

BEFORE THE ALABAMA HOUSE  
OF REPRESENTATIVES  
JUDICIARY COMMITTEE

In Re: The Impeachment of  
Robert Bentley, Governor of Alabama

**The Constitutional Standard for Impeachment  
Of A Governor Of Alabama**

Ross H. Garber (*pro hac vice* pending)  
Shipman & Goodwin LLP  
1875 K. St, NW  
Washington, D.C. 20006  
202-469-7798  
[rgarber@goodwin.com](mailto:rgarber@goodwin.com)

David B. Byrne, Jr., Chief Legal Advisor  
Carrie Ellis McCollum, Deputy Legal Advisor  
Office of the Governor  
State Capitol  
Montgomery, Alabama 36130

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EXHIBIT  
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GOVERNOR OF ALABAMA**

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Prepared on behalf of the Office of the Governor of Alabama

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# THE CONSTITUTIONAL STANDARD FOR IMPEACHMENT OF A GOVERNOR OF ALABAMA

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## EXECUTIVE SUMMARY

### Impeachment History

No governor of Alabama has ever been impeached. In fact, it is rare for any governor to be impeached. Since the founding of our Nation, only fifteen governors have been impeached and only eight have been removed from office. Modern impeachments are particularly rare. In the past eighty-five years, only two governors have been impeached and, in both cases, the impeachments were preceded by indictment or arrest for a serious criminal offense.

### Standard For Impeachment

The drafters of the Alabama Constitution set an intentionally high bar for impeachment to make clear that only grave offenses against the system of government warrant impeachment. Article VII, § 173 of the Alabama Constitution sets forth the permissible grounds for impeachment, which include “willful neglect of duty” and “corruption in office.” The Alabama Supreme Court has made clear, however, that impeachment is an “extraordinary remedy,” which is penal in nature, and therefore to be impeachable, the alleged offense must “seriously cripple the administration of justice in all its departments.”<sup>1</sup>

A governor may not be impeached simply because the legislature disapproves of the governor’s actions, or even as the result of a violation of ethics standards or indeed most other laws. This is consistent with the generally accepted interpretation of the federal standard for impeachment of a President. In connection with the potential impeachment of President Richard Nixon, a Congressional report (the “Rodino Report”) noted that:

[i]mpeachment is a constitutional remedy addressed to serious offenses against the system of government....Impeachment is directed to address constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself....<sup>2</sup>

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<sup>1</sup> *State v. Hasty*, 184 Ala. 121, 124 (1913); *Nelson v. State*, 182 Ala. 449, 460-61 (1913).

<sup>2</sup> Staff of the House Comm. on the Judiciary, 93d Cong., Constitutional Grounds for Presidential Impeachment 19 (Comm. Print 1974) [hereinafter “Rodino Report”]

Impeachment is, therefore, generally reserved for situations in which the official has engaged in serious criminal misconduct affecting his office.<sup>3</sup>

### Impeachment Procedure

Just as the standard for impeachment in Alabama is a high one, the procedures employed must be rigorous. Indeed, in Alabama an impeachment proceeding is considered penal in nature and, as a result, an impeachment defendant is entitled to due process protections.<sup>4</sup> A governor may certainly not be impeached based on rumor, gossip, innuendo, or conjecture. To the contrary, a governor subject to impeachment proceedings is entitled to a presumption of innocence,<sup>5</sup> and may be impeached only based on admissible evidence that establishes an impeachable offense “beyond a reasonable doubt and to a moral certainty.”<sup>6</sup> Particularly because a governor of Alabama is suspended from office pending trial in the Senate, due process protections must be afforded at all stages of impeachment proceedings.<sup>7</sup>

### Impeachment As Rejection of Election and Disruption of Balance of Powers

Impeachment of a governor would overthrow the results of a democratically held election, negating the voters’ choice of a chief elected official.<sup>8</sup> It would fundamentally disrupt the balance of powers between the Legislative and Executive branches established by the Alabama Constitution. It would also create a precedent that could permanently weaken future Offices of the Governor in Alabama. The impeachment process alone is enormously tumultuous, time-consuming and expensive. It has been said that impeachment “is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at.”<sup>9</sup>

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<sup>3</sup> The Rodino Report concluded that impeachment is appropriate “only for reasons at least as pressing as those needs of government that give rise to the creation of criminal offenses.” In his treatise on impeachment, Charles Black noted that “it remains true that the House of Representatives and the Senate must feel more comfortable when dealing with conduct clearly criminal in the ordinary sense, for as one gets further from that area it becomes progressively more difficult to be certain, as to any particular offense, that it is impeachable.” Charles L. Black, Jr., *Impeachment: A Handbook* 69 (1974).

<sup>4</sup> *Hasty*, 184 Ala. 121, 124 (1913); *State ex rel. Gallion v. Thomas*, 283 Ala. 227, 227 (1968); see also *State ex rel. Strange v. Clark*, No. 1151021, at p. 7 (Ala. July 27, 2016) (“Alabama caselaw is well settled that [an impeachment proceeding] is criminal in nature.”).

<sup>5</sup> *Thomas*, 283 Ala. at 227 (“This impeachment proceeding is in the nature of a criminal prosecution, hence the defendant came into this Court with a presumption of innocence.”).

<sup>6</sup> *Id.*; see also *Clark*, No. 1151021, at p. 7 (“The State must prove the charges on which the proceeding is based beyond a reasonable doubt.”).

<sup>7</sup> See Ala. Const. Art. V, § 127.

<sup>8</sup> Alabama constitutional law reflects the primacy of the will of the voters. For example, the Alabama Supreme Court has made clear that conduct during a public official’s prior term of office may not be a basis for impeachment. The voters’ re-election of the official operates as a “condonation” of the official’s actions during a prior term. *Lewis v. State ex rel. Evans*, 387 So.2d 795, 807 (Ala. 1980); *Parker v. State*, 333 So.2d 806, 808 (Ala. 1976).

<sup>9</sup> James Bryce, *The American Commonwealth*, Vol. I, 212 (1919).

## Summary

Law and history make clear that impeachment is reserved for situations in which no lesser response will do, where the misconduct is so clear and so grave that no other remedy is adequate. It is not surprising that impeachment has been called the “political equivalent of capital punishment.”<sup>10</sup> Accordingly, the Constitution of Alabama mandates that the governor be afforded due process and that impeachment is warranted only upon proof beyond a reasonable doubt of grave crimes or other similarly egregious misconduct that has seriously crippled the administration of justice in all its departments.

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<sup>10</sup> Lawrence H. Tribe, *Defining “High Crimes and Misdemeanors”: Basic Principles*, 67 Geo. Wash. L. Rev. 712, 723 (1999).

## FORMAT

This memorandum is divided into two sections:

Section I examines the impact of the impeachment mechanism on Alabama's separation of powers and on the public's right to choose its leaders through popular election.

Section II begins, in Part A, by summarizing the legal, scholarly and expert consensus regarding the federal constitutional standard of impeachment. Parts B, C and D then demonstrate that the Alabama Constitution establishes an unambiguously high and rigorous standard for impeachment, such that only those offenses that seriously cripple the administration of justice in all its departments warrant the grave step of removing a duly elected chief executive; that impeachments are penal in nature, requiring due process protections; and that impeachable offenses must be proven beyond a reasonable doubt and to a degree of moral certainty. Part E of Section II confirms the high constitutional standard of impeachment through a review of prior impeachments involving state governors and presidents.

**I. A Strict Impeachment Standard Is Vital To Preserving The Balance Of Powers And The Public's Right To A Popularly Elected Government.**

**A. Impeachment Disrupts The Necessary Balance Of Powers Between The Three Separate And Coordinate Branches Of Government.**

The Alabama Constitution delineates the separation and balance of powers between the legislative, executive and judicial branches. Article III, § 43 provides: “In the government of this state, except in the instances in this Constitution hereinafter expressly directed or permitted, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.”<sup>11</sup>

The Alabama Supreme Court recognizes that the separation of powers provision of the Alabama Constitution “creates the framework for the division of powers between the State's legislative, executive, and judicial branches. Each branch within our tripartite governmental structure has distinct powers and responsibilities, and our Constitution demands that these powers and responsibilities never be shared.”<sup>12</sup> The principle of separation of powers in Alabama derives from “the political maxim that an individual's liberty depends directly upon separation of the legislative, executive, and judicial powers of government.”<sup>13</sup> Expounding on this maxim, James Madison stated with reference to the United States Constitution's separation of powers doctrine: “In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and *usurpations are guarded against by a division of the government into distinct and separate departments.*”<sup>14</sup> “The People of the United States, and the People of Alabama, transformed [this] maxim from political philosophy into fundamental law by ratifying Constitutions that expressly vest the three great powers of government in three separate branches.”<sup>15</sup>

Impeachment is an “exception to the separation of powers,” and, for that reason, must be “narrowly channeled.”<sup>16</sup> When the legislature considers impeachment, it puts one “branch in a position to sit in judgment on another, empowering the [legislature] essentially to decapitate the executive branch in a single stroke....”<sup>17</sup> Impeachment “involves the uniquely solemn act of having one branch essentially overthrow another.”<sup>18</sup> As legal scholars have long recognized, the “most critical point possible in the relations” between the branches of government is “the actual imminence of impeachment

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<sup>11</sup> Ala. Const. Art. III, §43.

<sup>12</sup> *Monroe v. Harco, Inc.*, 762 So. 2d 828, 831 (Ala. 2000).

<sup>13</sup> *Ex parte Jenkins*, 723 So. 2d at 654.

<sup>14</sup> *Id.* (quoting *The Federalist No. 51*, at 322-23) (emphasis in original).

<sup>15</sup> *Id.*

<sup>16</sup> Raoul Berger, *Impeachment: The Constitutional Problems* 5 (1974).

<sup>17</sup> Tribe, *supra* note 10, at 723.

<sup>18</sup> *Id.*

proceedings.”<sup>19</sup> Therefore, “it is utterly vital to the health of our polity” that the legislature heed the highest caution, adhere with the greatest care to the confines of the Constitution, and have “appreciation of the constraints.”<sup>20</sup>

Because impeachment so subverts the ordinary constitutional processes that define the boundaries between the branches, it must “remain a remedy to be deployed only in extremely serious and unequivocal cases, where [there is] a high degree of confidence that the conduct in question falls squarely and unambiguously within the parameters of a persuasive definition, and where the insult to the constitutional system is grave indeed.”<sup>21</sup> Central to this restrained approach is the realization that lowering the standard for impeachable conduct would unduly weaken the role of Governor in the State of Alabama and permanently shift Alabama’s system of government, based on the separation of powers, toward a parliamentary system. Unlike the parliamentary system in Great Britain, the American system of government does not allow a legislature to cast out a chief executive based on a vote of no confidence.

Indeed, the Framers of the United States Constitution deliberately and distinctly rejected “maladministration” as a ground for impeachment because such a standard would undesirably weaken the executive and reduce future leaders to serving “during [the] pleasure of the Senate.”<sup>22</sup> One noted scholar’s observation in the context of a presidential impeachment bears repeating here:

Anyone who lowers the bar on what constitutes an impeachable offense simply in an effort to “get” [the President], whether for partisan reasons or in a spirit of equally genuine patriotism, may live to regret the abuses by future Congresses, and the resulting incapacity of future presidents, that might just as easily be unleashed were we to establish a precedent making it too easy – easier than the Constitution contemplated – to remove a President simply because, as in a parliamentary system, the legislature has come to disagree profoundly with his or her public policies or personal proclivities and has thus lost confidence in the President’s leadership.”<sup>23</sup>

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<sup>19</sup> Black, *supra* note 3, at 69; *see also* Rodino Report, *supra* note 2, at 19 (observing that impeachment implicates “issues of state going to the heart of the constitutional division” between the different branches of government).

<sup>20</sup> Black, *supra* note 3, at 69.

<sup>21</sup> *Background and History of Impeachment: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1998) [hereinafter “*Subcommittee Hearings*”] (prepared statement of Professor Jack Rakove), at 247.

<sup>22</sup> 1 Max Farrand, *The Records of the Federal Convention of 1787*, 230 (1911); *see also* Black, *supra* note 15, at 27-29, 30 (observing that an executive’s policy “ought to play *no* part in the decision on impeachment” and that “without any flavor of criminality or distinct wrongdoing, impeachment and removal would take on the character of a British parliamentary vote of ‘no confidence’”).

<sup>23</sup> Tribe, *supra* note 10, at 713.

Because not only the governor, but also the lieutenant-governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commission of agriculture and industries, justices of the supreme court, chancellors, judges of the circuit and probate courts, judges of courts from which appeal may be taken directly to supreme court, solicitors, sheriffs and all “other officers than those” specifically named are subject to impeachment by the Alabama legislature, diluting the constitutional standard of impeachment would also serve as a precedent to undermine the offices, and independence, of both state judges and state-elected officials.<sup>24</sup> With this in mind, weakening our officials by “watering down the basic meaning” of an impeachable offense is “a singularly ill-conceived...way of backing into a new – and for us at least, untested – form of government.”<sup>25</sup> Therefore, impeachment “is not, within the political logic of the separation of powers system, designed to cope with just any situation where [an official] might face ‘outrage,’ nor just any situation where [an official] might patently have engaged in ‘wrongdoing.’”<sup>26</sup> It is predicated only upon “constitutional wrongs that subvert the structure of government” and the Constitution itself.<sup>27</sup> To diminish this standard would “risk lowering the threshold for impeachment in a way that would genuinely threaten a transformation of our constitutional system.”<sup>28</sup>

**B. Impeachment Of A Chief Executive Nullifies A Popular Election And Must Not Be Used To Cut Short The Term Of A Democratically Elected Official.**

Legislative removal “is a stunning penalty, the ruin of a life. Even more important, it unseats the person the people have deliberately chosen for the office.”<sup>29</sup> It replaces the decision made by, and constitutionally entrusted to, the people in a popular election with the judgment of a different branch of government. This concern is particularly grave when a legislature contemplates impeachment of an elected chief executive, such as a president or governor. Impeachment of an elected chief executive “essentially cancels the results of the most solemn collective action of which” Alabama “as a constitutional democracy” is capable: the election of a governor.<sup>30</sup> This exceptional “frustration of popular will” should not occur except when necessary to remedy the most egregious misconduct that “corrupt[s] or subvert[s] the political and governmental process”; otherwise, impeachment would itself undermine the political process and the chief executive’s accountability to the electorate whose interests he or she is charged with serving.<sup>31</sup>

The basic constitutional design of the United States and of this State contemplates that when a chief executive is elected in a regular, periodic election, he or she will serve

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<sup>24</sup> Ala. Const. Art. VII, §§ 173 & 174.

<sup>25</sup> Tribe, *supra* note 10, at 716-17.

<sup>26</sup> *Subcommittee Hearings*, *supra* note 21, at 70 (prepared statement of Professor Matthew Holden, Jr.) (emphasis omitted).

<sup>27</sup> Rodino Report, *supra* note 2, at 26-27.

<sup>28</sup> *Subcommittee Hearings*, *supra* note 21, at 247 (prepared statement of Professor Jack Rakove).

<sup>29</sup> Black, *supra* note 3, at 17.

<sup>30</sup> Tribe, *supra* note 10, at 723.

<sup>31</sup> Black, *supra* note 3, at 17, 37.

out the constitutionally prescribed term absent the type of truly egregious wrongdoing that threatens our system of government and could justify invocation of the impeachment power. The Alabama Constitution provides that: “The Governor ... shall be elected by the qualified electors of the state,” “shall hold [his] respective office[] for the term of four years” and “shall be eligible to succeed himself in office,” but not “for more than one additional term.”<sup>32</sup> When the people have chosen through an election one eligible to act as a state official for a term certain, that election cannot be undone and that official cannot be removed, except through the impeachment process mandated by the Alabama Constitution.<sup>33</sup>

Indeed, Alabama’s constitutional law confirms the high degree of deference to be afforded to the will of the electorate. In particular, the Supreme Court of Alabama has concluded that an official “cannot be removed because of his conduct during a previous term” and, in fact, re-election to an office operates as a “condonation” of the official’s conduct during the prior term.<sup>34</sup> In other words, when the electorate has condoned prior misconduct by re-electing a public official to office, that prior misconduct cannot be the basis for impeachment.

As Chief Justice William Rehnquist noted, “[o]ne need only note the way in which the framers arranged the text of the United States Constitution to realize that they were concerned about the separation of powers....The framers were particularly concerned about the possibility of overreaching and bullying by the legislative branch—Congress—against the other branches. To that end, they established the terms of office..., where they could not be changed by Congress.”<sup>35</sup> The stability of democratic government and the integrity of such periodic elections demand that legislators not cut that term short, even if they have lost confidence in the particular chief executive’s ability to lead. In

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<sup>32</sup> Ala. Const. Art. V §§ 114 & 116.

<sup>33</sup> *State v. Buckley*, 54 Ala. 599, 614 (1875) (“After the adoption of our Constitution, impeachment, save as therein provided for, ceased to be a part of our jurisprudence.”); *Bradford v. State*, 226 Ala. 342 (1933) (rejecting writ of *quo warranto* seeking removal of city attorney, who “was elected ... and his term was therefore fixed” therefore he was “removable by impeachment under section 175 of the Constitution of 1901” and “could only be removed by impeachment”); *Williams v. State ex rel. Schwartz*, 197 Ala. 40 (1916) (statute allowing for recall of elected commissioner unconstitutional because commissioner “is within the protection of section 175 of the Constitution” and “an incumbent cannot be removed from office during the term for which he is elected, by recall or otherwise, except by the mode and in the manner, and for the causes, fixed in the constitutional provisions” concerning impeachment); see also *State v. Blake*, 225 Ala. 124 (1932) (discussing distinction between impeachable offenses and offenses rendering office holder ineligible to hold office); see also Ala. Const. Art. VII, § 176 (“The penalties in cases arising under the three preceding sections shall not extend beyond removal from office, and disqualifications from holding office, under the authority of this state, for the term for which the officer was elected or appointed; but the accused shall be liable to indictment and punishment as prescribed by law.”); Ala. Const. Art. IV, § 60 (“No person convicted of embezzlement of the public money, bribery, perjury, or other infamous crime, shall be eligible to the legislature, or capable of holding any office of trust or profit in this state.”); *Opinion of the Justices*, 359 So. 2d 1155 (Ala. 1978); Ala. Code § 36-9-2.

<sup>34</sup> *Evans*, 387 So.2d at 807; *Parker*, 333 So.2d at 808.

<sup>35</sup> William H. Rehnquist, *Grand Inquests* 9, 10 (1992) (concluding that the acquittal of President Andrew Johnson and Supreme Court Justice Samuel Chase from impeachment “was of extraordinary importance to the American system of government” and that, if “convicted, the future independence of the president [and the judiciary] could have been jeopardized”).

short, “the impeachment process is not merely about replacing a leader who is at present sagging in the polls...”<sup>36</sup> As one eminent impeachment scholar noted, “taking, at intervals, of public opinion polls on guilt or innocence, should be looked on as an unspeakable indecency.”<sup>37</sup>

### **C. Separation Of Powers Issues Are Intensified In Alabama Because A Governor Is Temporarily Removed Upon Impeachment.**

A distinct feature of Alabama’s impeachment procedure further heightens issues of the balance and separation of powers, as well as the electoral implications of impeachment. In contrast to the federal system, which allows an impeached President to remain in office until convicted by the Senate, the Alabama Constitution mandates the suspension of a Governor from office upon impeachment by the House of Representatives.<sup>38</sup> The Governor would resume his post only upon acquittal by the Senate, and the Lieutenant Governor would become Acting Governor in the interim.<sup>39</sup>

Therefore, a decision by the House to impeach would, itself, disrupt the Executive Branch, breach the separation of powers, and overturn a statewide election, even if the Senate ultimately acquits the governor. That is likely why, unlike the federal government, Alabama considers the impeachment process to be “in its nature, highly penal” and “governed by rules of law applicable to criminal prosecutions” including due process safeguards.<sup>40</sup> Moreover, in Alabama, a governor is limited to two terms in office.<sup>41</sup> Therefore, when a Governor is in his or her second term in office, there is a significant risk that impeachment will become the functional equivalent to conviction and removal as the governor’s term may end prior to the conclusion of a Senate trial. Accordingly, the House cannot view its role as merely a gatekeeper or the counterpart of a grand jury in a criminal proceeding. To pass an article of impeachment, the House must afford the full panoply of due process protections, including the same burden of proof that controls in the Senate - proof beyond a reasonable doubt - and conclude, not that the alleged conduct is sufficient to justify a Senate *trial*, but that it unmistakably warrants *removal*. Indeed, the House seems to have recognized as much in adopting the new Rule 79.1 to require, among other things, that due process be afforded during the House investigation process.

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<sup>36</sup> Black, *supra*, note 3, at x (forward by Akhil Reed Amar).

<sup>37</sup> *Id.* at 20.

