines that there was no misbehavior
19 or you decide to pursue it because you believe that there
20 was misbehavior, then I do think it's important to set
21 forth exactly why, and I think that will set a precedent
22 for the future.

23 And I would not get that hung up on the words
24 because I think when we go back to the original intent of
25 the framers -- and you can look at the U.S. Constitution,

1 the Commonwealth Constitution or the Constitution of some
2 other State where there might be some other precedence, I
3 would be very surprised to find any evidence that in
4 crafting the Pennsylvania Constitution the drafters decided
5 to use misbehavior as opposed to some other word because
6 they really had a well-defined idea of what was
7 impeachment. And that's sort of why you have this
8 responsibility, and I commend you for having a hearing
9 where you're trying to think about this in a rigorous way.

10 MAJORITY CHAIRMAN STEPHENS: Thank you.

11 Questions from Members of the Committee?

12 All right. Professor, thank you very much. We
13 appreciate you joining us and providing some insight and
14 some food for thought for the Committee as we move forward.

15 Thanks to the Members of the Committee for
16 joining us. We'll be in touch about future meetings and
17 hearings.

18 This hearing is concluded. Thank you.

19
20 (The hearing concluded at 11:45 a.m.)

1 I hereby certify that the foregoing proceedings
2 are a true and accurate transcription produced from audio
3 on the said proceedings and that this is a correct
4 transcript of the same.

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