<sup>38</sup> See Ala. Const. Art. V, § 127 (“In case of the impeachment of the governor ... the power and authority of the office shall, until the governor is acquitted ... devolve in the order herein named, upon the lieutenant governor, president pro tem. of the senate, speaker of the house of representatives, attorney-general, state auditor, secretary of state, and state treasurer.”).

<sup>39</sup> *Id.*

<sup>40</sup> *Hasty*, 184 Ala. at 124 (1913); *Thomas*, 283 Ala. at 227.

<sup>41</sup> Ala. Const. Art. V § 116 (a person “shall be eligible to succeed himself in office, but no person shall be eligible to succeed himself for more than one additional term.”).

**II. Impeachment Must Be Limited To Serious Crimes Or Serious Misconduct, Involving Corruption To The System Of Government, That Can Be Established By Proof Beyond a Reasonable Doubt.**

**A. Scholars And Experts Agree That Impeachment Should Be Reserved Only For Grave Misconduct That Corrupts The Constitutional Form, The Political Process, Or The System Of Government.**

Only the gravest public wrongdoing that corrupts or subverts the political and governmental process warrants impeachment. This requirement stems not only from concerns regarding the separation of powers and due respect for the outcome of a popular election, but also from the harm that impeachment causes to the individual, the people, and the system of government. Because impeachment is so harmful to the people and to the system of government, “it is predicated only upon conduct seriously incompatible with either the constitutional form and principles of our government or the proper performance of constitutional duties....”<sup>42</sup> The language used in the constitutional provision for impeachment in Alabama differs from the federal standard. Regardless of the language used, however, invocation of the extraordinary process of impeachment will always give rise to the same concerns regarding separation and balance of powers. Accordingly, analysis of the federal standard is useful and instructive.

“Impeachment is a constitutional remedy addressed to serious offenses against the system of government. The purpose of impeachment under the Constitution is indicated by the limited scope of the remedy (removal from office and possible disqualification from future office) and by the stated grounds for impeachment (treason, bribery, and other high crimes and misdemeanors). It is not controlling whether treason and bribery are criminal. More important, they are constitutional wrongs that subvert the structure of government, or undermine the integrity of office and even the Constitution itself, and thus are ‘high’ offenses in the sense that word was used in English impeachments.”<sup>43</sup>

The available historical sources confirm that impeachment was intended only to reach conduct in the official’s public capacity. Alexander Hamilton, one of the chief authors of the Federalist Papers, explained that impeachable conduct relates “chiefly to injuries done immediately to the society itself.”<sup>44</sup> Similarly, former Supreme Court Justice Joseph Story wrote that impeachable offenses are those “committed by public men,” which inflict “injuries to the society in its political character.”<sup>45</sup> The Staff of the House Committee tasked with considering impeachment against President Nixon stated that, in the impeachment context, “the crucial factor is not the intrinsic quality of behavior but the significance of its effect upon our constitutional system or the functioning of our government.”<sup>46</sup>

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<sup>42</sup> Rodino Report, *supra* note 2, at 27.

<sup>43</sup> *Id.* at 26.

<sup>44</sup> *The Federalist* No. 65, at 334 (Alexander Hamilton) (Basil Blackwell 2d ed., 1987).

<sup>45</sup> Joseph Story, *Commentaries on the Constitution of the United States*, Vol. I, § 746, at 529-30 (Little, Brown, and Company, 4th ed. 1873).

<sup>46</sup> Rodino Report, *supra* note 2, at 26.

With respect to the impeachment of a governor, “the principal goal of the impeachment clause is to allow impeachment for a narrow category of large-scale abuses of authority that come from the exercise of distinctly [gubernatorial] powers. Outside of that category of cases, impeachment is generally foreign to our traditions and prohibited by the Constitution.”<sup>47</sup> The impeachment of a chief executive “must relate to some reprehensible exercise of official authority. If a [chief executive] commits treason he has abused his executive powers. Likewise, a [chief executive] who accepts bribes has abused his official powers. The same misuse of official powers must be present in any consideration of a [chief executive’s] engaging in ‘other high crimes and misdemeanors.’”<sup>48</sup> The wrongdoing that properly qualifies as impeachable must therefore not only be public, but also substantial.<sup>49</sup>

Where the conduct in question consists of an “omission of duty without the element of fraud,” it is “not impeachable, although it may be highly prejudicial to the interests of the State.”<sup>50</sup> Even willful wrongdoing is not impeachable except where it is truly egregious and harmful to the constitutional order. Impeachment of a chief executive is strictly confined to “offenses against the government” where the offense is “convincingly established [and] so egregious that [the executive’s] continuation in office is intolerable.”<sup>51</sup> This requirement of substantiality follows in part from a paramount, constitutional prohibition against *ex post facto* laws and bills of attainder.<sup>52</sup> As Professor Black forcefully notes, the definition of an impeachable offense “must not be so interpreted as to make its operation in a given impeachment case equivalent to the operation of a bill of attainder, or of an *ex post facto* law, or of both. When a congressman says, in effect, that Congress is entirely free to treat as impeachable any conduct it desires so to treat, he (or she) is giving a good textbook definition of a bill of attainder and an *ex post facto* law, rolled into one.”<sup>53</sup>

To be sure, although impeachable conduct must cause substantial public injury and will often constitute criminal conduct, it need not necessarily fit squarely within the prohibition of an extant criminal statute. Grave abuses that threaten democracy or are “seriously incompatible with either the constitutional form and principles of our government” may not always technically qualify as a crime.<sup>54</sup> That impeachable conduct need not be criminal, however, does not imply that impeachment may lie for conduct less egregious; to the contrary, impeachment “must occur only for reasons at least as pressing

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<sup>47</sup> *Subcommittee Hearings*, *supra* note 21, at 38 (prepared statement of Professor Cass R. Sunstein) (emphasis omitted).

<sup>48</sup> *Id.* at 115 (prepared statement of Father Robert F. Drinan, S.J.).

<sup>49</sup> See Rodino Report, *supra* note 2, at 27 (“Not all [executive] misconduct is sufficient to constitute grounds for impeachment. There is a further requirement—substantiality.”).

<sup>50</sup> Paul S. Fenton, *The Scope of the Impeachment Power*, 65 Nw. U. L. Rev. 719, 746-47 (1970).

<sup>51</sup> John R. Labovitz, *Presidential Impeachment*, 26, 110 (Yale University ed. 1979).

<sup>52</sup> See, e.g., U.S. Const. art. I, § 9, cl. 3; S.C. Const. art. I, § 4.

<sup>53</sup> Black, *supra*, note 3, at 32 (“Our Framers abhorred both these things, and we have never wavered from that abhorrence. It cannot be right for Congress to act toward [the chief executive] as though these prohibitions did not exist.”).

<sup>54</sup> Rodino Report, *supra* note 2, at 27.

as those needs of government that give rise to the creation of criminal offenses.”<sup>55</sup> For this reason, “it remains true that the House of Representatives and the Senate must feel more comfortable when dealing with conduct clearly criminal in the ordinary sense, for as one gets further from that area it becomes progressively more difficult to be certain, as to any particular offense, that it is impeachable.”<sup>56</sup>

In sum, impeachment must be reserved only for serious crimes or other “grave misconduct that so injures or abuses our constitutional institutions and form of government as to justify” the removal of a governor.<sup>57</sup> “Some of the most grievous offenses against our constitutional form of government may not entail violations of the criminal law.”<sup>58</sup> But impeachable conduct will rarely, if ever, consist of ethical transgressions, omissions, or other lapses that do not threaten this type of severe harm to the constitutional order.

### **B. The Plain Language Of The Alabama Constitution And Supreme Court Precedent Establish An Unambiguously High And Rigorous Standard For Impeachment.**

The constitutional standard for impeachment in Alabama is:

willful neglect of duty, corruption in office, incompetency, or intemperance in the use of intoxicating liquors or narcotics to such an extent, in view of the dignity of the office and importance of its duties, as unfits the officer for the discharge of such duties, or for any offense involving moral turpitude while in office, or committed under color thereof, or connected therewith....<sup>59</sup>

In adopting this standard, Alabama intended to adopt an unambiguously high and rigorous standard for impeachment. A review of Alabama’s constitutional law and history reveals that it has deliberately adopted this standard in order to be unequivocal and explicit in what constitutes an impeachable offense in Alabama and that only a serious offense against the system of government will be impeachable. Alabama’s constitutional law further reveals what does not constitute an impeachable offense: personal transgressions, misdemeanors or even felonious conduct unless such conduct involves moral turpitude, neglect of official duties or isolated technical violation of the law.

Alabama has had six constitutions in its history: The Constitutions of 1819, 1861, 1865, 1868, 1875 and 1901. The first State Constitution, ratified on December 14, 1819, allowed for impeachment of the “Governor and all civil officers” for “any misdemeanor in office...”<sup>60</sup> The “any misdemeanor in office” standard remained in place<sup>61</sup> until the

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<sup>55</sup> *Id.* at 22.

<sup>56</sup> Black, *supra*, note 3, at 35.

<sup>57</sup> Rodino Report, *supra* note 2, at 22.

<sup>58</sup> *Id.* at 24.

<sup>59</sup> Ala. Const. Art. VII, § 173; U.S. Const. art. II, § 4.

<sup>60</sup> Ala. Const. of 1819, Art. V, § 3.

<sup>61</sup> See Ala. Const. of 1861, Art. V, Impeachments, § 3; Ala. Const. of 1865, Art. VII, § 7; Ala. Const. of 1868, Art. IV, § 23.

Constitution of 1875 was ratified on November 16, 1875, when the legislature made the decision to adopt a more rigorous and explicit standard: “willful neglect of duty, corruption in office, habitual drunkenness, incompetency, or any offense involving moral turpitude while in office, or committed under color thereof.”<sup>62</sup> This standard was revised in 1901 remove the reference to “habitual drunkenness” and replace it with reference to “intemperance in the use of intoxicating liquors or narcotics to such an extent, in view of the dignity of the office and importance of its duties, as unfits the officer for the discharge of such duties.” The legislature thus made it clear that the personal transgression of habitual drunkenness was an insufficient ground upon which to impeach a state official and only such intoxication as would render such official unfit to discharge his or her duties would be an impeachable offense, even where such intoxication involved the use of narcotics.

No governor of Alabama has ever been impeached, and the House of Representatives has had no cause to investigate articles of impeachment concerning any governor of Alabama. The House has only once been called upon to prefer articles of impeachment, in 1915, relating to charges against the Secretary of State, John Purifoy, for moral turpitude and willful neglect of duty.<sup>63</sup> The Judiciary Committee of the House conducted the investigation and the report of the majority recommended impeachment.<sup>64</sup> The full House, however, accepted the Minority Report, which recommended that no proceedings to impeach John Purifoy be had.<sup>65</sup>

Recognizing the gravity of its task in investigating and making a recommendation on impeachment charges, the Minority Report stated that “the provisions of our Constitution prescribing the offenses for which officers therein might be removed from office are the only law in force in this State and should be strictly followed, not only in form but in spirit and substance.”<sup>66</sup> Of particular importance, the minority found that:

In section 173 of the Constitution is all of the law governing this proceeding and prescribing the offenses for which the Secretary of State may be impeached and removed from office .... If there ever was any doubt as to the proper meaning or construction of this fundamental law, it has been completely dispelled by the decisions of the Supreme Court of Alabama, which are not only guides to every one, the true interpretation thereof, but are binding on the conscience of every legislator under his oath to support the Constitution.<sup>67</sup>

As the tribunal constitutionally tasked with hearing and deciding impeachment proceedings brought against numerous state officials under the impeachment standard applicable to a governor, the Supreme Court of Alabama has had cause to review and rule

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<sup>62</sup> Ala. Const. of 1875, Art. VII § 1.

<sup>63</sup> Report of Judiciary Committee of the House to Which Committee Was Referred the Duty of Investigating on the Matter of the Impeachment of John Purifoy, Secretary of State (August 14, 1915).

<sup>64</sup> *Id.* at 1.

<sup>65</sup> *Id.* at 19.

<sup>66</sup> *Id.* at 20.

<sup>67</sup> *Id.*

on that standard for impeachment.<sup>68</sup> A review of that authority makes it plain that, in Alabama as elsewhere, “[i]mpeachment is an “extraordinary remedy” and encompasses only those offenses that “seriously cripple the administration of justice in all its departments.”<sup>69</sup>

The grounds for impeachment relevant to this discussion are “willful neglect of duty” and “corruption in office.”<sup>70</sup> The Supreme Court has articulated the high standard necessary to establish an impeachable offense:

Willful neglect,” being one of several grounds of removal from office, must be interpreted in connection with the other grounds with which it is associated in the Constitution, which are also made causes of impeachment.... Speaking of these causes for removal from office, ... “They all tend, more or less, to reflect upon the dignity of office, to generate disrespect for the law, through the want of worth, moral or intellectual, in the officer, to create dissatisfaction among the people with their government, and to thus seriously cripple the administration of justice in all its departments.”<sup>71</sup>

Accordingly, the Supreme Court has held: “[t]hat ‘willful neglect,’ as used in the Constitution, means something more than simple neglect, or the neglect of mere inadvertence, is obvious.”<sup>72</sup> Indeed, allegations of a misdemeanor, lack of prudence or even patent negligence are insufficient to state a cause for “willful neglect” under the Alabama Constitution.<sup>73</sup> Most recently, on July 27, 2016, the Alabama Supreme Court defined “willful neglect of duty” as follows: “[A]n intentional failure or omission of an officer to perform a plain and manifest duty which he is able to perform when he omits to do so.”<sup>74</sup> The Supreme Court has further made clear in the past that:

[N]eglect of official duties, to be willful, to authorize forfeiture of office, must be characterized by a certain moral or intellectual quality different from that implied in the mere intentional doing, or failing to do, an act. The implication is of a different and more enduring status of the mental or moral faculties. There seems to be required such a determined, perverse, and obstinate neglect of official duty as will authorize and an inference and finding that defendant is so morally or intellectually constituted as to be unfit for the duties of a public office.<sup>75</sup>

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<sup>68</sup> Ala. Const. Art. VII, § 174.

<sup>69</sup> *Hasty*, 184 Ala. at 124; *Nelson v. State*, 182 Ala. 449, 460-61 (1913).

<sup>70</sup> Following introduction of the first resolution to impeach Governor Bentley, and recognizing the extraordinary nature of this process, a majority of the House voted to enact House Rule 79.1 to, among other things, require twenty-one signatures to approve a House impeachment resolution rather than the previously-contemplated ten signatures. Following adoption of this Rule, the resolution to impeach Governor Bentley was substantially revised to remove all but two of the grounds: willful neglect of duty and corruption in office.

<sup>71</sup> *Nelson*, 182 Ala. at 460-61 (1913); *State v. Martin*, 180 Ala. 458, 471 (1913).

<sup>72</sup> *Nelson*, 182 Ala. at 458.

<sup>73</sup> *Id.* at 458.

<sup>74</sup> *Clark*, No. 1151021, at p. 7 (quotation marks omitted).

<sup>75</sup> *Nelson*, 182 Ala. at 461.

Thus, in order for an alleged “willful neglect of duty” to warrant the solemn invocation of impeachment, such willful neglect must be “more than the merely intentional omission of an act of public duty; that, to justify removal from office, it must appear that the incumbent is morally or mentally unfit ....”<sup>76</sup>

The Supreme Court of Alabama has also very recently undertaken to define the term “corruption in office,” also known as “official misconduct” as: “[a] public officer’s corrupt violation of assigned duties by malfeasance, misfeasance, or nonfeasance.”<sup>77</sup> That Court has previously held that in order to establish “corruption in office” sufficient meet the constitutional impeachment standard there must be a showing of “corrupt intent or motive.... That is the act must be done with evil motive, in bad faith or not honestly.”<sup>78</sup> In so concluding, the Court cited with approval a decision of the Supreme Court of New Jersey defining “misconduct in office” as:

‘corrupt misbehavior by an officer in the exercise of the duties of his office or while acting under color of his office’.... [T]he word ‘corrupt’ does not necessarily, in this sense, mean financial dishonesty. It rather connotes that the wrongful act was done ‘willfully’ and ‘unlawfully’.<sup>79</sup>

Considering the term “corruption in office” in context, as the Supreme Court instructs, it is plain that the constitution requires not mere misbehavior while in office but rather malfeasance, misfeasance or nonfeasance with a corrupt motive rising to the level of a serious and crippling offense against the system of government.

In sum, a review of relevant law reveals that only affirmative public wrongdoing that seriously cripples the administration of justice in all its departments warrants impeachment. The Alabama Constitution, which must be strictly followed, not only in form but in spirit and substance, is designed to provide a strong and rigorous impeachment standard and it is clear that allegations of misdemeanors, minor crimes and personal misconduct do not justify impeachment. Moreover, as will be discussed below, in Alabama a “defendant is entitled to a presumption of innocence and impeachment charges must be proven beyond a reasonable doubt and to a moral certainty,” further highlighting the extraordinary nature of impeachment proceedings and the seriousness and caution with which they should be addressed.<sup>80</sup>

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<sup>76</sup> *Id.* at 462; *Evans*, 387 So.2d at 803.

<sup>77</sup> *Clark*, No. 1151021, at p. 7-8 (quotation marks omitted).

<sup>78</sup> *State ex rel. Harlow v. Chandler*, 360 So. 2d 957, 960 (Ala. 1978).

<sup>79</sup> *State v. Schultz*, 71 N.J. 590, 601-02 (1976).

<sup>80</sup> *Lewis*, 387 So.2d at 800.

### C. Impeachment Proceedings Are Penal In Nature and Due Process Protections Must Be Afforded At All Stages of the Proceedings

“Due process of law is essential to impeachment.”<sup>81</sup> The Supreme Court as recently as July 27, 2016, has reaffirmed that, in Alabama, the “caselaw is well settled that a proceeding [for impeachment] is criminal in nature.”<sup>82</sup> While that Court has recognized that impeachment proceedings “partake[] of the nature of both civil and criminal actions”<sup>83</sup> and has characterized such proceedings as “unique hermaphroditic creatures,”<sup>84</sup> the Court is uniform in its holding that impeachments are “governed by rules of law applicable to criminal prosecutions.”<sup>85</sup> Moreover, “[t]he defendant in such cases is entitled to certain constitutional and statutory protections accorded to defendants in exclusively criminal cases.”<sup>86</sup> Indeed, “[c]onstitutional and statutory provisions in such cases are to receive strict construction in favor of the accused.”<sup>87</sup> The penal nature of an impeachment and the concomitant need for constitutional protections are reflected in House Rule 79.1(c), which recognizes that all impeachment-related proceedings before the House of Representatives and its Committees must “ensure due process.”

Accordingly, other than the right to a jury trial or change of venue, a defendant in an impeachment proceeding is entitled to the full array of constitutional due process protections set forth in the Alabama Constitution.<sup>88</sup>

a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; and to have a copy thereof; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and, in all prosecutions by indictment, ...; and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law ....<sup>89</sup>

In addition, the Supreme Court has made clear that an impeachment defendant is entitled to a presumption of innocence and, as will be discussed below, proof beyond a

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<sup>81</sup> *Blake*, 225 Ala. at 126.

<sup>82</sup> *Clark*, No. 1151021, at p. 7; *see also Lewis*, 387 So.2d at 800

<sup>83</sup> *Lewis*, 387 So.2d at 800.

<sup>84</sup> *Id.*

<sup>85</sup> *Hasty*, 184 Ala. at 124 (judgment exonerating respondent following impeachment trial of Judge of Probate).

<sup>86</sup> *Lewis*, 387 So.2d at 801.

<sup>87</sup> *Parker*, 333 So. 2d at 808.

<sup>88</sup> Because the trial must take place before the Senate with the Chief Justice presiding, there can be no right to a jury trial or change of venue. Ala. Const. Art. VII, § 173 (The governor ... may be removed from office ... by the senate sitting as a court of impeachment, under oath or affirmation, on articles or charges preferred by the house of representatives. When the governor ... is impeached, the chief justice, or if he be absent or disqualified, then one of the associate justices of the supreme court, to be selected by it, shall preside over the senate when sitting as a court of impeachment.”).

<sup>89</sup> Ala. Const. Art. I, § 6.

reasonable doubt and to a moral certainty.<sup>90</sup> Thus, impeachment proceedings both before the House and the Senate must afford an impeachment defendant with due process protections.

#### **D. Allegations Of Impeachable Conduct Must Be Proved Beyond A Reasonable Doubt.**

The “drastic remedy of impeachment and removal” is “truly the political equivalent of capital punishment.”<sup>91</sup> The “adoption of a lenient standard of proof could mean that this punishment, and this frustration of popular will, could occur even though substantial doubt of guilt remained.”<sup>92</sup> Impeachment “is the heaviest piece of artillery in the legislative arsenal, but because it is so heavy it is unfit for ordinary use. It is like a hundred-ton gun which needs complex machinery to bring it into position, an enormous charge of powder to fire it, and a large mark to aim at.”<sup>93</sup> The same constitutional imperatives that demand a rigorous definition of impeachable conduct, and due process of law, therefore, also require that the legislature impeach only where alleged conduct has been established by proof beyond a reasonable doubt and to a moral certainty, which is the standard articulated by the Supreme Court of Alabama.<sup>94</sup>

The “beyond a reasonable doubt” standard is the appropriate standard of proof in impeachment proceedings before both the House and the Senate in Alabama. This is particularly apt in light of fact that, in Alabama, the governor is immediately removed from office upon impeachment by the House. An impeached governor is reinstated only if and when the Senate votes to acquit. Under these circumstances, there can be no rationale to impose differing standards for House and Senate proceedings. A lower standard of proof could unfairly result in the political equivalent of capital punishment, breach the constitutional balance of powers, and unseat a popularly elected chief executive who did not commit an impeachable offense. As noted above, the House has voted to ensure due process protections during impeachment investigations as part of House Rule 79.1(c). Therefore, the legislature may not impeach the Governor without proof beyond a reasonable doubt to a degree of moral certainty of an impeachable offense.

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<sup>90</sup> *Id.*; *Thomas*, 283 Ala. at 227 (“This impeachment proceeding is in the nature of a criminal prosecution, hence the defendant came into this Court with a presumption of innocence. The burden was upon the prosecution to adduce evidence sufficient to establish the defendant’s guilt beyond a reasonable doubt and to a moral certainty.”); *see also Clark*, No. 1151021, at p. 7 (“The State must prove the charges on which the proceeding is based beyond a reasonable doubt.”).

<sup>91</sup> *Tribe*, *supra* note 10, at 723; *see also* 144 Cong. Rec. H11, 976 (daily ed. Dec. 19, 1998) (statement of Rep. Schumer) (stressing that impeachment is the “political version of capital punishment”); 144 Cong. rec. H11, 822 (daily ed. Dec. 18, 1998) (statement of Rep. Klink) (arguing that “just as every crime does not justify the death penalty, neither should impeachment, the political equivalent of the death penalty, be the punishment for every presidential misdeed”).

<sup>92</sup> *Black*, *supra* note 3, at 17.

<sup>93</sup> *Bryce*, *supra* note 9, at 212.

<sup>94</sup> *Thomas*, 283 Ala. at 227; *Clark*, No. 1151021, at p. 7.

**E. The History Of Impeachment In The United States Confirms That Impeachment Is To Be Exercised Only Where There Is Evidence, Beyond A Reasonable Doubt, Of Serious Criminal Conduct Or A Serious Threat Against The System Of Government Beyond.**

The State of Alabama has never impeached a governor. The United States Congress has never convicted and removed a single official in the Executive Branch. Since the New Deal, every impeachment of a federal official has involved allegations of serious criminal wrongdoing relating to service in office. None has been predicated solely on allegations of ethical wrongdoing or minor crimes. As noted above, in the past eighty-five years, only two governors have been impeached. Before they were impeached, both of those governors were first subject to criminal charges alleging that they had committed felonies in connection with the performance of their official duties. The history of presidential and state gubernatorial impeachments in the United States confirms that the impeachment of a sitting chief executive is a grave and extraordinary event in the American experience and should be limited to situations presenting serious criminal conduct or comparable wrongdoing that perpetrates grievous injury to the constitutional order.

**1. Presidential Impeachment**

To date, there have been three impeachment proceedings that have led to an impeachment or resignation of a President of the United States: the impeachment and acquittal of President Johnson in 1868 for his removal of Secretary of War Edwin Stanton in violation of the Tenure of Office Act;<sup>95</sup> the impeachment investigation and subsequent resignation of President Richard Nixon in 1974 for obstruction of justice and abuse of power;<sup>96</sup> and the impeachment and acquittal of President Clinton in 1998-1999 for obstruction of justice and criminal perjury.<sup>97</sup> Each of these historical precedents, which are relevant because *conviction and removal* of the national chief executive is a close analogue to *impeachment* of a Governor in Alabama, provides historical evidence of consensus that impeachment should be limited to serious criminal offenses or similarly serious wrongdoing that threatens the political process or system of government.

The impeachment proceedings involving President Johnson can be understood largely as a consequence of the regional partisanship created by the Reconstruction Era, and both experts and scholars have almost universally pointed to the impeachment as “a gross abuse of the impeachment process, an attempt to punish the President for differing with or obstructing the policy of Congress.”<sup>98</sup> Its legacy has prompted the observation that the “history of impeachment in this country has been one primarily of misuse. Where it has been used, for the most part, it has been subject to gross abuse for purely partisan

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<sup>95</sup> Rehnquist, *supra* note 35, at 210; *see also* Act of Mar. 2, 1867, Ch. 154, 14 Stat. 430 (1867).

<sup>96</sup> *See* House Comm. on the Judiciary, *Impeachment of Richard M. Nixon, President of the United States*, H.R. Rep. No. 93-1305, 93d Cong., 2d Sess., at 1-4 (1974).

<sup>97</sup> *See Impeachment Inquiry: Hearing Pursuant to H. Res. 581 Before the House Comm. on the Judiciary*, 105th Cong., 2d Sess. 19 (1998); 145 Cong. Rec. s1462-02, \*S1594 (daily ed. Feb. 12, 1999).

<sup>98</sup> Berger, *supra* note 16, at 308; *see also* Archives of Maryland, *Proceedings and Debates of the 1967 Constitutional Convention*, Vol. 104-1, Debates 2622, at 1 (Dec. 19, 1967).

advantages and the trial of Andrew Johnson illustrates this. The trial of the five governors in the reconstruction [era] illustrates it, and in each one of those cases it was the senate that was the guilty body.”<sup>99</sup>

Nevertheless, the Senate did not convict President Johnson. In perhaps the most notable account of this episode, late Chief Justice Rehnquist of the United States Supreme Court declared, “[t]he acquittal of Andrew Johnson by the Senate was of course a victory for the independence of the executive branch of the government” and the “importance” of this acquittal “in our constitutional history can hardly be overstated.”<sup>100</sup> It “surely contributed as much to the maintenance of our tripartite...system of government as any case decided by any court.”<sup>101</sup> Had Andrew Johnson “been convicted, the future independence of the president could have been jeopardized. It was the United States Senate which...made th[is] fundamental decision[.]”<sup>102</sup> Historians and scholars agree:

Had the impeachment drive succeeded, the constitutional separation of powers would have been radically altered, and the alteration would have been protected and maintained by the lowered threshold of impeachment. The presidential system might have become a quasi-parliamentary regime, in which the impeachment process would have served as the American equivalent of the vote of no confidence. The Presidency would have been permanently weakened and our polity permanently changed.<sup>103</sup>

In contrast to the lawless and partisan character of the Johnson impeachment, the proceedings involving President Nixon are paradigmatic of the modern, accepted practice. All of the Articles of Impeachment that the House Judiciary Committee drafted prior to President Nixon’s resignation allege wrongdoing that bears a clear relationship to serious criminal violations and to subversion of the basic structure of government.<sup>104</sup> Notably, the Committee rejected a proposed article that would have accused the President of tax evasion and misappropriation of government funds, concluding that “even if the tax fraud were proved...it was not the type of abuse of power at which the remedy of impeachment is directed.”<sup>105</sup> Likewise, in the impeachment and subsequent acquittal of President Clinton, each of the offenses charged by the full House – grand jury perjury and

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<sup>99</sup> Archives of Maryland, *supra* note 98, at 1 (statement of Delegate Scanlan).

<sup>100</sup> Rehnquist, *supra* note 35, at 250, 278.

<sup>101</sup> *Id.* at 278.

<sup>102</sup> *Id.* at 10.

<sup>103</sup> *Subcommittee Hearing*, *supra* note 21, at 102 (prepared statement of Professor Arthur M. Schlesinger); see also Irving Brant, *Impeachment: Trials and Errors* 3-4 (1972) (predicting that if the Johnson impeachment “had been successful and had been accepted as precedent, it would have converted a government of divided powers, of checks and balances, into a congressional dictatorship”).

<sup>104</sup> See House Comm. on the Judiciary, *Impeachment of Richard M. Nixon, President of the United States*, H.R. Rep. No. 93-1305, 93d Cong., 2d Sess., at 1-4 (1974).

<sup>105</sup> *Id.* at 220-23 (stating that “an impeachment inquiry in the House and trial in the Senate are inappropriate forums to determine the President’s culpability for tax fraud”).

obstruction of justice – constitutes serious criminal conduct. Indeed, following the conclusion of the impeachment proceedings, the Independent Counsel reported “that the evidence was sufficient to prosecute President Clinton for federal crimes.”<sup>106</sup> Nevertheless, President Clinton was acquitted, a result that reflects the United States Senate’s view that the charges of grand jury perjury and obstruction of justice did not, in this case, warrant the drastic remedy of impeachment.<sup>107</sup>

The United States Congress has never removed a chief executive from office, and the history of presidential impeachment proceedings evidence that the impeachment and removal of a chief executive from office is a solemn act to be reserved only for conduct that seriously threatens the system of government or constitutional form.

## 2. Impeachment Of State Governors

The history of state gubernatorial impeachments also confirms that the dire remedy of impeachment is to be reserved only for the most serious, indictable offenses or similar wrongdoing that corrupts the constitutional form. In the more than two-hundred years since the Founding, only sixteen state governors have been impeached and only eight of those impeachments have resulted in conviction and removal. In the last eighty-five years, only two state governors have been impeached. Since the New Deal, no governor has been impeached without a prior indictment or arrest for a serious felony.

Although most States adopted impeachment clauses soon after ratification of the United States Constitution, not one state applied the drastic remedy of impeachment until the social and political upheaval occasioned by the Civil War and Reconstruction. Indeed, that period accounts for half of all the gubernatorial impeachments in American history, and seven out of the sixteen impeachments occurred during the five-year period between 1871 and 1876.<sup>108</sup> After the end of Reconstruction, there were no more impeachments until 1913, when New York Governor William Sulzer was removed as a result of what is generally believed to be the work of the Tammany Hall political machine.<sup>109</sup> The political

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<sup>106</sup> *Final Report of the Independent Counsel*, In re Madison Guaranty Sav. & Loan Ass’n Regarding Monica Lewinski and Others, at 20 (filed May 18, 2001).

<sup>107</sup> See 145 Cong. Rec. S1462-02, \*S1539 (daily ed. Feb. 12, 1999) (statement of Sen. Specter) (“Perjury and obstruction of justice are serious offenses which must not be tolerated by anyone in our society. However, I remain unconvinced that impeachment is the best course to vindicate the rule of law on this offensive conduct. President Clinton may still be prosecuted in the Federal criminal courts when his term ends.”); *id.* at \*S1568 (statement of Sen. Collins) (“I believe that in order to convict, we must conclude from the evidence presented to us with no room for doubt that our Constitution will be injured and our democracy suffer should the President remain in office one moment more. In this instance, the claims against the President fail to reach this very high standard.”).

<sup>108</sup> The impeachments that took place during the Civil War and Reconstruction are: Charles Robinson of Kansas, 1862 (acquitted); Harrison Reed of Florida, 1868 (never tried); William Woods Holden of North Carolina, 1871 (removed); Powell Clayton of Arkansas, 1871 (resigned); David Butler of Nebraska, 1871 (removed); Harrison Reed of Florida, 1872 (never tried); Henry Clay Warmoth of Louisiana, 1872 (never tried); Adelbert Ames of Mississippi, 1876 (resigned); William Pitt Kellogg of Louisiana, 1876 (acquitted).

<sup>109</sup> See, e.g., John R. Dunne & Michael A.L. Balboni, *New York’s Impeachment Law and the Trial of Governor Sulzer: A Case for Reform*, 15 *Fordham Urb. L.J.* 567, 568-70 (1987); see also Samuel P. Orth, *The Boss and the Machine* 119-32 (1921) (“No episode in recent political history shows better the relations of the legislature to the political machine and the great power of invisible government than the

abuse of impeachments persisted during the social unrest of the 1920s and into the Great Depression.<sup>110</sup>

Since the New Deal, not one state has impeached a governor without a prior indictment or arrest for serious and affirmative criminal conduct. The rarity of impeachment is shown by the fact that, in the last eighty-five years, only two governors have been impeached. In 1988, following indictment on criminal charges, Evan Mecham of Arizona was impeached and removed from office for obstruction of justice, for perjury relating to more than \$365,000 in concealed monies, and for loaning \$80,000 of state money to a business that he and his wife owned.<sup>111</sup> Significantly, the Arizona legislature chose not to initiate impeachment proceedings until the criminal grand jury investigation had produced an indictment of Governor Mecham.<sup>112</sup> The Arizona legislature removed Governor Mecham only upon finding clear and convincing evidence of serious criminal wrongdoing.<sup>113</sup>

Similarly, the Illinois legislature, did not begin impeachment proceedings against Governor Rod Blagojevich until after a federal judge issued a criminal arrest warrant and until after Governor Blagojevich was arrested by the Federal Bureau of Investigation on federal corruption charges.<sup>114</sup> Contrary to the historical application of impeachment, Illinois, which defines its constitutional standard for impeachment as “cause”, did not agree on a controlling evidentiary standard.<sup>115</sup> The Illinois General Assembly impeached Governor Blagojevich based on a substantial totality of evidence of conduct that fit squarely within one of the two enumerated grounds for impeachment in the United States Constitution – “bribery” – and went to the heart of what constitutes an impeachable offense – the corruption or subversion of the political process.<sup>116</sup>

Perhaps even more indicative are three situations in recent history in which impeachment of a sitting governor was threatened but averted. In 2009, South Carolina

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impeachment and removal of Governor William Sulzer in 1913....The proceeding was not merely an impeachment of New York’s Governor. It was an impeachment of its government.”)

<sup>110</sup> The impeachments that took place between 1900 and the New Deal are: William Sulzer of New York, 1913 (removed); James Ferguson of Texas, 1917 (removed after criminal indictment); John Walton of Oklahoma, 1923 (removed); Henry S. Johnston of Oklahoma, 1927 (impeachment invalidated by Oklahoma Supreme Court); Henry S. Johnston of Oklahoma, 1929 (removed); Huey P. Long of Louisiana, 1929 (acquitted).

<sup>111</sup> See *In the Matter of the Impeachment of Evan Mecham, Report of the House Managers in the matter of the impeachment of the Honorable Evan Mecham, Governor of the State of Arizona*, Ariz. H. Res. 2002 (Feb. 8, 1988).

<sup>112</sup> See *Mecham v. Gordon*, 156 Ariz. 297, 299 (1988); see also See Ronald J. Watkins, *High Crimes and Misdemeanors: The Term and Trials of Former Governor Evan Mecham* 238, 301 (describing the indictment on January 8, 1988 and the impeachment on February 8, 1988).

<sup>113</sup> See Watkins, *supra* note 112, at 312, 348-58 (1990) (describing the conclusion of the trial and the removal on April 4, 1988).

<sup>114</sup> See *Final Report of the Special Investigative Committee*, 95th Ill. Gen. Ass., at 8 (Jan. 8, 2009). Rod Blagojevich was arrested by federal agents on December 9, 2008; the House of Representatives then created the Special Investigative Committee on December 15, 2008. See *id.* at 1, 8.

<sup>115</sup> Ill. Const. art. IV, § 14.

<sup>116</sup> U.S. Const. art. II, § 4; see *Final Report of the Special Investigative Committee, supra* note 114, at 8-9 & nn.30, 31.

Governor Mark Sanford faced impeachment for leaving the state on a secret trip to Argentina to see his mistress and misuse of state resources. The House committee tasked with investigating the allegations and making a recommendation on impeachment decided not to recommend impeachment and instead recommended censure, concluding that Governor Sanford's conduct was not sufficient to meet the constitutional standard for impeachment, stating "We can't impeach for hypocrisy .... We can't impeach for arrogance. We can't impeach an officeholder for his lack of leadership skills."<sup>117</sup> In 1994, Governor David Walters of Oklahoma faced possible impeachment after he was indicted on eight felony counts, including perjury and conspiracy, and resolved the charges by pleading guilty to a misdemeanor campaign finance violation.<sup>118</sup> In light of this result, the Oklahoma House of Representatives concluded that impeachment was not warranted.<sup>119</sup> In 1985, Alaska Governor Bill Sheffield was also investigated by a criminal grand jury for alleged political corruption. The grand jury subsequently declined to indict him, but formally referred the matter to the Alaska Senate (which initiates impeachment under the Alaska Constitution).<sup>120</sup> Although the grand jury recommended impeachment, the Senate rejected that recommendation, concluding that there was not sufficient evidence that Bill Sheffield had committed an impeachable offense.<sup>121</sup>

These modern impeachment proceedings and investigations evidence and confirm that state legislatures generally initiate impeachment proceedings only after a prior criminal indictment or arrest for substantial criminal behavior and not for personal transgressions, moreover, that the dire remedy of impeachment is to be applied only when there is a serious criminal offense or similar wrongdoing that corrupts or subverts the political process or constitutional form.

## CONCLUSION

In considering the impeachment of a sitting Governor of Alabama, the legislature must be mindful that it could be embarking on a course of historic dimension. It is considering whether to undo a popular election. It is considering whether to breach the balance of powers between the Legislative and Executive Branches. It is considering whether to cripple permanently future Offices of the Governor in the State of Alabama. The Constitution of Alabama mandates, and history instructs, that impeachment of a Governor is warranted only upon proof beyond a reasonable doubt of evidence of serious crimes or other similarly egregious misconduct that has seriously crippled the administration of justice in all its departments.

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<sup>117</sup> See Shaila Dewan, *South Carolina Panel Rejects Impeachment of Governor*, The New York Times, Dec. 9, 2009, at A28.

<sup>118</sup> See Mick Hinton, *Bid to Impeach Walters Defeated, House Votes 52-47 Against Investigation*, Daily Oklahoman, Feb. 10, 1994, at A1; Ellen Knickmeyer, *Oklahoma Governor Survives Impeachment Fight*, Assoc. Press, Feb. 9, 1994; cf. Arnold Hamilton, *Statewide Grand Jury Calls on Lawmakers to Impeach Walters*, Dallas Morning News, Dec. 10 1993, at A34.

<sup>119</sup> *Id.*

<sup>120</sup> Alaska Const. art. II, § 20.

<sup>121</sup> See *Alaska Senate Clears Governor*, Chi. Trib., Aug. 6, 1985, at C3; *Panel in Alaska Advises Ending Bid to Impeach*, N.Y. Times, Aug. 4, 1985, at A1.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing **Constitutional Standard for Impeachment of a Governor of Alabama**, upon the following persons on this the 2<sup>nd</sup> day of August, 2016:

*Via Email*

Jackson R. Sharman  
Lightfoot, Franklin & White LLC  
400 20<sup>th</sup> Street North  
Birmingham, Alabama 35203

*Via Email*

Joseph C. Espy, III  
Melton, Espy & Williams  
225 Dexter Avenue  
Montgomery, Alabama 36104

*By Hand Delivery*

Tracy Arnold, Clerk  
Alabama House of Representatives Judicial Committee  
Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130

*By Hand Delivery*

Jeff Woodard, Clerk  
Alabama House of Representatives  
Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130

*By Hand Delivery*

Othni J. Lathram, Director  
Alabama Law Institute  
Alabama State House, Suite 207  
Montgomery, Alabama 36130

  
Of Counsel

BEFORE THE HOUSE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES

In Re: The Impeachment Investigation of  
Governor Robert Bentley

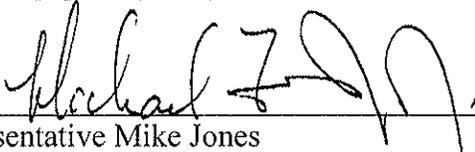
ORDER

Susan S. Murphy, a member in good standing of the Bar of the State of Connecticut, having applied pursuant to Rule VII of the Rules Governing Admission to the Alabama State Bar for admission in the above referenced proceeding to represent *pro hac vice* The Office of the Governor of Alabama and Robert Bentley in his official capacity; and the Alabama State Bar having furnished the Statement required by Rule VII.D;

It is hereby ORDERED that the application is GRANTED.

Date:

8-8-16

  
\_\_\_\_\_  
Representative Mike Jones

Chairman, Alabama House Judiciary Committee

COMMITTEE  
EXHIBIT

7-B

**BEFORE THE HOUSE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES**

**In Re: The Impeachment Investigation of  
Governor Robert Bentley**

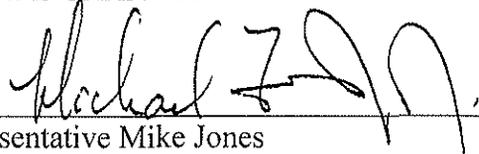
**ORDER**

Ross H. Garber, a member in good standing of the Bars of the State of Connecticut and the District of Columbia, having applied pursuant to Rule VII of the Rules Governing Admission to the Alabama State Bar for admission in the above referenced proceeding to represent *pro hac vice* The Office of the Governor of Alabama and Robert Bentley in his official capacity; and the Alabama State Bar having furnished the Statement required by Rule VII.D;

It is hereby ORDERED that the application is GRANTED.

Date:

8-8-16



\_\_\_\_\_  
Representative Mike Jones  
Chairman, Alabama House Judiciary Committee

**IN THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES**

**In re** )  
**The Impeachment of Robert** )  
**Bentley, Governor of Alabama** )

**GOVERNOR ROBERT BENTLEY'S  
MOTION FOR RECUSAL OF COMMITTEE MEMBERS**

The Honorable Robert Bentley and the Office of the Governor of Alabama hereby move that Representatives Allen Farley, Michael Holmes and Michael Ball, who are members of this Committee, recuse themselves from the impeachment investigation in order to comport with Governor Bentley's constitutional due process rights.

The grounds for this motion are as follows.

**I. Governor Bentley Is Entitled to Due Process Protections During the House Committee Investigation and Due Process Requires a Fair Investigation By An Impartial Committee**

As set forth in Governor Robert Bentley's Motion to Suspend dated August 11, 2016, submitted herewith, and in The Constitutional Standard for Impeachment of a Governor of Alabama (August 2016), Governor Bentley is entitled to due process protections during the impeachment investigation to be conducted by this Committee. *See* Governor Robert Bentley's Motion to Suspend, at Part I, pp. 1-3; *see generally* The Constitutional Standard for Impeachment of a Governor of Alabama (August, 2016). That discussion is incorporated in and made a part of this motion as if fully set forth herein.

The "goal of fundamental fairness ... is the essence of due process." *Ex parte Fountain*, 842 So. 2d 726, 730 (Ala. 2001) ("Both the Alabama and United States Constitutions protect a citizen of this state from being deprived of life or liberty without 'due process of law.' The phrase 'due process of law,' although incapable of a precise definition, in its most basic sense



encompasses the observation of that degree of fundamental fairness that is essential to our concept of justice.”) (quotation marks omitted); *Pike v. S. Bell Tel. & Tel. Co.*, 263 Ala. 59, 71 (1955) (“Procedural due process, broadly speaking, contemplates the rudimentary requirements of fair play ....”) (quotation marks omitted). In particular:

Procedural due process in this respect requires at a minimum an orderly proceeding appropriate to the case or adapted to its nature, just to the parties affected, and adapted to the ends to be attained; one in which a person has an opportunity to be heard, and to defend, enforce, and protect his rights *before a competent and impartial tribunal legally constituted to determine the right involved*; representation by counsel; procedure at the hearing consistent with the essentials of a fair trial according to established rules which do not violate fundamental rights, and in conformity to statutes and rules, conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed; revelation of the evidence on which a disputed order is based and opportunity to explore that evidence, and a conclusion based on the evidence and reason.

*Med. Servs. Admin. v. Duke*, 378 So. 2d 685, 686 (Ala. 1979) (quotation marks omitted) (emphasis added).

## **II. Recusal Is Necessary to Remedy Bias on the Part of Committee Members**

Representatives Farley, Ball and Holmes, each of whom co-sponsored both the original articles of impeachment filed in the House of Representatives and the Articles of Impeachment filed after the passage of House Rule 79.1 and two of whom have made public statements evidencing personal bias, must recuse themselves from the Investigation to be conducted by this Committee.

The Alabama Supreme Court has concluded that “[a]n unbiased and impartial decision-maker is one of the most, if not the most, fundamental of requirements of fairness and due process.” *State Tenure Comm'n v. Page*, 777 So.2d 126, 131 (Ala. Civ. App. 2000) (quoting *Stallworth v. City of Evergreen*, 680 So.2d 229, 233 (Ala. 1996) (quotation marks omitted)); *Buck v. C.H. Highland, LLC*, No. 2150220, 2016 WL 3221095, at \*6 (Ala. Civ. App. June 10,

2016) (same). This requirement is violated where there is an “intolerably high risk of bias.” *Buck*, 2016 WL 3221095, at \*6; *Page*, 777 So.2d at 131. Such an “intolerably high risk” exists, for example, where it is demonstrated that the decision maker had made up his or her mind before the petitioner had an opportunity to be heard. *Buck*, 2016 WL 3221095, at \*6; *Page*, 777 So.2d at 131. Where an intolerably high risk of bias exists, a failure to recuse a biased decision maker violates due process.

These decisions are consistent with the recent United States Supreme Court decision in *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1905-06 (2016), in which the Court reaffirmed its prior holding that “an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case. This objective risk of bias is reflected in the due process maxim that no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome.” (quotation marks omitted). *See also In re Murchison*, 349 U.S. 133, 134, 137 (1955) (judge may not act as “one-man judge-grand jury” and “Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of the accused.”).

Importantly, pursuant to House Rule 79.1, the work of this Committee is not merely to investigate but also to “gather information and ... hear testimony relating to the question of whether cause exists to impeach” Governor Bentley. House Rule 79.1(d). Moreover, House Rule 79.1 further provides that the Committee, upon the conclusion of its investigation, “shall submit its report and recommendation regarding impeachment” to the House “for consideration by the body.” House Rule 79.1(f). The House therefore purports to delegate to the Committee its responsibility to hear and consider the evidence against Governor Bentley and Governor Bentley’s defense and to vote on the question of whether to impeach the Governor, which vote

could result in his immediate removal from office pending a Senate trial, based on the recommendation of this Committee.<sup>1</sup> Accordingly, at a minimum, due process requires the recusal of any member of this Committee who acted as accuser to Governor Bentley or otherwise evidenced personal bias against him.

Here, Representatives Farley, Ball and Holmes each co-sponsored both the original articles of impeachment filed with the House against Governor Bentley and the Articles of Impeachment filed following the passage of House Rule 79.1. Moreover, Representative Farley has also requested an investigation into Governor Bentley by the Attorney General's Office. *See e.g.*, GOP State Executive Member Calls for Gov. Bentley to Resign: "It's a Disgrace," available at [www.al.com](http://www.al.com) ("Rep. Allen Farley, R-McCalla, has called on the Attorney General's Office to look into allegations of misuse of public funds related to the divorce or the alleged infidelity. The AG's office confirmed they had received the letter but could not discuss the allegations it contained."). Those members stand as Governor Bentley's accusers in this matter, not once but twice, resulting in the referral of the Articles of Impeachment to this Committee for investigation. *See* House Rule 79.1(a) ("Articles of impeachment ... shall be filed in the form of a House resolution. Upon the filing of articles of impeachment co-sponsored by at least 21 members ... the articles shall be referred to the House Judiciary Committee ..."). As such, and for this reason, these members must recuse themselves from the Committee investigation. They cannot act as both accuser and adjudicator in this investigation. *Williams*, 136 S.Ct. at 1905-06; *In re Murchison*, 349 U.S. at 137.

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<sup>1</sup> This delegation is wholly improper in the light of the due process protections that attach to the House impeachment proceedings as required by the Alabama Supreme Court and House Rule 79.1. *State v. Blake*, 225 Ala. 124, 126 (1932); *Lewis v. State ex rel. Evans*, 387 So.2d 795, 800 (Ala. 1980); *Parker v. State*, 333 So.2d 806, 808 (Ala. 1976); *State ex rel. James v. Reed*, 364 So.2d 303, 307 & n.3 (Ala. 1978); *McCarley v. Sanders*, 309 F. Supp. 8, 11 (M.D. Ala. 1970).

Moreover, statements and appearances in the press by Representatives Farley and Ball further demonstrate an intolerably high risk of bias by these two members. Representative Ball has made statements to and appearances in the press that clearly indicate his bias against Governor Bentley, referring to the “unfortunate set of circumstances” leading to the impeachment process which, he claims, have “affected us all.” *See Alabama Legislator to Start Impeachment Process Against Governor Bentley*, available at <https://news.wbhm.org> (April 5, 2016). Tellingly, Representative Ball was one of the three legislators who joined Representative Ed Henry on stage for the press conference introducing the articles of impeachment against Governor Bentley, clearly communicating his support for the statements made by Representative Henry that, among other things, that the citizens of Alabama no longer trust Governor Bentley, that Governor Bentley “betrayed the trust of the people of Alabama through actions and lies that have caused us to have some doubt about his leadership” and that the “only course of action” is to impeach the Governor. *See Lawmakers Start Impeachment Process Against Bentley*, Birmingham Business Journal, available at [www.bizjournals.com](http://www.bizjournals.com) (April 5, 2016). Further statements by Representative Ball confirm his support of this position. *See Alabama Governor Refuses to Talk About Sex Scandal, Impeachment*, available at [www.cnn.com](http://www.cnn.com) (April 7, 2016) (claiming that there is a “crisis of confidence” in Governor Bentley).

Representative Farley has made no secret of his bias against the Governor, claiming that “We’ve bottomed out ... now we’ve got a governor who’s using his office for God knows what” and “It’s totally humiliating”; “This man has got to understand that every day he’s in the governor’s office, this circus will go on.” *Governor of Alabama, Robert Bentley, Says He Won’t Quit*, The New York Times, available at [www.nytimes.com](http://www.nytimes.com) (March 30, 2016). In fact, Representative Farley has made his position perfectly clear in the media, stating outright that

“Governor Bentley should not be sitting in the governor’s office” and “He’s the state of Alabama’s spokesperson, our representative .... And this is someone I want negotiating on behalf of the state? I don’t think so.” Alabama Is No Stranger to Sex Scandals. It Just Never Expected One From This Guy, The Washington Post, *available at* [www.washingtonpost.com](http://www.washingtonpost.com) (April 17, 2016).

Due Process prohibits Representatives Farley, Ball and Holmes from standing as accusers and adjudicators of Governor Bentley and the bias against Governor Bentley is palpable. As such, those members of the Committee must recuse themselves from this investigation.

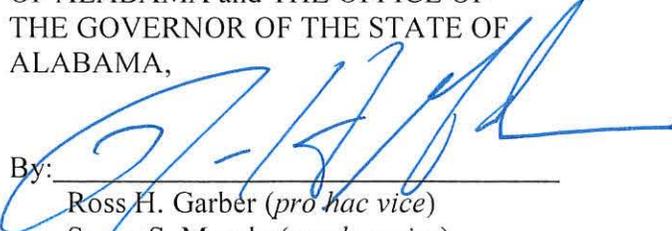
### **III. Conclusion**

WHEREFORE, based on the foregoing, Governor Bentley moves that Representatives Allen Farley, Michael Holmes and Michael Ball, who are all members of this Committee, recuse themselves from the impeachment investigation.

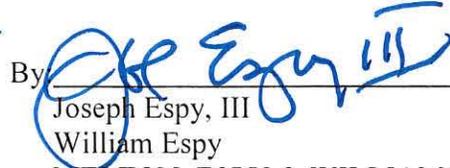
Respectfully Submitted this, the 11<sup>th</sup> day of August, 2016,

ROBERT BENTLEY, GOVERNOR  
OF ALABAMA and THE OFFICE OF  
THE GOVERNOR OF THE STATE OF  
ALABAMA,

ROBERT BENTLEY,  
IN HIS PERSONAL CAPACITY,

By: 

Ross H. Garber (*pro hac vice*)  
Susan S. Murphy (*pro hac vice*)  
Shipman & Goodwin LLP  
1875 K. St, NW  
Washington, D.C. 20006  
202-469-7798  
[rgarber@goodwin.com](mailto:rgarber@goodwin.com)  
[smurphy2@goodwin.com](mailto:smurphy2@goodwin.com)

By: 

Joseph Espy, III  
William Espy  
MELTON, ESPY & WILLIAMS, P.C.  
P.O. Drawer 5130  
Montgomery, AL 36103  
(334) 263-6621  
[jespy@mewlegal.com](mailto:jespy@mewlegal.com)  
[wespy@mewlegal.com](mailto:wespy@mewlegal.com)

  
David B. Byrne, Chief Legal Advisor  
Carrie Ellis McCollum, Deputy Legal Advisor  
Office of the Governor  
State Capitol  
Montgomery, Alabama 36130  
[David.Byrne@governor.alabama.gov](mailto:David.Byrne@governor.alabama.gov)  
[Carrie.McCollum@governor.alabama.gov](mailto:Carrie.McCollum@governor.alabama.gov)

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing upon the following persons on this the 11<sup>th</sup> day of August, 2016:

*Via Email*

Jackson R. Sharman  
Lightfoot, Franklin & White LLC  
400 20<sup>th</sup> Street North  
Birmingham, Alabama 35203

*By Hand Delivery*

Tracy Arnold, Clerk  
Alabama House of Representatives Judicial Committee  
Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130

*By Hand Delivery*

Jeff Woodard, Clerk  
Alabama House of Representatives  
Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130

*By Hand Delivery*

Othni J. Lathram, Director  
Alabama Law Institute  
Alabama State House, Suite 207  
Montgomery, Alabama 36130

  
\_\_\_\_\_  
Of Counsel

**IN THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES**

**In re** )  
**The Impeachment of Robert** )  
**Bentley, Governor of Alabama** )

**GOVERNOR ROBERT BENTLEY'S  
MOTION TO SUSPEND PROCEEDINGS**

The Honorable Robert Bentley and the Office of the Governor of Alabama hereby move to suspend these proceedings pending adoption by the House of Representatives of articles of impeachment that are sufficiently particular and within the proper scope of the constitutional impeachment authority of the House of Representatives. The current impeachment resolution is impermissibly vague and does not comport with well-established due process requirements. In fact, the current impeachment resolution appears to sanction the deployment of governmental power to conduct a roving investigation that is unbounded by time or subject matter, and to then compel the Governor to defend himself against amorphous allegations that almost certainly have no bearing on a lawful impeachment process. This the Alabama Constitution does not permit.

The grounds for this motion are as follows.

**I. Governor Bentley Is Entitled to Due Process Protections During the House Committee Investigation**

The Supreme Court has made it patently clear that “[d]ue process of law is *essential* to impeachment.” *State v. Blake*, 225 Ala. 124, 126 (1932) (emphasis added). “In Alabama, the caselaw is well settled that a proceeding [for impeachment] is criminal in nature.” *State ex rel. Strange v. Clark*, No. 1151021, at p. 7 (Ala. July 27, 2016); *see also Lewis v. State ex rel. Evans*, 387 So.2d 795, 800 (Ala. 1980). Accordingly, impeachments are “governed by rules of law applicable to criminal prosecutions.” *State v. Hasty*, 184 Ala. 121, 124 (1913). “The defendant

in such cases is entitled to certain constitutional and statutory protections accorded to defendants in exclusively criminal cases.” *Lewis*, 387 So.2d at 801. Indeed, “[c]onstitutional and statutory provisions in such cases are to receive strict construction in favor of the accused.” *Parker v. State*, 333 So.2d 806, 808 (Ala. 1976).

Moreover, *any* proceeding to remove an elected official from office must comply with due process. So, for example, in considering the legislature’s power “to expel a member by a two-thirds vote” and concluding that this power is “seemingly unrestricted,” the Alabama Supreme Court nevertheless recognized that “the legislature must afford a member the minimum procedural due process requirements of the federal constitution.” *State ex rel. James v. Reed*, 364 So.2d 303, 307 & n.3 (Ala. 1978). Tellingly, that Court further recognized that “[t]he power of the Legislature to remove one of its members for criminal misconduct is *analogous to the power of impeachment*.” *Id.* at 308. Similarly, in *McCarley v. Sanders*, 309 F. Supp. 8, 11 (M.D. Ala. 1970), the district court concluded that “a person may not be discharged or expelled from a state public office upon a ground involving criminal guilt, infamy, disgrace or other grave injury to the individual until after such notice and hearing as is requisite to due process of law.” That Court concluded that “[w]henver a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law.” *Id.* (quotation marks omitted).

Here, the House Investigation is both an impeachment proceeding and a proceeding to remove an elected official. Alabama’s Constitution dictates that, should Governor Bentley be impeached, he will be immediately removed from office. Ala. Const. Art. V, § 127 (“In case of the impeachment of the governor ... the power and authority of the office shall, until the governor is acquitted ... devolve in the order herein named, upon the lieutenant governor....”).

Because the Alabama Constitution provides that the Governor must be removed upon impeachment (and not, upon conviction, as is the case at the federal level), and because the House investigation is an impeachment proceeding, the Committee must afford Governor Bentley due process protections. The manifest need for due process protections during the course of this Committee's work is further reflected in House Rule 79.1(c), which requires that *all* impeachment-related proceedings *before the House of Representatives and its Committees* must "ensure due process."

Accordingly, Governor Bentley is entitled to the full array of due process protections set forth in the Alabama Constitution.<sup>1</sup>

## **II. Due Process Requires That the Charges Against Governor Bentley Be Stated With Specificity and the Articles of Impeachment Are Insufficient**

"Due process requires that the accused shall be advised of the charges, and have a reasonable opportunity to meet them. This includes the assistance of counsel if requested, the right to call witnesses, to give testimony, relevant either to the issues of complete exculpation or extenuation of the offense and in mitigation of the penalty imposed." *Ex parte Seymore*, 264 Ala. 689, 692 (1956); *Hunter v. State*, 251 Ala. 11, 14 (1948) (same). "Under Article 1, Section 6, the right of the accused to demand the nature and cause of the accusation is a fundamental component of the right to due process; the defendant must fully and intelligently understand the charge to adequately prepare a defense." *Newberry v. State*, 493 So.2d 995, 997 (Ala. 1986); *Gayden v. State*, 262 Ala. 468, 469 (1955) ("No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused

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<sup>1</sup> To be sure, the right to a trial by a jury is altered by the Constitution's provisions that the House of Representatives and then the Senate sit in judgment. See Ala. Const. Art. VII, § 173.

in a criminal proceeding ...”) (quotation marks omitted); *Nelson v. State*, 50 Ala. App. 285, 288 (Ala. Crim. App. 1973) (same).

“We must be ever mindful that the right of an accused to demand the nature and cause of the accusation is one of the cornerstones of our Bill of Rights; that he fully and intelligently understand the charge against him, so that he may adequately prepare his defense, is the first requirement of due process.” *Young v. State*, 348 So.2d 544, 546 (Ala. Crim. App. 1977). The right to notice of the specific charge is “the first and most universally recognized requirement of due process.” *Id.* (quotation marks omitted); *Gayden*, 262 Ala. at 469 (“An intelligent and full understanding by the accused of the charge against him is a first requirement of due process.”). It is a “fundamental” right that is “essential” to due process. *See also Nelson*, 50 Ala. App. at 287; *Ex parte Seymore*, 264 Ala. at 692 (“Of course due process requires that the accused shall have reasonable opportunity to meet the charges that have been filed against him.”). Relatedly, the Alabama Supreme Court has recently held, in *Tulley v. City of Jacksonville*, that “It is a fundamental tenet of due process that [n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes ...” No. 1140049, 2015 WL 5192182, at \*9 (Ala. Sept. 4, 2015) (quotation marks omitted). The same may be said of impeachment charges - a sitting Governor cannot be forced to speculate as to the scope or meaning of grounds for impeachment with which he is charged.

The general rule is that “it is sufficient to charge the elements of a statutory offense in the words of the statute.” *Gayden*, 262 Ala. 468, 471. However, “the law is, and has always been that it is not enough to charge against a defendant a mere legal conclusion as justly inferential from facts not set out in the indictment.” *Gayden*, 262 Ala. at 469-70; *Nelson*, 50 Ala. App. at 288.

In order to properly inform the accused of the nature and cause of the accusation, within the meaning of the constitution and the rules of the common law, a little thought will make it plain, not only to the legal, but to all other educated minds, that not only must all the elements of the offense be stated in the indictment, but that also they must be stated with clearness and certainty, and with a sufficient degree of particularity to identify the transaction to which the indictment relates as to place, persons, things, and other details. The accused must receive sufficient information to enable him to reasonably understand not only the nature of the offense, but the particular act or acts touching which he must be prepared with his proof ....<sup>2</sup>

*Gayden*, 262 Ala. at 470 (emphasis omitted); *Nelson*, 50 Ala. App. at 288; *see also Young v. State*, 348 So.2d 544, 546 (Ala. Crim. App. 1977) (indictment must set forth “the facts (time, place, and circumstances) which constitute the alleged crimes ... with reasonable particularity”). Accordingly, the general description of an offense -- even when framed in the words of a statutory (or in this case Constitutional) provision -- “must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description , with which he is charged.” *Gayden*, 262 Ala. at 471 (quotation marks omitted).

Under this standard, the Articles of Impeachment are wholly inadequate.

### **III. The Current Articles of Impeachment Are Unconstitutionally Vague And Impermissibly Broad**

As adopted, the Articles of Impeachment do not comport with due process requirements.

As to the charge of “willful neglect of duty” they state:

Credible evidence exists to create probable cause to believe that, in his conduct while Governor of the State of Alabama, he [Governor Bentley] willfully neglected his duty as

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<sup>2</sup> The Supreme Court has concluded that an information charging a public official with an impeachable offense under Ala. Const. Art. VII, § 175 is not, strictly speaking, an “indictment,” so that its sufficiency must be measured against the statutory requirements set forth in Ala. Code § 36-11-7. *Lewis v. State ex rel. Evans*, 387 So. 2d 795, 805 (Ala. 1980). Articles of impeachment of a governor are more comparable with a criminal indictment since a governor is removed from office immediately upon impeachment. In any event, even under the statutory standard applicable to public officers and employees subject to § 175, the Articles of Impeachment do not pass muster as they do not “specify, with reasonable certainty, the offense or offenses or other grounds of impeachment charged against the officer ... and ... a succinct statement of the facts constituting the matters complained of ....” Ala. Code § 36-11-7.

Governor by failing to faithfully execute the laws of this state and by refusing to perform his constitutional and statutory duties.

As to the charge of “corruption in office,” they state:

Credible evidence exists to create probably cause to believe that, in his conduct while Governor of the State of Alabama, he [Governor Bentley] unlawfully misused state property, misappropriated state resources, and consistently acted in violation of law to promote his own personal agenda.

Neither of these charges comes close to the requirement that they identify with particularity “the transaction to which the indictment relates as to place, persons, things, and other details” or otherwise provide Governor Bentley with any means to “reasonably understand not only the nature of the offense, but the particular act or acts touching which he must be prepared with his proof.” *Gayden*, 262 Ala. at 470. The charges brought against Governor Bentley therefore give him *no* ability to prepare his defense or even to understand the conduct at issue and the prejudice to Governor Bentley is apparent.

This is particularly troublesome in the context of an impeachment, where only grave crimes or other similarly egregious misconduct that have occurred during the Governor’s current term and have seriously crippled the administration of justice in all its departments warrant impeachment. *See The Constitutional Standard for Impeachment of a Governor of Alabama*, at p.3 (August, 2016). By their terms, the Articles of Impeachment and House Rule 79.1 do not limit the Committee’s investigation to impeachable acts. Instead, the resolution as drafted appears to sanction an investigation virtually unlimited by subject matter. The Constitution does not permit such a broad, unfettered inquisition by the legislature into a coordinate branch of government and the lives of those who serve within it.

In addition, on their face, neither the Articles of Impeachment nor House Rule 79.1, which forms the basis for this Committee’s investigative authority, are limited to matters

occurring during the Governor's present term. To the contrary, the Articles extend to Governor Bentley's "conduct while Governor of the State of Alabama." If the Articles of Impeachment and House Rule 79.1 are indeed read to extend to Governor Bentley's previous term, they are patently unconstitutional. The Supreme Court of Alabama has made clear that an official "cannot be removed because of his conduct during a previous term." *Lewis v. State ex rel. Evans*, 387 So.2d 795, 807 (Ala. 1980); *Parker v. State*, 333 So.2d 806, 808 (Ala. 1976); *Hasty*, 184 Ala. at 125–26. The Committee may not conduct an investigation of, and the Governor cannot be forced to defend against, issues unrelated to his current term in office. This issue must be clarified by the House of Representatives before the Committee may proceed with an investigation.

"It is but to repeat the axiomatic that due process requires that no person shall be deprived of life, liberty or property without a fair hearing, but one cannot have a fair hearing unless notified of the charges to be defended against." *Gayden v. State*, 262 Ala. at 474. Governor Bentley has not been so notified and the Articles of Impeachment do not comply with due process.

**IV. This Committee Must Suspend These Proceedings Until Such Time As Articles of Impeachment That Comply With the Requirements of Due Process Are Passed In Accordance With House Rule 79.1**

Article VII, § 173 of the Alabama Constitution states that the Governor may be removed from office "by the senate sitting as a court of impeachment, under oath or affirmation, on articles or charges preferred by the house of representatives." House Rule 79.1 sets forth the process that the House of Representatives must follow in executing its responsibilities under Article VII, § 173. Subsection (a) of that Rule requires that "Articles of Impeachment, as provided in Section 173 of the Constitution of Alabama of 1901, shall be filed in the form of a

House resolution. Upon the filing of articles of impeachment *co-sponsored by at least 21 members ... the articles shall be referred to the House Judiciary Committee*” for investigation and recommendation to the full House. (emphasis added). Thus, in order for this Committee to investigate any articles of impeachment, they must be passed by a vote of the full House in accordance with Rule 79.1.

As discussed above, however, the Articles of Impeachment that were adopted by the House are impermissibly broad and wholly lacking in requisite particulars such that they do not comply with the requirements of due process. Action on those Articles of Impeachment by this Committee would, therefore, deprive the Governor of the fundamental fairness required by the Constitution of this State and the United States Constitution. *See Ex parte Fountain*, 842 So. 2d 726, 730 (Ala. 2001) (“Both the Alabama and United States Constitutions protect a citizen of this state from being deprived of life or liberty without ‘due process of law.’ The phrase ‘due process of law,’ although incapable of a precise definition, in its most basic sense encompasses the observation of that degree of fundamental fairness that is essential to our concept of justice.”) (quotation marks omitted). This is particularly true in light of the Committee’s responsibility to not only investigate the charges against Governor Bentley but to “make a recommendation to the body as to whether cause exists to impeach” the Governor. House Rule 79.1(a)(2). The Articles of Impeachment are, in short, unconstitutional and therefore invalid. Accordingly, the Committee must suspend these proceedings until such time as valid and sufficiently specific articles of impeachment are voted on and passed by the full House of Representatives in accordance with House Rule 79.1.

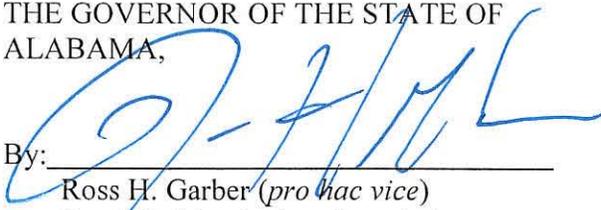
**V. Conclusion**

WHEREFORE, Governor Bentley respectfully moves the Committee to suspend these proceedings until such time as an appropriately specific statement of the charges at issue before the Judiciary Committee are passed by a vote of the full House of Representatives in compliance with House Rule 79.1.

Respectfully submitted this, the 11th day of August, 2016,

ROBERT BENTLEY, GOVERNOR  
OF ALABAMA and THE OFFICE OF  
THE GOVERNOR OF THE STATE OF  
ALABAMA,

By: \_\_\_\_\_

  
Ross H. Garber (*pro hac vice*)  
Susan S. Murphy (*pro hac vice*)  
Shipman & Goodwin LLP  
1875 K. St, NW  
Washington, D.C. 20006  
202-469-7798  
[rgarber@goodwin.com](mailto:rgarber@goodwin.com)  
[smurphy2@goodwin.com](mailto:smurphy2@goodwin.com)

ROBERT BENTLEY,  
IN HIS PERSONAL CAPACITY,

By: \_\_\_\_\_

  
Joseph Espy, III  
William Espy  
MELTON, ESPY & WILLIAMS, P.C.  
P.O. Drawer 5130  
Montgomery, AL 36103  
(334) 263-6621  
[jespy@mewlegal.com](mailto:jespy@mewlegal.com)  
[wespy@mewlegal.com](mailto:wespy@mewlegal.com)

  
David B. Byrne, Chief Legal Advisor  
Carrie Ellis McCollum, Deputy Legal Advisor  
Office of the Governor  
State Capitol  
Montgomery, Alabama 36130  
[David.Byrne@governor.alabama.gov](mailto:David.Byrne@governor.alabama.gov)  
[Carrie.McCollum@governor.alabama.gov](mailto:Carrie.McCollum@governor.alabama.gov)

CERTIFICATE OF SERVICE

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*Via Email*

Jackson R. Sharman  
Lightfoot, Franklin & White LLC  
400 20<sup>th</sup> Street North  
Birmingham, Alabama 35203

*By Hand Delivery*

Tracy Arnold, Clerk  
Alabama House of Representatives Judicial Committee  
Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130

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Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130

*By Hand Delivery*

Othni J. Lathram, Director  
Alabama Law Institute  
Alabama State House, Suite 207  
Montgomery, Alabama 36130

  
\_\_\_\_\_  
Of Counsel

IN THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES

August 15, 2016  
DENIED  
Michael A-J

In re )  
The Impeachment of Robert )  
Bentley, Governor of Alabama )

**GOVERNOR ROBERT BENTLEY'S  
MOTION FOR RECUSAL OF COMMITTEE MEMBERS**

The Honorable Robert Bentley and the Office of the Governor of Alabama hereby move that Representatives Allen Farley, Michael Holmes and Michael Ball, who are members of this Committee, recuse themselves from the impeachment investigation in order to comport with Governor Bentley's constitutional due process rights.

The grounds for this motion are as follows.

**I. Governor Bentley Is Entitled to Due Process Protections During the House Committee Investigation and Due Process Requires a Fair Investigation By An Impartial Committee**

As set forth in Governor Robert Bentley's Motion to Suspend dated August 11, 2016, submitted herewith, and in The Constitutional Standard for Impeachment of a Governor of Alabama (August 2016), Governor Bentley is entitled to due process protections during the impeachment investigation to be conducted by this Committee. See Governor Robert Bentley's Motion to Suspend, at Part I, pp. 1-3; see generally The Constitutional Standard for Impeachment of a Governor of Alabama (August, 2016). That discussion is incorporated in and made a part of this motion as if fully set forth herein.

The "goal of fundamental fairness ... is the essence of due process." *Ex parte Fountain*, 842 So. 2d 726, 730 (Ala. 2001) ("Both the Alabama and United States Constitutions protect a citizen of this state from being deprived of life or liberty without 'due process of law.' The phrase 'due process of law,' although incapable of a precise definition, in its most basic sense



IN THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES

August 15, 2016  
DENIED  
Michael [Signature]

In re )  
The Impeachment of Robert )  
Bentley, Governor of Alabama )

GOVERNOR ROBERT BENTLEY'S  
MOTION TO SUSPEND PROCEEDINGS

The Honorable Robert Bentley and the Office of the Governor of Alabama hereby move to suspend these proceedings pending adoption by the House of Representatives of articles of impeachment that are sufficiently particular and within the proper scope of the constitutional impeachment authority of the House of Representatives. The current impeachment resolution is impermissibly vague and does not comport with well-established due process requirements. In fact, the current impeachment resolution appears to sanction the deployment of governmental power to conduct a roving investigation that is unbounded by time or subject matter, and to then compel the Governor to defend himself against amorphous allegations that almost certainly have no bearing on a lawful impeachment process. This the Alabama Constitution does not permit.

The grounds for this motion are as follows.

**I. Governor Bentley Is Entitled to Due Process Protections During the House Committee Investigation**

The Supreme Court has made it patently clear that “[d]ue process of law is *essential* to impeachment.” *State v. Blake*, 225 Ala. 124, 126 (1932) (emphasis added). “In Alabama, the caselaw is well settled that a proceeding [for impeachment] is criminal in nature.” *State ex rel. Strange v. Clark*, No. 1151021, at p. 7 (Ala. July 27, 2016); *see also Lewis v. State ex rel. Evans*, 387 So.2d 795, 800 (Ala. 1980). Accordingly, impeachments are “governed by rules of law applicable to criminal prosecutions.” *State v. Hasty*, 184 Ala. 121, 124 (1913). “The defendant



**IN THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES**

**In re** )  
**The Impeachment of Robert** )  
**Bentley, Governor of Alabama** )

**GOVERNOR ROBERT BENTLEY’S RENEWED MOTIONS  
TO SUSPEND AND FOR RECUSAL AND REQUEST FOR HEARING**

The Honorable Robert Bentley and the Office of the Governor of Alabama hereby renew their motions, filed August 11, 2016, to suspend these proceedings until such time as a the full House of Representatives passes articles of impeachment that comply with due process and for recusal of Representatives Farley, Holmes and Ball. Petitioners further request a hearing before the Judiciary Committee in order to permit petitioners, through their undersigned counsel, to address those motions and the Constitutional Standard for Impeachment of a Governor of Alabama, submitted on August 2, 2016.

The grounds for this motion are as follows:

1. The petitioners filed their Motion to Suspend Proceedings and Motion for Recusal of Committee Members on August 11, 2016.
2. Undersigned counsel today received by email a copy of the first page of each of those motions reflecting the word “denied” in handwriting at the top of each page, a signature of Michael Jones and the date of August 15, 2016.
3. These documents provide no explanation whatsoever as to the basis for denial of petitioner’s motions, including whether the denial was based on a consideration of the merits of the motions or some other basis.



4. It appears, however, that the denial of these motions was effected by the Chair of the Judiciary Committee acting unilaterally while the Legislature was out of session, without a hearing or, indeed, without any consideration by the full Committee.

5. To the extent that Chairman Jones purported to deny the pending motions unilaterally, without the participation of the other members of this Committee, he exceeded his authority.

6. The Committee's rules state that the Chair "has the authority to call meetings of the Committee, call the Committee to order, designate the order of business, and generally supervise the affairs of the Committee." Rule 1 of the Committee Rules of the House Judiciary Committee for the Impeachment Investigation of Governor Robert Bentley (hereinafter "Committee Rules").

7. Chairman Jones is one member of this fifteen-member Committee and is nowhere authorized to take action on behalf of this Committee. Nothing in the Committee Rules empowers the Chair to unilaterally decide motions filed by the Governor or to take unilateral action during these proceedings. Indeed, Committee Rule 1 expressly states that "[n]o action shall be taken by the Committee unless a quorum is present."

8. Accordingly, summary denial of the Governor's motions was beyond the scope of the Chair's authority and was improper.

9. To the extent a Committee meeting did take place to consider the Governor's motions, which does not seem to be the case, such a meeting would have been in violation of the Committee Rules, which require notice to the Governor *and* that "[a]ll hearings of the Committee shall be public." Committee Rules 2 & 5(a).

10. The Committee's failure to follow its own rules, failure to consider the merits of these important constitutional issues and summary denial of petitioners' motions are fundamentally unfair and further impinge on and violate the Governor's due process rights. *See* House Rule 79.12(c) ("The committee shall adopt rules to govern the proceedings before it *in order to ensure due process, fundamental fairness, and a thorough investigation* ...).

11. Petitioners therefore renew both the Motion to Suspend Proceedings and the Motion for Recusal of Committee Members filed on August 11, 2016.

12. Moreover, petitioners request a hearing on those motions and on the Constitutional Standard for Impeachment of a Governor of Alabama, submitted on August 2, 2016 in compliance with the Committee Rules.

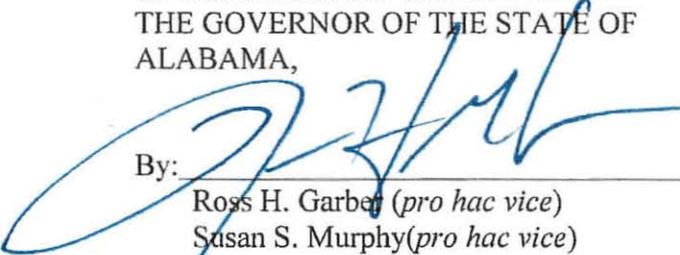
13. A hearing is necessary and appropriate in light of the fundamental issues raised by the petitioners' submissions, their constitutional import, and the significant public interest at stake.

14. Accordingly, Governor Bentley and the Office of the Governor respectfully request that a hearing on these matters be held before the full Committee, and decisions thereon be rendered, prior to all further substantive action of the Committee or its Chair.

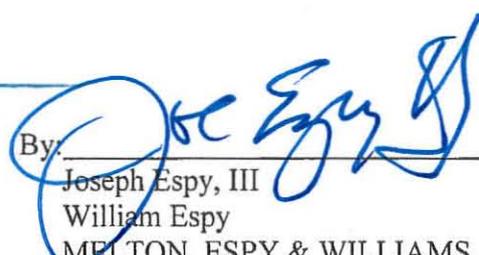
Respectfully Submitted this, the 16th day of August, 2016,

ROBERT BENTLEY, GOVERNOR  
OF ALABAMA and THE OFFICE OF  
THE GOVERNOR OF THE STATE OF  
ALABAMA,

ROBERT BENTLEY,  
IN HIS PERSONAL CAPACITY,

By: 

Ross H. Garber (*pro hac vice*)  
Susan S. Murphy (*pro hac vice*)  
Shipman & Goodwin LLP  
1875 K. St, NW  
Washington, D.C. 20006  
202-469-7798  
[rgarber@goodwin.com](mailto:rgarber@goodwin.com)  
[smurphy2@goodwin.com](mailto:smurphy2@goodwin.com)

By: 

Joseph Espy, III  
William Espy  
MELTON, ESPY & WILLIAMS, P.C.  
P.O. Drawer 5130  
Montgomery, AL 36103  
(334) 263-6621  
[jespy@mewlegal.com](mailto:jespy@mewlegal.com)  
[wespy@mewlegal.com](mailto:wespy@mewlegal.com)



David B. Byrne, Chief Legal Advisor  
Carrie Ellis McCollum, Deputy Legal Advisor  
Office of the Governor  
State Capitol  
Montgomery, Alabama 36130  
[David.Byrne@governor.alabama.gov](mailto:David.Byrne@governor.alabama.gov)  
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*Via Email*

Jackson R. Sharman  
Lightfoot, Franklin & White LLC  
400 20<sup>th</sup> Street North  
Birmingham, Alabama 35203

*By Hand Delivery*

Tracy Arnold, Clerk  
Alabama House of Representatives Judicial Committee  
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Montgomery, Alabama 36130

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*By Hand Delivery*

Othni J. Lathram, Director  
Alabama Law Institute  
Alabama State House, Suite 207  
Montgomery, Alabama 36130

  
Of Counsel

**IN THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES**

In re )  
The Impeachment of Robert )  
Bentley, Governor of Alabama )

**GOVERNOR ROBERT BENTLEY'S  
NOTICE OF SUPPLEMENTAL MATERIALS  
IN SUPPORT OF MOTION FOR RECUSAL OF COMMITTEE MEMBERS**

The Honorable Robert Bentley and the Office of the Governor of Alabama respectfully give notice of the attached materials, Exhibits A and B. These materials are relevant to and further support petitioners' renewed Motion for Recusal of Committee Members and, in particular, provide further grounds for recusal of Representative Allen Farley.

Specifically, at Exhibit A is a "Yellowhammer" blog post, which reflects that Representative Farley secretly recorded a phone call with the Governor in which Representative Farley sought to elicit comments from the Governor about matters that are now before the Committee. Moreover, Exhibit A reflects that Representative Farley, while sitting as a member of this Committee, delivered the surreptitious recording (or caused it to be delivered) to a political blog in order to obtain publicity.

Representative Farley further publicized the recording and his views thereof on his own blog, as reflected in Exhibit B, attached hereto. Notably, in his blog post Representative Farley indicates that he, as well as Representatives Ball and Holmes, have already prejudged this matter in favor of impeachment and removal of the Governor even before a single piece of evidence is taken or indeed any investigation is conducted.

He states:

Representative Mike Ball, Representative Mike Holmes and I, are three of the twenty-three House members who signed a resolution asking for Articles of Impeachment to be

brought forward against Governor Robert Bentley. We are also three members of the House Judiciary Committee assigned to determine if there is sufficient evidence to move the impeachment process forward for a vote of the full House. (If a majority of the House agrees there is sufficient evidence, then the final process will be a courtroom-style hearing before the Alabama Senate.)

Does signing the resolution for Articles of Impeachment make Mike Ball, Mike Holmes and me prejudiced against Governor Bentley? Absolutely not. We want a process to move forward so that evidence, including Governor Robert Bentley's personal testimony, can be presented to members of the Alabama Senate. (It's about the truth.)

(Ex. B, pp. 1-2) (emphasis omitted). Representative Farley thus indicates that he and Representatives Ball and Holmes favor impeachment "so that evidence... can be presented to members of the Alabama Senate" in a "courtroom-style hearing." In other words, those Representatives have already made up their minds that "there is sufficient evidence" to impeach the Governor, remove him from office, and proceed to a Senate trial.

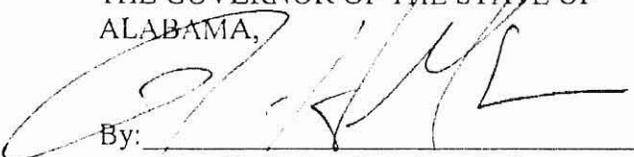
As further reflected in the attached exhibits, Representatives Farley, Ball and Holmes cannot be impartial and must be recused.<sup>1</sup>

---

<sup>1</sup> Not only is Representative Farley unconstitutionally biased and prejudiced against the Governor, but, as is reflected by the secretly taped records that he has leaked to the media, he also may become a material witness in this matter, providing a further basis for his recusal.

Respectfully Submitted this, the 17th day of August, 2016,

ROBERT BENTLEY, GOVERNOR  
OF ALABAMA and THE OFFICE OF  
THE GOVERNOR OF THE STATE OF  
ALABAMA,

By: 

Ross H. Garber (*pro hac vice*)  
Susan S. Murphy (*pro hac vice*)  
Shipman & Goodwin LLP  
1875 K. St, NW  
Washington, D.C. 20006  
202-469-7798  
[rgarber@goodwin.com](mailto:rgarber@goodwin.com)  
[smurphy2@goodwin.com](mailto:smurphy2@goodwin.com)

  
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[Carrie.McCollum@governor.alabama.gov](mailto:Carrie.McCollum@governor.alabama.gov)

ROBERT BENTLEY,  
IN HIS PERSONAL CAPACITY,

By: 

Joseph Espy, III  
William Espy  
MELTON, ESPY & WILLIAMS, P.C.  
P.O. Drawer 5130  
Montgomery, AL 36103  
(334) 263-6621  
[jespy@mewlegal.com](mailto:jespy@mewlegal.com)  
[wespy@mewlegal.com](mailto:wespy@mewlegal.com)

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11 South Union Street  
Montgomery, Alabama 36130

*By Hand Delivery*

Othni J. Lathram, Director  
Alabama Law Institute  
Alabama State House, Suite 207  
Montgomery, Alabama 36130

  
Of Counsel

Exhibit A

## SECRET AUDIO: Bentley sought to keep AG from investigating affair allegations fueled by 'gambling people'

*(Video above: Gov. Robert Bentley and Rep. Allen Farley discuss allegations during a phone conversation)*

MONTGOMERY, Ala. — In secret audio recordings obtained exclusively by Yellowhammer News, Gov. Robert Bentley (R-Ala.) accuses "casino gambling people" of fueling affair rumors and urges a state lawmaker not to ask the attorney general to investigate allegations that he had misused state resources to facilitate or coverup the alleged affair.

On August 31, 2015, State Rep. Allen Farley (R-Bessemer) received a phone call from Gov. Bentley, whose wife had filed for divorce just three days prior. The divorce fueled rumors that Mrs. Bentley had left him after discovering he was having an affair with Rebekah Caldwell Mason, a married staffer who had risen to become one of the governor's closest advisors. Audio recordings of conversations between Gov. Bentley and Mrs. Mason released by Yellowhammer in March of 2016 confirmed the affair, but at the time of the Farley-Bentley recording, the governor was vehemently denying the rumors.

"Alan, first of all let me say this," the governor begins. "There is no affair going on, okay? That's one thing. Now, I do have some close advisors. Rebekah is one of my close advisors. And unfortunately there has been jealousy on the part of my wife. But I can tell you that we're not having an affair."

Gov. Bentley said the divorce came as a complete surprise to him, adding that it was the result of him working too hard.

"Bless her heart, it's not her fault," he said of Mrs. Bentley. "I blame myself for working too hard. I blame myself for not spending the time with her. It's just unfortunately one of the casualties of working 12 to 14 hours a day and not spending the time with her that I should have. There are reasons that this has happened, but it was a total shock to me. I did not know. She had talked about it once or twice, but I said, 'Dianne, that's not the answer. We don't believe in divorce. That's not the answer.' But when this happened the other day, I had no clue. I found out about it from WSFA. I found out about it the same time you did. It was a shock to me."

Gov. Bentley went on to explain that an elaborate PR campaign was being waged against him, involving numerous blogs and journalists, and being quarterbacked by gambling interests.

"I read some of that stuff... It's just an avalanche," he said.

"This is a slimy guy," he added with regard to one of the bloggers. "Casino gambling people are feeding this story."

The reason gambling interests were fueling the affair rumors, Gov. Bentley explained, was because "they know I'm anti-gambling."

"These guys, let me tell you what they're most concerned about. They're most concerned about a lottery and me signing a compact with the [Poarch Band of Creek] Indians," said the governor. "That's what they're concerned about... That is the loaded gun right there. And they will do anything because these guys are poised to make hundreds of millions of dollars."

Gov. Bentley went on to say that gambling interests were fighting him on two fronts. On the policy front, they were trying to block his tax increase proposals to build momentum for a gambling expansion, and on the personal front they were trying to "discredit" him by hurting his marriage and fueling unfounded rumors of an affair.

"I'm not saying that my divorce was totally caused by that but some of it was because they fed my wife [this stuff]," he told Rep. Farley. "This is not as simple as people think... There is a concerted effort out there to not pass any taxes. Not passing any taxes means that there has to be a solution because we're going to have to cut government, and that's going to make people unhappy. So how do you solve all this without raising taxes?"

As the conversation proceeded, Rep. Farley mentioned allegations that Gov. Bentley had misused state resources to facilitate or coverup the alleged affair. He believed the quickest way to put those rumors to bed was to ask the Alabama Attorney General's office to investigate the matter.

"I want the AG to step up and say, 'I will look into it and make sure that the state dollars were properly spent by the governor,'" said Rep. Farley. "This is the reason we have an attorney general's office. I'll ask him to clear that up. Then we'll turn the divorce situation over to the God. He'll deal with that. But the AG can go in and look at the records and the travel logs and things like that, and then people don't have to talk about that anymore. That can be cleared up."

Gov. Bentley immediately suggested such a move was not necessary.

"Well, the travel logs and all that, that's public record," he insisted. "It's already out there right now, Allen."

Rep. Farley agreed, but said that most people would not take the time to read them all or would think the records had been doctored, making a definitive statement from the attorney general's office the best way to put the issue to rest.

"I think when Luther comes back and says, 'We looked at it.' And when Luther comes back and says that, I'll stand up and say, 'I'm satisfied with it. I'm absolutely, positively satisfied with it. Now let's move on and talk about something else. Let's not be distracted by this.'"

"Allen, I've explained things to you," Gov. Bentley shot back. "I don't think you need to get Luther involved in it, personally. I mean, there's nothing that we're trying to hide... The only thing I'm saying is, y'all are using — I mean, whoever's doing it — is using rumors and innuendo to make accusations that are not founded."

Rep. Farley continued to push the need to get the AG involved.

"We've got one agency that can look into this — that's what they do, they can look into this — and say, 'It's our opinion, as the AG it's my opinion, that there's nothing improper there.' And then move on," he said.

In spite of Gov. Bentley's pleas, Rep. Farley ultimately wrote a letter to Attorney General Luther Strange, which reads, in part, as follows:

More than one allegation has mentioned the possibility of Governor Bentley utilizing his state security team, state vehicles, and state aircraft to assist in facilitating the alleged adulterous relationship while serving as Alabama's governor.

I understand that a divorce case is not something the Attorney General's Office would normally be associated with. However, I believe the allegations swirling around Governor Robert Bentley's divorce case are different. In this situation we are talking about the improper use of Alabama tax dollars.

General Strange, as Alabama's Attorney General, I am requesting that you immediately initiate an investigation to determine if Governor Robert Bentley did in fact utilize any of Alabama's resources outside the official capacity of his elected office.

The Alabama Attorney General's Office told Yellowhammer they are not able to comment on the matter. The Governor's office did not reply to Yellowhammer's request for comment.

Roughly six months after insisting to Rep. Farley that he had not engaged in an affair, audio emerged proving that he had. Now, roughly a year after insisting to Rep. Farley that the attacks against him were being orchestrated because he was "anti-gambling," Governor Bentley is preparing to call the Alabama legislature into a Special Session in an attempt to pass gambling legislation aimed at patching the hole in the state's General Fund Budget.

The full conversation between Gov. Bentley and Rep. Farley can be heard in the video above.

(This story may be updated as additional information is made available.)

**Exhibit B**





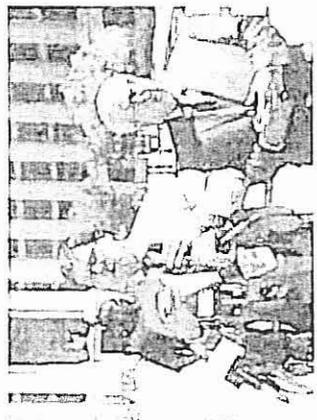
the House agrees upon a bill or resolution, that the President has a certain right to veto it.

the Constitution

... the articles of impeachment shall first be laid on the table, and the yeas and nays taken thereon. ...

Now, can you imagine the work we do every day when I recognized the history surrounding the name of the ...

... the fact that Mr. Eddy is already a very capable attorney in receipt of the ...



... the fact that Mr. Eddy is already a very capable attorney in receipt of the ...



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(12) 15 Representatives Finley can be contacted at allentafley@westlaw.com, or (866) 980/7526
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## Exhibit B

allenfarley  
about

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### The Governor's Call: "It's Really Scary"

Alabama Legislators are anxiously waiting on *"The Governor's Call"* for the 2016 Special Session. I'm not talking about a telephone call from the Alabama Governor. I'm talking about the *"Official Call"* listing specific items Governor Robert Bentley wants the Alabama Legislature to address during the upcoming Alabama Special Session. Will it be a short list? Say, just a *"Lottery"*?

Will Alabama's Governor *call* for a discussion on building *"Super Prisons"* and increasing *"Fuel Taxes"*? Or, maybe Governor Bentley will have us finally verify each line-item of our **92 percent** state and federal tax dollars? (*Alabama's 30 BILLION dollar primarily EARMARKED budgets.*) Will the Alabama Legislature finally be asked to hold itself accountable for the *largest earmarked budgets in the nation?* (*If Accountability was a good idea for our school teachers, it should definitely be a good idea for Alabama government.*)

On July 29, 2016, Caitlan Dallas, ("WHNT 19 NEWS" in Huntsville, Alabama), posted an article on social media entitled *"Special session could bring up other issues besides lottery vote."* In the article Ms Dallas gets some insight from State Representative Mike Ball, one of the Huntsville area's senior legislators. Mike has been in the Alabama House of Representatives for several terms, and was there when Governor Bentley served as a House member. So, could Representative Ball have a little insight on how our governor is thinking?

In Ms Dallas's article Representative Ball stated: *"If the governor's call is what I suspect it's gonna be, it would give pretty broad latitude to what could be brought up in the special session."* However, my friend apparently also told Ms Dallas that, "right now," the focus seems to be on Medicaid. It's the *"right now"* part that worries me. It's not like Alabama's governor hasn't ever changed his mind. (Maybe Governor Bentley *"called"* his old House colleague and shared some of his thoughts and concerns?)

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Reading Mike Ball's comments about the governor's "official call" for our upcoming August 2016 Legislative Special Session made me think back to an "unofficial call" I received from Governor Robert Bentley the night of August 31, 2015. (Somebody has to make a movie out of this one.)

**Consider these comments made to me by Governor Robert Bentley during my telephone conversation with the Governor on August 31,2015:**

- "There is no affair going on."
- "There has been jealousy on the part of my wife."
- "Casino Gambling People are feeding this story."
- "They fed my wife with this stuff."
- "They're trying to discredit me."
- "This is not as simple as people think."
- "There is a concerted effort out there to not pass any taxes."
- "To not pass any taxes means that there has to be a solution, because we're going to have to cut government and that's going to make people unhappy."
- "So how do you solve all this without raising any taxes? Well, you gamble."
- "It's well planned."
- "They're most concerned about a lottery, and me signing a compact with the Indians."
- "That is the loaded gun right there."
- "They will do anything, because these guys are poised to make hundreds of millions of dollars."
- "They know I'm anti-gambling, and always have been."
- "They know I want to control it."
- "The way you control it is to sign a compact with the Indians."
- "Nobody expands, because the Indians are here, they're not going away."
- "I don't think you need to get Luther involved in it personally."
- "There's nothing that we're trying to hide."
- "It is Casino Gambling, I can tell you it is."
- "It's really scary."

**Important:** I ended my August, 31, 2015 conversation with Governor Bentley by praying with him.

Representative Mike Ball, Representative Mike Holmes and I, are three of the twenty-three House members who signed a resolution asking for Articles of Impeachment to be brought forward against Governor Robert Bentley. We are also three members of the House Judiciary Committee assigned to determine if there is sufficient evidence to move the Impeachment process forward for a vote of the full House. (If a majority of the House agrees there is sufficient evidence, then the final process will be a courtroom-style hearing before

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the House agrees there is sufficient evidence, then the final process will be a courtroom-style hearing before the Alabama Senate.)

Does signing the resolution for Articles of Impeachment make Mike Ball, Mike Holmes, and me prejudiced against Governor Bentley? **Absolutely not.** We want a process to move forward so that evidence, including Governor Robert Bentley's personal testimony, can be presented to members of the Alabama Senate. (*It's about the truth.*)

Now, can you imagine the look on my face when I recognized the attorney representing Governor Robert Bentley at that first House Judiciary Impeachment hearing?

Let me be very clear, Mr. Espy is obviously a very capable attorney. In recent years he has been seen and heard on televisions and social media due to his successful defense of one of Alabama's most notable citizens and businessmen. However, Mr. Espy is now defending Governor Robert Bentley. And, Mr. Espy has called for me to be removed from the House Judiciary Impeachment hearings because he feels I have a conflict of interest. I don't believe I have a conflict. However, I will say, when I first recognized Mr. Espy I was confused. (I couldn't help recalling a couple of the Governor's comments: "*This is not as simple as people think,*" and "*It's Really Scary.*")



*Luke 18:11 The Pharisee, standing by himself, prayed thus: 'God, thank you that I am not like other men, extortioners, unjust, adulterers, or even like this tax collector. (12) I fast twice a week; I give tithes of all that I*

conflict of interest. I don't believe I have a conflict. However, I will say, when I first recognized Mr. Espy I was confused. (I couldn't help recalling a couple of the Governor's comments: "This is not as simple as people think," and "It's Really Scary.")



*Luke 18:11 The Pharisee, standing by himself, prayed thus: 'God, thank you that I am not like other men, extortioners, unjust, adulterers, or even like this tax collector. (12) I fast twice a week; I give tithes of all that I get.'*

Allen Farley represents portions of Jefferson and Shelby counties in the Alabama Legislature's House District 15. Representative Farley can be contacted at [allenfarley@bellsouth.net](mailto:allenfarley@bellsouth.net), or (205)-960-7526.

Representative Farley's blogs can be viewed at [allenfarley.wordpress.com](https://allenfarley.wordpress.com)

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**BEFORE THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES**

**In Re: The Impeachment Investigation of  
Governor Robert Bentley**

**NOTICE**

This Committee has received in recent weeks various communications from Governor Robert Bentley’s legal counsel styled “Motions.” Although, under the Alabama Constitution,<sup>1</sup> and the Rules of the House of Representatives and of this Committee,<sup>2</sup> motions are properly brought by members, and not by the chief executive or his attorneys, the undersigned has nonetheless carefully considered the Governor’s communications and answers them as follows:

**Procedural Background**

On August 11, 2016, the clerk of this Committee received by hand delivery two documents styled “Governor Robert Bentley’s Motion to Suspend Proceedings” (hereinafter “Motion to Suspend”) and “Governor Robert Bentley’s Motion for Recusal of Committee Members” (hereinafter “Motion for Recusal”). On August 15, 2016, the undersigned communicated to Governor Bentley’s counsel that those requests were denied. The next day, Governor Bentley’s counsel delivered a document styled “Governor Robert Bentley’s Renewed Motions to Suspend and for Recusal and Request for Hearing” (hereinafter “Renewed Motion”), and on the next day delivered two items of supplemental material in support of the “Motion for Recusal.” In Governor Bentley’s “Renewed Motion,” he complained that this Committee

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<sup>1</sup> See Ala. Const. § 43 (“In the government of this state, . . . the executive shall never exercise the legislative . . . powers, . . . to the end that it may be a government of laws and not of men.”).

<sup>2</sup> See House Rule 2 (“No motion shall be deemed in order to admit any person on the floor of the House to present any petition . . . or to have any such read.”); House Rule 78 (“The rules of procedure in the House shall be observed in standing committees as they may be applicable . . .”).

“provide[d] no explanation whatsoever as to the basis for denial of [his] motions, including whether denial was based on a consideration of the merits of the motion or some other basis.”<sup>3</sup>

In parallel with this course of communications from the Governor to this Committee have been communications between Special Counsel to this Committee and the Governor’s counsel. On August 12, 2016 Special Counsel delivered to Governor Bentley two Requests for Documents in accordance with the Committee Rules for this investigation. On August 17, the Governor’s counsel responded by letter, informing Special Counsel that the Governor intended to wait for this Committee’s “substantive decision on our pending motions and a constitutionally firm charging document” before responding to the Request for Documents. On August 25, 2016 Special Counsel replied to the Governor’s letter, and provided a series of well-reasoned rejoinders to the Governor’s various complaints and objections. The undersigned adopts the reasoning of that letter and attaches it hereto as Exhibit A.

The investigation that this Committee has been charged by the House to conduct must proceed without further delay. Accordingly, the undersigned provides the Governor with a response to the matters raised in his various communications and renews his denial of the Governor’s requests for the reasons stated below.

**Governor Bentley’s Due Process Complaints Are Premature And Erroneous**

The Governor argues that he is entitled to due process protections during this Committee’s investigation that are identical to “the rules of law applicable to criminal prosecutions.”<sup>4</sup> From this premise, he complains that the Articles of Impeachment that were filed by 23 members as House Resolution 367, and referred by the House to this Committee for

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<sup>3</sup> Renewed Motion at 1.

<sup>4</sup> Motion to Suspend at 1.

investigation in accordance with House Rule 79.1, are unconstitutionally vague and therefore invalid. The Governor asks this Committee to “suspend” the investigation that it has been charged by the House to conduct “until such time as valid and sufficiently specific articles of impeachment are voted on and passed by the full House of Representatives in accordance with House Rule 79.1.”<sup>5</sup>

The Governor’s protests reflect a misunderstanding of the process outlined in House Rule 79.1 and of our current stage within that process. Contrary to the Governor’s assertion that “Articles of Impeachment . . . were adopted by the House,”<sup>6</sup> no such thing has happened. Rather, a Resolution proposing Articles of Impeachment was filed by 23 of 105 members of the House and was then referred to this Committee for investigation. This Committee is charged to “investigate the *allegations* asserted in the Articles of Impeachment,” to “make a *recommendation* to the body as to whether [or not] cause exists to impeach,” and, if appropriate, to “offer amendments to the impeachment resolution.”<sup>7</sup> If this Committee submits a report to the House recommending impeachment, a vote of 63 members would then be required before the House would consider it.<sup>8</sup> A majority vote of the House of Representatives would then be required to *adopt* the articles and impeach the Governor.<sup>9</sup>

In short, we are currently in the investigation phase of this process. Even if the Governor’s argument—that the rules of criminal prosecutions apply to impeachment proceedings—were correct, due process would not entitle him to “specificity” in the

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<sup>5</sup> *Id.* at 8.

<sup>6</sup> *Id.*

<sup>7</sup> House Rule 79.1(a), (f) (emphases added).

<sup>8</sup> House Rule 79.1(g).

<sup>9</sup> *Id.*

investigation phase of proceedings. This is confirmed by reports from the Judiciary Committee of the United States House of Representatives related to its impeachment proceedings.<sup>10</sup>

The Governor's protests are not only premature, they are ultimately incorrect. An impeachment proceeding in the House of Representatives, even in its final stages, is not a criminal proceeding. "[I]mpeachment is 'a proceeding purely of a political nature. It is not so much designed to punish an offender as to secure the state against gross official misdemeanors. It touches neither his person nor his property, but simply divests him of his official capacity,' that is it disqualifies him to hold office."<sup>11</sup> United States Supreme Court Justice Joseph Story noted that impeachable offenses are "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."<sup>12</sup> Alexander Hamilton 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."<sup>13</sup>

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<sup>10</sup> "As the factual investigation progresses, it will become possible to state more specifically the constitutional, legal and conceptual framework within which the staff and the Committee work." Constitutional Grounds for Presidential Impeachment, Report by the Staff of the Impeachment Inquiry, 2<sup>nd</sup> Sess., 93<sup>rd</sup> Cong., House Committee Print ("Rodino Report") at 2 (February 22, 1974). The "Rodino Report" was prepared by the staff of the House Judiciary Committee as the Committee conducted its inquiry into the impeachment of President Nixon.

"[I]mpeachable offenses cannot be defined in advance of full investigation of the facts." Investigatory Powers of the Committee in the Judiciary With Respect to Its Impeachment Inquiry, Report, Together With Additional and Dissenting Views, 2<sup>nd</sup> Sess., 105<sup>th</sup> Cong., House Committee Print (October 7, 1998) ("Hyde Report"). The "Hyde Report" was prepared by the staff of the House Judiciary Committee as the Committee conducted its inquiry into the impeachment of President Clinton.

<sup>11</sup> Raoul Berger, *Impeachment: The Constitutional Problems* (Cambridge: Harvard Univ. Press, 1973) at 79 (quoting Joseph Story, *Commentaries On The Constitution of the United States*, 5<sup>th</sup> ed. 2 vols. (Boston: Little, Brown, 1905) §803).

<sup>12</sup> Joseph Story, *Commentaries On The Constitution of the United States*, 5<sup>th</sup> ed. 1965, §764 at 559, cited in Final Report of the Special Investigative Committee, State of Illinois, 95<sup>th</sup> General Assembly, House of Representatives Special Investigative Committee, January 8, 2009, at 3.

<sup>13</sup> Federalist No. 65, *The Federalist* 453-54 (1864) (capitalization in original), cited in Final Report of the Special Investigative Committee, State of Illinois, 95<sup>th</sup> General Assembly, House of Representatives Special Investigative Committee, January 8, 2009, at 3.

The nature of the grounds for impeachment enumerated in Section 173 of the Alabama Constitution further confirms the non-criminal nature of an impeachment. Those grounds include, for example, “incompetency,” “intemperance,” and “any offense involving moral turpitude.”<sup>14</sup> None of those offenses are crimes, and it is difficult to imagine convicting a public official for “incompetency,” for example, by “the rules of law applicable to criminal prosecution.” As for “intemperance,” the framers of the Alabama Constitution elaborated that it is an impeachable offense to the extent that, “in view of the dignity of the office and importance of its duties, [it] unfits the officer for the discharge of such duties.”<sup>15</sup> Unfitness for office, of course, is not a crime, although any office holder’s commission of a crime certainly bears on his or her fitness for office. It is an official wrong, against which our Constitution provides to Alabama citizens a unique, non-criminal remedy.

Similarly, it is widely accepted that the phrase “high Crimes and Misdemeanors” in the United States Constitution’s impeachment provision is not limited to “crimes” in the statutory sense. “The American experience with impeachment . . . reflects the principle that impeachable conduct need not be criminal. . . . Impeachment and the criminal law serve fundamentally different purposes.”<sup>16</sup>

Against this backdrop, the Governor cites at least five cases from courts in Alabama in support of his contention that an impeachment proceeding is criminal in nature and governed by criminal law and procedure. All of the cases upon which the Governor relies, however, involved impeachments under Section 174 of the Alabama Constitution, which applies to “[c]hancellors,

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<sup>14</sup> Ala. Const. § 173.

<sup>15</sup> *Id.*

<sup>16</sup> Rodino Report at 23-24.

judges of the circuit courts, judges of the probate courts, and judges of other courts from which an appeal may be taken directly to the supreme court, and solicitors and sheriffs.” That section of the Constitution provides that such officers may be impeached “by the supreme court, under such regulations as may be prescribed by law.”<sup>17</sup> It is that class of impeachments—impeachments of inferior judicial officers—that the courts have sometimes found to be “governed by rules of law applicable to criminal prosecutions.”<sup>18</sup> Those proceedings are brought, after all, in the courts of law.<sup>19</sup>

By contrast, Section 173 of the Alabama Constitution—under which House Resolution 367 was brought—provides that certain high officers may be impeached,<sup>20</sup> not “by the supreme court,” but “by the senate sitting as a court of impeachment . . . on articles preferred by the house of representatives.” Section 173 lacks any reference to “regulations . . . prescribed by law,” but is instead “self-executing.”<sup>21</sup> Accordingly, Section 173 allows each chamber of the legislature to conduct its respective proceedings under Section 173 according to such procedures as it deems appropriate.

The Governor cites no law or other authority for the proposition that impeachments under Section 173, as distinct from Section 174, are criminal in nature. The weight of history and

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<sup>17</sup> Ala. Const. § 174 (emphasis added).

<sup>18</sup> Motion to Suspend at 1 (quoting *State v. Hasty*, 184 Ala. 121, 124 (1913)).

<sup>19</sup> Section 174 borrows from Section 173 only the list of impeachable offenses. See Ala. Const. § 174 (“. . . may be removed from office for any of the causes specified in the preceding section or elsewhere in the Constitution . . .”). Section 174 further provides that “[t]he legislature may provide for the impeachment or removal of other officers than those named in this article.” This provision confirms Section 174’s distinctively non-legislative character.

<sup>20</sup> “The governor, lieutenant-governor, attorney-general, state auditor, secretary of state, state treasurer, superintendent of education, commissioner of agriculture and industries, and justices of the supreme court . . .” Ala. Const. § 173.

<sup>21</sup> See *State v. Buckley*, 54 Ala. 599, 615 (1875) (comparing the predecessors to Sections 173 and 174, respectively, and remarking that “[t]he first is complete and self-executing.”).

authority from other jurisdictions, including the United States, counsels against this view of impeachment proceedings.

That aside, this Committee's investigation is not an impeachment proceeding. Accordingly, the Governor's claim that he has been denied due process is without basis and his renewed request is therefore **denied**.

#### **Committee Members Are Not Required To "Recuse" Themselves**

The Governor has requested that certain members of this Committee "recuse themselves from the impeachment investigation in order to comport with Governor Bentley's constitutional due process rights."<sup>22</sup> The Governor incorporated by reference into his "Motion for Recusal" the argument from his "Motion to Suspend" that he is entitled to the procedural protections due a criminal defendant during the impeachment investigations.

As discussed above, the Governor misunderstands the nature of these proceedings, as well as their proper course under House Rule 79.1, and is incorrect that due process entitles him to the relief he seeks.

Governor Bentley argues that the recusal of the three members is "necessary to remedy bias." He states that "[d]ue process prohibits [the three members] from standing as accusers and adjudicators of Governor Bentley."<sup>23</sup> Again, the Governor supports his argument with case law wholly unrelated to legislative proceedings such as this one.

Governor Bentley cites no authority to support his argument that a member of the House of Representatives must recuse himself from legislative proceedings because he has "made

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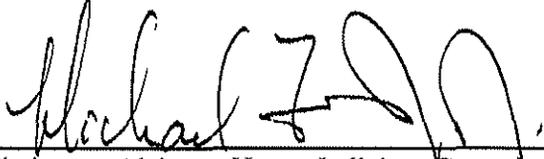
<sup>22</sup> Motion to Recuse at 1.

<sup>23</sup> *Id.* at 6.

public statements evidencing personal bias.”<sup>24</sup> That elected representatives routinely make public statements concerning matters before the legislature seems hardly worth noting. Similarly, it is entirely proper for a legislator both to sponsor a resolution and to sit on the committee to which it is referred.

The Governor makes no mention of the fact that the right and duty to judge a Representative’s qualifications are committed to the House, and not to himself.<sup>25</sup> The Governor has no legal or political authority to dictate to the House or to this Committee which Representatives may or may not decide an issue constitutionally entrusted to them. Furthermore, there are no rules or other means that are available to this Committee by which a member can be made to recuse himself from Committee business. Thus, because the Rules of the House do not permit this Committee to remove or to enforce “recusal” upon a qualified representative, Governor Bentley’s renewed request is **denied**.

Dated: August 31, 2016.

  
Chairman, Alabama House Judiciary Committee

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<sup>24</sup> *Id.* at 2.

<sup>25</sup> *See* Ala. Const. § 51 (“Each house shall choose its own officers and shall judge the . . . qualifications of its members.”); § 53 (“Each house shall have power to determine the rules of its proceedings . . .”).



## ALABAMA HOUSE OF REPRESENTATIVES

### JUDICIARY COMMITTEE

**JACK SHARMAN**  
SPECIAL COUNSEL  
LIGHTFOOT, FRANKLIN & WHITE LLC  
400 20TH STREET NORTH  
BIRMINGHAM, ALABAMA 35203

August 25, 2016

**Via Electronic and U.S. Mail**

Joseph C. Espy, III, Esq.  
Melton, Espy & Williams, P.C.  
255 Dexter Avenue  
Montgomery, Alabama 36104  
[jespy@mewlegal.com](mailto:jespy@mewlegal.com)

David Byrne, Esq.  
Chief Legal Advisor  
Carrie Ellis McCollum, Esq.  
Office of the Governor of Alabama  
State Capitol  
600 Dexter Avenue  
Montgomery, Alabama 36130  
[dbyrne@alabama.gov](mailto:dbyrne@alabama.gov)  
[carrie.mccollum@governor.alabama.gov](mailto:carrie.mccollum@governor.alabama.gov)

Ross H. Garber, Esq.  
Susan S. Murphy, Esq.  
Shipman & Goodwin LLP  
1875 K Street NW, Suite 600  
Washington, DC 20006-1251  
[rgarber@goodwin.com](mailto:rgarber@goodwin.com)  
[smurphy2@goodwin.com](mailto:smurphy2@goodwin.com)

**Re: Impeachment Investigation of Governor Robert Bentley**

Dear Counselors:

Thank you for your letter of August 17, 2016 and also for Mr. Garber's telephone call. We all appreciate the seriousness of the impeachment investigation started by House Resolution 367. In these circumstances, it is certainly wise to keep our lines of communication open. Both the Committee and I appreciate that effort on your part.

With regard to the renewed Motion to Suspend Proceedings and the renewed Motion for Recusal, the Committee has those under advisement.

In the meantime, several points bear clarification.

EXHIBIT A

### **The Governor Will Have Due Process**

First, the Governor's concerns about "due process" are ill founded and show some misunderstanding of the stage of proceedings.<sup>1</sup> We are in the investigation stage. In an actual impeachment proceeding, the Governor will be provided process. Of course, we might dispute the amount of "process" that is "due," but neither I nor the Committee have any reason to doubt that a sufficient procedural system will apply to the impeachment proceedings – if any occur.

### **The Committee's Investigation Is Undertaken To Discharge The Committee's Duties to the House**

Second, we are conducting an investigation on behalf of and at the instruction of the Committee, as contemplated by House Resolution 367. The Committee takes its delegated authority and instructions from the House very seriously. We are seeking documents and interviewing or taking testimony from witnesses. An impeachment investigation, like the impeachment process as a whole, is not neatly analogous to any other legal, political or constitutional structure. Indeed, it partakes of all of those characteristics. Perhaps a pertinent analogy at the moment is to a grand jury investigation: serious issues have been raised but an investigation is required to ascertain their gravity (or lack of gravity).

As accomplished white-collar defense and government-investigations lawyers, you know that the rights and remedies of a subject of a grand jury investigation are severely limited. Such an investigation is not a "joint" investigation with counsel for the subject of the investigation, nor will this one be. Rather, I intend to do as I was charged by the Committee – conduct a factual investigation, make a recommendation and report to the Committee, and assist the Committee in any impeachment proceedings that it sees fit to recommend to the House.

### **An Impeachment Proceeding Is Not A Criminal Proceeding**

Third, an impeachment proceeding – and much less, an impeachment investigation – is not a criminal proceeding. This letter is not the appropriate forum for a full discussion of those issues, but there is ample law and scholarly opinion that, whatever an impeachment is, it is not a criminal proceeding. The criminal standard of proof ("beyond a reasonable doubt") does not apply. Impeachable offenses may include but are not limited to "crimes." There is no legislative equivalent to a grand jury's secrecy: indeed, documents and testimony obtained in our investigation will eventually be public record.

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<sup>1</sup> For convenience, I will use the terms "Governor" or "Governor Bentley" for both the Office of the Governor and Governor Bentley in his personal capacity, unless the context requires greater specificity.

As a leading impeachment scholar notes, “the starting point . . . is that impeachment is ‘a proceeding purely of a political nature. It is not so much designed to punish an offender as to secure the state against gross official misdemeanors. It touches neither his person nor his property, but simply divests him of his political capacity,’ that is it disqualifies him to hold office.”<sup>2</sup>

Even at the federal level, where the Constitution provides that a President may be impeached for “high Crimes and Misdemeanors,” U.S.Const. Art. II §4, the overwhelming authority is that impeachment is not limited to “crimes” in our common, modern, statutory understanding of that term. *See generally* Constitutional Grounds for Presidential Impeachment, Report by the Staff of the Impeachment Inquiry, 2<sup>nd</sup> Sess., 93<sup>rd</sup> Cong., House Committee Print (the “Rodino Report”) at 22-25 (February 22, 1974).<sup>3</sup> This “non-criminal” understanding is confirmed in the text of the provisions of the Alabama Constitution that address the grounds for impeachment of a governor.<sup>4</sup> Thus, the rules of the House are the rules that govern, rather than cognates to the federal or Alabama Rules of Criminal Procedure. Should the Governor be menaced with state or federal prosecution, of course, the full array of federal and state criminal law standards – constitutional, procedural and substantive – would kick in. A legislative impeachment investigation – indeed, any legislative investigation – has a constitutional and legal mandate different from that of the criminal justice system.

#### **Failure to Cooperate With The Committee’s Investigation Can Be Additional Grounds For Impeachment**

Fourth, I note the Governor’s long-standing position that he intends to be transparent and to cooperate with the Committee in order to put these matters behind him.<sup>5</sup> Similarly, the Committee intends to conduct a swift, unhindered investigation that starts with the collection of documents, most of which are public records. In that light, it is disappointing to receive “general objections” and reservations of rights amounting to a refusal to respond to the Committee’s investigatory efforts. As I mentioned to Ross in our recent telephone call, I am certainly happy to listen to questions about specific requests or to proposals on how to narrow them. The

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<sup>2</sup> Raoul Berger, *Impeachment: The Constitutional Problems* (Cambridge: Harvard Univ. Press, 1973) at 79 (quoting Joseph Story, *Commentaries On The Constitution of the United States*, 5<sup>th</sup> ed. 2 vols. (Boston: Little, Brown, 1905) §803).

<sup>3</sup> The Rodino Report, named for the late Peter Rodino (D-NJ), was prepared by the staff of the House Judiciary Committee as the Committee conducted its inquiry into the impeachment of President Nixon.

<sup>4</sup> “The governor . . . may be removed from office for willful neglect of duty, corruption in office, incompetency, or intemperance in the use of intoxicating liquors or narcotics to such an extent, in view of the dignity of the office and importance of its duties, as unfits the officer for the discharge of such duties, or for any offense involving moral turpitude while in office, or committed under color thereof, or connected therewith . . .” Ala. Const. § 173.

<sup>5</sup> “We’re going to be very cooperative with the legislature,” Bentley said. “We have nothing to hide. We have no charges against us at all. We have nothing to hide. The truth always has a sound. And I can tell you, we tell the truth and we’ve done nothing wrong. We’ll work with them and it’s really not a problem. They are trying to feel their way through this process so we’ll let them do that.” Paul Gattis, *Gov. Robert Bentley: People of Alabama ‘not interested in impeachment,’* [http://www.al.com/news/huntsville/index.ssf/2016/06/gov\\_robert\\_bentley\\_people\\_of\\_a.html](http://www.al.com/news/huntsville/index.ssf/2016/06/gov_robert_bentley_people_of_a.html) (last visited August 24, 2016).

Governor does not have standing, however, to “object” to the Committee’s information requests or to decline to cooperate in the investigation.

Indeed, although I trust that matters will not come to this point, the Governor’s failure to cooperate with the Committee’s investigation can itself be grounds for impeachment.

**The Constitutional Standard for Impeachment  
Is Distinct From the Scope of the Committee’s Investigation**

Fifth, your letter refers to the document you previously submitted to the Committee addressing, among other things, what you understand to be the “constitutional standard” for the impeachment of a governor in Alabama. As I mentioned to Ross, that is indeed an important question and will likely be part of our final report and recommendation, either as an integral part of the report or as a free-standing submission to the Committee. What constitutional or evidentiary standard an individual member of the House might ultimately apply to articles of impeachment has minimal bearing on facts to be gathered and information to be obtained: “As the factual investigation progresses, it will become possible to state more specifically the constitutional, legal and conceptual framework within which the staff and the Committee work.” (Rodino Report at 2). In addition, “impeachable offenses cannot be defined in advance of full investigation of the facts.” Investigatory Powers of the Committee in the Judiciary With Respect to Its Impeachment Inquiry, Report, Together With Additional and Dissenting Views, 2<sup>nd</sup> Sess., 105<sup>th</sup> Cong., House Committee Print (October 7, 1998) (the “Hyde Report”).<sup>6</sup> In other words, as in any investigation, what is relevant to the Committee’s investigation is of greater scope than what may be pertinent, once a particular legal standard is settled upon, to the Committee’s decision.

**The Governor Is Not Impeached But Is Rather  
The Subject of an Impeachment Investigation**

Sixth, in your correspondence and submissions to the Committee, as well as in my phone call with Ross, you have frequently referred to the fact that, if there is an impeachment of a governor in Alabama, the Constitution calls for the governor to be removed from office pending trial in the Senate. That is true. That is also a reason why we should all understand that the Committee is conducting an impeachment *investigation* and that the impeachment *decision* has not actually been made. Had it been made, Governor Bentley would not currently be in office. House Resolution 367 and revised Rule 79.1 contemplate an investigation; a report and recommendation to the Committee; the Committee’s consideration of the report and recommendation; a referral (or not) by the Committee to the full House; and then a vote by the

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<sup>6</sup> The Hyde Report, named for the late Henry Hyde (R-IL), was prepared by the House Judiciary Committee as the Committee conducted its inquiry into the impeachment of President Clinton.

Governor Bentley Counsel  
August 25, 2016  
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House. Only if all those things happen will the Governor be “impeached.” To draw upon my earlier analogy to the grand jury, we are not in a “post-indictment” situation.

**The Articles Govern The Investigation**

Seventh, the Governor at several points complains of the vagueness and brevity of the Articles. The subject of an investigation always appreciates more detail and elaboration. The House has spoken, however. We will work with the Articles as drafted. In addition, I know that you have been paying close attention to the series of events that led to this investigation. The underlying main concerns that have driven these legislative inquiries are well-publicized and are not so unascertainable as to not allow the Governor to prepare or to respond fully to the Committee’s demands for information. In addition, in our document requests, we have been quite specific as to date ranges, names, offices and events. (For your easy reference, a copy of those document demands is provided herewith as “Attachment A”).

\* \* \* \*

I hope this letter has been helpful to you. The Committee looks forward to the Governor’s full cooperation in its investigation, beginning with production to the Committee of documents necessary for its investigation.

With best wishes, I am

Sincerely yours,



Jack Sharman

cc: The Honorable Mike Jones, Chairman, Alabama House Judiciary Committee

EXHIBIT A

# **Attachment A**

**BEFORE THE HOUSE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES**

**In Re: The Impeachment Investigation of  
Governor Robert Bentley**

**DOCUMENT REQUEST TO THE OFFICE OF THE GOVERNOR**

**TO: Governor Robert Bentley  
Office of the Governor of Alabama  
c/o Ross H. Garber, Esq.  
SHIPMAN & GOODWIN LLP  
1875 K. St., NW  
Washington, D.C. 20006**

**David B. Byrne, Jr., Esq.  
Chief Legal Advisor  
Office of the Governor of Alabama  
State Capitol  
600 Dexter Avenue  
Montgomery, Alabama 36130**

**Definitions and Instructions**

- A. The term "Office of the Governor" as used herein refers to Governor Robert Bentley in his official capacity and all current or former members of Governor Robert Bentley's Staff, including but expressly not limited to those assigned to the following offices: Executive Office, Chief of Staff and Deputy Chief of Staff, Legal Office, Communications Office, Legislative Office, Constituent Services Office, Scheduling Office, Appointments Office, Policy Office, Administration Office, Office of the First Lady, and Governor's Mansion. These requests are directed to the Office of the Governor as defined herein and shall be construed to include all documents or things in the possession, custody, or control of any and all persons encompassed by that term.
- B. Unless otherwise specified, all Requests shall encompass the period of time beginning January 17, 2011 to the present.
- C. Documents responsive to any Request shall be produced together, in electronic or paper file folders or with other enclosures that separate the files by Request number. If a document is responsive to more than one Request, it shall be produced in response to the Request to which it is primarily responsive.

### **Documents and Things Requested**

1. All State employment policies applicable to the Office of the Governor.
2. Current and previous staff lists, directories, and organizational charts and diagrams for the Office of the Governor.
3. For all current and former members of the Office of the Governor, a list of their work telephone(s) and State-issued cellular telephone(s) and mobile device(s).
4. The complete calendar of Governor Robert Bentley in native electronic format, including any and all electronic data and information evidencing or reflecting any changes made at any time thereto.
5. The complete calendar of Rebekah Mason in native electronic format, including any and all electronic data and information evidencing or reflecting any changes made at any time thereto.
6. For the period of time beginning January 1, 2013 to present, daily and weekly schedules of Governor Robert Bentley, including any and all documents evidencing or relating to any changes made at any time thereto.
7. Any and all documents, electronic data, and information evidencing or relating to the use of State aircraft by, or at the direction of, the Office of the Governor, including but expressly not limited to, all requests for travel, flight plans, flight logs, and flight manifests.
8. Any and all documents, electronic data, and information evidencing or relating to ground transportation of or for Rebekah Mason, including but expressly not limited to all requests to any State agency, route plans, and vehicle manifests.
9. Any and all documents, electronic data, and information evidencing or relating to any and all visits by Rebekah Mason to the Governor's Mansion and its appurtenant facilities.
10. Any and all documents, electronic data, and information evidencing or relating to any and all visits by Rebekah Mason to Wynfield Estate and its appurtenant facilities.
11. Any and all documents, electronic data, and information evidencing or relating to leasing or chartering aircraft for travel by Governor Robert Bentley or Rebekah Mason.
12. Any and all documents, electronic data, and information evidencing or relating to any requests for reimbursement from State funds, including all supporting documentation, submitted by or on behalf of Governor Robert Bentley from January 1, 2013 to the present.
13. Any and all documents, electronic data, and information evidencing or relating to any requests for reimbursement from State funds, including all supporting documentation, submitted by or on behalf of Rebekah Mason from January 1, 2013 to the present.

14. Any and all documents, electronic data, and information evidencing or relating to any requests for reimbursement, including all supporting documentation, submitted to the National Governors Association from January 1, 2013 to the present.

15. Any and all documents, electronic data, and information evidencing or relating to any requests for reimbursement, including all supporting documentation, submitted to the Republican Governors Association from January 1, 2013 to the present.

16. Any and all documents, electronic data, and information evidencing or relating to any requests for reimbursement, including all supporting documentation, submitted to Bentley for Governor, Inc. from January 1, 2013 to the present.

17. Any and all documents, electronic data, and information evidencing or relating to any requests for reimbursement from State funds, including all supporting documentation, for any expense relating to Rebekah Mason submitted by or on behalf of the Office of the Governor from January 1, 2013 to the present.

18. Any and all documents, electronic data, and information evidencing or relating to any and all work, services, or goods performed or provided by Rebekah Mason, RCM Communications, Inc., Jon Mason, or JRM Enterprises, Inc. for or to the State of Alabama, Governor Robert Bentley, the Office of the Governor, the University of Alabama, Alabama Council for Excellent Government, or Bentley for Governor, Inc.

19. Any and all documents, electronic data, and information evidencing or relating to any and all compensation, reimbursements, expenses, and payments of any kind to Rebekah Mason, RCM Communications, Inc., Jon Mason, or JRM Enterprises, Inc.

20. Any and all documents, electronic data, and information evidencing or relating to any nondisclosure or confidentiality agreements signed by or proffered to any person by or on behalf of the Office of the Governor.

21. Any and all documents, electronic data, and information evidencing or relating to any and all temporary or permanent removals, reassignments, replacements, or terminations of any persons in the Office of the Governor.

22. Any and all documents, electronic data, and information evidencing or relating to any and all temporary or permanent removals, reassignments, replacements, or terminations of any officers or employees of the Alabama Law Enforcement Agency or any of its subordinate agencies, departments, or divisions from January 1, 2014 to present.

23. Any and all documents, electronic data, and information evidencing or relating to any formal or informal files maintained, whether electronically or otherwise, by or within the Office of the Governor related to any of the following:

- a. Spencer Collier;
- b. Rebekah Mason;

- c. Jon Mason;
- d. Dianne Bentley;
- e. Bentley for Governor, Inc.;
- f. Alabama Council for Excellent Government;
- g. RCM Communications, Inc.;
- h. JRM Enterprises, Inc.;
- i. Matt Hart, Mike Duffy, or any other person involved in the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.
- j. the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.

24. Any and all documents, electronic data, and information evidencing or relating to the job titles, duties, or performance of Rebekah Mason.

25. Rebekah Mason's personnel file.

26. A list of any and all email accounts used by Governor Robert Bentley.

27. A list of any and all email accounts used by Rebekah Mason.

28. An electronic copy in native format of any and all email accounts assigned to or used by Rebekah Mason.

29. A complete list of any and all cellular phones or mobile devices issued to or used by Governor Robert Bentley, including for each phone or device the telephone number, account number, the name of the carrier, and dates of use or service.

30. All bills and usage histories for any cellular phone or mobile device listed in response to the previous Request.

31. A complete list of any and all cellular phones or mobile devices issued to or used by Rebekah Mason, including for each phone or device the telephone number, account number, the name of the carrier, and dates of use or service.

32. All bills and usage histories for any cellular phone or mobile device listed in response to the previous Request.

33. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, between Governor Robert Bentley and Rebekah Mason, including any attorney or other person acting for or on behalf of either of them.

34. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, between Governor Robert Bentley and Jon Mason, including any attorney or other person acting for or on behalf of either of them.

35. Any and all audio or video recordings of any part of any telephone or other conversations between Governor Robert Bentley and Rebekah Mason.

36. Any and all documents, electronic data, and information evidencing or relating to any meetings at which both Governor Robert Bentley and Spencer Collier were present from January 1, 2014 to the present.

37. Any and all documents, electronic data, and information evidencing or relating to any meetings at which both Governor Robert Bentley and Rebekah Mason were present.

38. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, between the Office of the Governor and Spencer Collier, including any attorney or other person acting for or on behalf of either of them, from January 1, 2014 to present.

39. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, between the Office of the Governor and Stan Stabler, including any attorney or other person acting for or on behalf of either of them, from January 1, 2014 to present.

40. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, between the Office of the Governor and Ray Lewis, including any attorney or other person acting for or on behalf of either of them, from January 1, 2014 to present.

41. Any and all documents, electronic data, and information evidencing or relating in any way to the substance of the press release by the Office of the Governor on March 22, 2016 (which is attached hereto as **Attachment 1**), including but expressly not limited to:

- a. placing Spencer Collier on medical leave;
- b. internal review of the Alabama Law Enforcement Agency or any of its subordinate agencies, departments or divisions;
- c. misuse of State funds by the Alabama Law Enforcement Agency or any of its subordinate agencies departments or divisions;
- d. termination of Spencer Collier.

42. Any and all documents, electronic data, and information evidencing or relating to the Alabama Council for Excellent Government.

43. Any and all documents, electronic data, and information evidencing or relating to the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.

44. Any and all documents, electronic data, and information evidencing or relating to the 2014 gubernatorial campaign, including but expressly not limited to Bentley for Governor, Inc.

45. Any and all documents, electronic data, and information evidencing or relating to Statements of Economic Interests filed by the Office of the Governor with the Alabama Ethics Commission.

46. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, sent to or received by the Office of the Governor concerning:

- a. Rebekah Mason;
- b. Alabama Council for Excellent Government;
- c. RCM Communications, Inc.;
- d. JRM Enterprises, Inc.;
- e. Bentley for Governor, Inc.

**BEFORE THE HOUSE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES**

**In Re: The Impeachment Investigation of  
Governor Robert Bentley**

**DOCUMENT REQUEST TO GOVERNOR ROBERT BENTLEY**

**TO: The Honorable Robert Bentley  
Governor of Alabama  
c/o Joseph C. Espy III, Esq.  
MELTON, ESPY & WILLIAMS, P.C.  
255 Dexter Avenue  
Montgomery, Alabama 36104**

**Definitions and Instructions**

- A. The term “you” or “your” as used herein refers to Governor Robert Bentley in his personal capacity.
- B. Unless otherwise specified, all Requests shall encompass the time from January 17, 2011 to the present.
- C. Documents responsive to any Request shall be produced together, in file folders or with other enclosures that segregate the files by Request number. If a document is responsive to more than one Request, it shall be produced in response to the Request to which it is primarily responsive.

**Documents and Things Requested**

1. All statements for any checking, savings, or investment account in your name, jointly or individually.
2. All federal and state income tax returns, including all schedules, attachments, and W-2s.
3. Any and all documents, electronic data, and information evidencing or relating to any and all work, services, or goods performed for or provided to the State of Alabama, Bentley for Governor, Inc. or you by Rebekah Mason, RCM Communications, Inc., Jon Mason, or JRM Enterprises, Inc.
4. Any and all documents, electronic data, and information evidencing or relating to any and all compensation, reimbursements, expenses, and payments of any kind made by the State of Alabama, Bentley for Governor, Inc. or you or on your behalf to Rebekah Mason, RCM Communications, Inc., Jon Mason, JRM Enterprises, Inc., Alabama Council for Excellent Government, or Bentley for Governor, Inc.

5. Any and all documents, electronic data, and information evidencing or relating to your daily and weekly schedule.

6. A complete list of any and all cellular phones or mobile devices owned or used by you, including for each phone or device the telephone number, account number, the name of the carrier, and the dates of use or service.

7. All bills and usage histories for any cellular phone or mobile device listed in response to the previous Request.

8. A complete list of any and all email accounts and social media accounts owned or used by you.

9. Any and all audio or video recordings of any part of any telephone or other conversations between you and Rebekah Mason.

10. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, between you and any of the following persons, including any attorney or other person acting for or on behalf of either you or them:

- a. Rebekah Mason;
- b. Jon Mason;
- c. Spencer Collier;
- d. Stan Stabler;
- e. Ray Lewis;
- f. Cooper Shattuck.

11. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, sent to or received by you concerning:

- a. Spencer Collier;
- b. Rebekah Mason;
- c. Jon Mason;
- d. Alabama Council for Excellent Government;
- e. RCM Communications, Inc.;
- f. JRM Enterprises, Inc.;

g. Matt Hart, Mike Duffy, or any other person involved in the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard;

h. The investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.

12. Any and all documents, electronic data, and information evidencing or relating to any meetings at which both you and Spencer Collier were present from January 1, 2014 to the present.

13. Any and all documents, electronic data, and information evidencing or relating to any meetings at which both you and Rebekah Mason were present.

14. Any and all documents, electronic data, and information evidencing or relating to any of the following:

- a. Rebekah Mason;
- b. Jon Mason;
- c. RCM Communications, Inc.;
- d. JRM Enterprises, Inc.;
- e. reimbursements to you by or from the State of Alabama, the National Governors Association, the Republican Governors Association, or Bentley for Governor, Inc.;
- f. Alabama Council for Excellent Government.

15. Any and all documents, electronic data, and information evidencing or relating to any and all work, services, or goods performed or provided by Rebekah Mason, RCM Communications, Inc., Jon Mason, or JRM Enterprises, Inc. for or to the State of Alabama, Governor Robert Bentley, the Office of the Governor, the University of Alabama, Alabama Council for Excellent Government, or Bentley for Governor, Inc.

16. Any and all documents, electronic data, and information evidencing or relating to Statements of Economic Interests filed by you with the Alabama Ethics Commission.

**BEFORE THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES**

**In re: The Impeachment of Robert Bentley  
Governor of Alabama**

**OBJECTION OF JONATHAN MASON TO SUBPOENA OR,  
IN THE ALTERNATIVE, MOTION TO QUASH SUBPOENA**

Comes now Jonathan Mason (“Mr. Mason”), by and through undersigned counsel, and hereby objects to the subpoena served upon him in this matter for the production of documents or, in the alternative, moves to quash said subpoena. As grounds for said objections and motion, Mr. Mason shows as follows.

1. The said subpoena, a copy of which is attached hereto as Exhibit A, was caused to be served on Mr. Mason by the Judiciary Committee of the Alabama House of Representatives (“the Committee”). It purportedly was issued in connection with the Committee’s investigation of the proposed impeachment of Governor Robert Bentley.
2. There is no authority in Alabama for the issuance of the subpoena by the Committee, its Chair, its subcommittee, or its special counsel.
3. The issuance of the subpoena is unlawful, and the subpoena is unenforceable. In support of the unlawfulness of the issuance of the subpoena and the unenforceability of the subpoena, Mr. Mason adopts by reference and incorporates herein the legal grounds, arguments, and rationales set forth in the objection filed by Governor Robert Bentley to the subpoena served on him by the Judiciary Committee.
4. The subpoena seeks information from Mr. Mason not only in his capacity as an employee of the State of Alabama, but also in his capacity as a private citizen, and in that regard the subpoena seeks to invade his privacy, and his rights as a private citizen, in impermissible ways.
5. The subpoena is grossly overbroad.
6. The subpoena is grossly intrusive.
7. The subpoena is harassing and abusive.
8. The subpoena seeks information outside the possession, custody or control of Mr. Mason.
9. The subpoena seeks information that is within the public domain and, therefore, that is equally accessible to the Committee and its Special Counsel.
10. The subpoena seeks information that goes far beyond any legitimate inquiry into allegedly impeachable conduct by the Governor.

11. Attempting to search for and produce the information sought by the subpoena would be unduly and unbelievably burdensome and oppressive, both in terms of time and expense and both to the State of Alabama and to Mr. Mason.

12. Even if there were legal authority for the issuance of the subpoena, the committee lacks jurisdiction to seek information not relevant to its investigation, and, given the vagueness of the Articles of Impeachment, many of the documents requested are either not relevant, or one cannot reasonably determine whether or not they are relevant. The Committee has no jurisdiction to conduct a fishing expedition in hopes of finding, as opposed to investigating, some basis for a charge.

13. Taken as a whole, the subpoena constitutes an abuse of process.

14. With respect to his claims asserted herein that the subpoena is unreasonable in its content and scope, and is overly broad, unduly burdensome, harassing, unnecessarily intrusive, and abusive, Mr. Mason adopts by reference and incorporates herein the legal grounds, arguments, and rationales set forth in the objection filed by Governor Robert Bentley to the subpoena served on him by the Judiciary Committee.

15. The subpoena denies Mr. Mason due process and other constitutional protections under the Alabama and United States Constitutions in that, among other things, it is being improperly used as a tool to investigate matters pending in other forums and to investigate allegedly criminal matters.

16. The subpoena attempts to invade the attorney-client privilege, the attorney work product privilege and other privileges protected by law.

17. In raising objections to the issuance of the subpoena and in challenging the enforceability of the subpoena, Mr. Mason does so without waiving any of his state or federal constitutional, statutory, or other rights and protections, including without limitation his right of association, right to due process, right to avoid self-incrimination, right to Equal Protection, right to privacy, his attorney client privilege, and all other of his rights and protections, all of which he hereby asserts and relies upon both with respect to the subpoena served on him and the one served on JRM Enterprises, Inc.

WHEREFORE, premises considered, Mr. Mason objects to the subpoena and to each request set forth therein and in the alternative, moves to quash the subpoena.

Respectfully submitted,



---

Bobby Segall  
Attorney for Jonathan Mason

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the above and foregoing upon the following persons on this the 10th day of October, 2016:

**Via Email**

Jackson R. Sharman  
Lightfoot, Franklin & White LLC  
400 20<sup>th</sup> Street North  
Birmingham, Alabama 35203

**By Hand Delivery**

Tracy Arnold, Clerk  
Alabama House of Representatives Judicial Committee  
Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130

**By Hand Delivery**

Jeff Woodard, Clerk  
Alabama House of Representatives  
Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130

**By Hand Delivery**

Othni J. Lathram, Director  
Alabama Law Institute  
Alabama State House, Suite 207  
Montgomery, Alabama 36130

  
\_\_\_\_\_  
Of Counsel

BEFORE THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES

TO: Mr. Jonathan Mason  
c/o Robert D. Segall, Esq.  
COPELAND, FRANCO, SCREWS & GILL  
444 South Perry Street  
Montgomery, Alabama 36104

SUBPOENA

PURSUANT TO THE COMMITTEE RULES OF THE HOUSE JUDICIARY COMMITTEE FOR THE IMPEACHMENT OF GOVERNOR ROBERT BENTLEY, THE JUDICIARY COMMITTEE OF THE ALABAMA HOUSE OF REPRESENTATIVES ("THE COMMITTEE") HEREBY COMMANDS YOU:

To appear before the Committee and be questioned at the place, date, and time specified below:

Place: \_\_\_\_\_

Date: \_\_\_\_\_

Time: \_\_\_\_\_

To produce the materials, identified in the attached Exhibit A, to the Committee at the place, date, and time specified below:

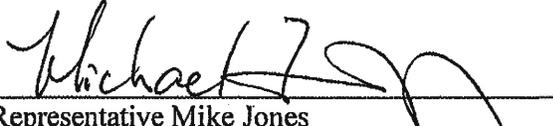
Place: 400 20<sup>th</sup> Street North, Birmingham, Alabama 35203

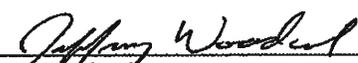
Date: Monday, October 10, 2016

Time: By no later than 5:00 p.m.

ON BEHALF OF THE COMMITTEE:

ISSUED BY:

  
\_\_\_\_\_  
Representative Mike Jones  
Chairman, Alabama House Judiciary Committee

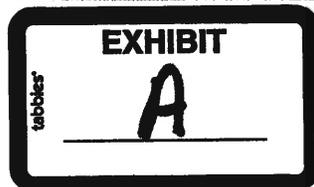
  
\_\_\_\_\_  
Jeffrey Woodard  
Clerk, Alabama House of Representatives

Date: 9-26-2016

Date: 9-29-16

Any questions pertaining to this Subpoena should be directed to the Special Counsel for the Committee:

Jackson R. Sharman III  
400 20th Street North  
Birmingham, Alabama 35203  
Telephone: (205) 581-0700  
Email: [jsharman@lightfootlaw.com](mailto:jsharman@lightfootlaw.com)



**BEFORE THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES**

**TO: Mr. Jonathan Mason  
c/o Robert D. Segall, Esq.  
COPELAND, FRANCO, SCREWS & GILL  
444 South Perry Street  
Montgomery, Alabama 36104**

**SUBPOENA  
EXHIBIT A**

**Definitions and Instructions**

- A. The term "Office of the Governor" as used herein refers to Governor Robert Bentley in his official capacity and all current or former members of Governor Robert Bentley's Staff, including but expressly not limited to those assigned to the following offices: Executive Office, Chief of Staff and Deputy Chief of Staff, Legal Office, Communications Office, Legislative Office, Constituent Services Office, Scheduling Office, Appointments Office, Policy Office, Administration Office, Office of the First Lady, and Governor's Mansion.
- B. Unless otherwise specified, all items shall encompass the period of time beginning January 17, 2011 to the present.
- C. Documents responsive to any items shall be produced together, in electronic or paper file folders or with other enclosures that separate the files by item number. If a document is responsive to more than one item, it shall be produced in response to the item to which it is primarily responsive.

**Documents and Things Requested**

1. Any and all documents, electronic data, and information evidencing or relating to any and all work, services, or goods you performed for or provided to the State of Alabama, the Office of the Governor, the University of Alabama, the Alabama Council for Excellent Government, RCM Communications, Inc., JRM Enterprises, Inc., Bentley for Governor, Inc., or Governor Robert Bentley in his personal capacity.
2. Any and all documents, electronic data, and information evidencing or relating to any and all donations, contributions, compensation, reimbursements, or other payments of any kind made to you by the State of Alabama, the Office of the Governor, the University of Alabama, the Alabama Council for Excellent Government, RCM Communications, Inc., JRM Enterprises, Inc., or Bentley for Governor, Inc.
3. Any and all documents, electronic data, and information evidencing or relating to any and all compensation, reimbursements, expenses, and payments of any kind made by you to the State of Alabama, the Office of the Governor, the University of Alabama, the Alabama Council for Excellent Government, RCM Communications, Inc., JRM Enterprises, Inc., or Bentley for Governor, Inc.
4. Any and all documents, electronic data, and information evidencing or relating to any loans, gifts, payments or other transfers of money or things of value to you from or on behalf of Governor Robert Bentley in his personal capacity.

5. All statements for any checking, savings, or investment account into which, or from which, any of the compensation, reimbursement, expenses, loans, gifts, payments, or other transfers of money or things of value referred to in Requests 2 through 4 were deposited or withdrawn.

6. Any and all documents, electronic data, and information evidencing or relating to any requests for reimbursement from State funds, including all supporting documentation, submitted by you or on your behalf from January 1, 2013 to the present.

7. Any and all documents, electronic data, and information evidencing or relating to your job titles, duties, or performance with or for the State of Alabama, Bentley for Governor, Inc., or the 2014 gubernatorial campaign of Governor Robert Bentley.

8. Any and all documents, electronic data, and information evidencing or relating to any nondisclosure or confidentiality agreements signed by you or proffered to you by or on behalf of Governor Robert Bentley, in his personal capacity, or the Office of the Governor.

9. A complete list of any and all email accounts and social media accounts owned or used by you.

10. Any and all documents, electronic data, and information evidencing or relating to State business.

11. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, between you and any of the following persons, including any attorney or other person acting for or on behalf of either you or them:

- a. the Office of the Governor;
- b. Governor Robert Bentley in his personal capacity;
- c. Dianne Bentley;
- d. any other member of the Bentley family;
- e. Spencer Collier;
- f. Stan Stabler;
- g. Ray Lewis;
- h. any director, officer, employee, agent, or representative of RCM Communications, Inc.;
- i. any director, officer, employee, agent, or representative of Alabama Council for Excellent Government;
- j. any director, officer, employee, agent, or representative of Bentley for Governor, Inc.

12. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, sent to or received by you concerning:

- a. the Office of the Governor;
- b. Governor Robert Bentley in his personal capacity;
- c. Dianne Bentley;
- d. any other member of the Bentley family;
- e. Spencer Collier;
- f. Stan Stabler;
- g. Ray Lewis;
- h. Alabama Council for Excellent Government;
- i. RCM Communications, Inc.;
- j. JRM Enterprises, Inc.;
- k. Bentley for Governor, Inc.;
- l. Alabama Law Enforcement Agency or any of its subordinate agencies, departments, or divisions;
- m. State aircraft;
- n. Matt Hart, Mike Duffy, or any other person involved in the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard;
- o. the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.

13. Any and all documents, electronic data, and information evidencing or relating to any of the following:

- a. the Office of the Governor;
- b. Governor Robert Bentley in his personal capacity;
- c. Dianne Bentley;
- d. any other member of the Bentley family;
- e. Spencer Collier;
- f. RCM Communications, Inc.;
- g. Alabama Council for Excellent Government;
- h. Bentley for Governor, Inc.;
- i. State aircraft;

- j. Matt Hart, Mike Duffy, or any other person involved in the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard;
- k. the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.

14. Any and all audio or video recordings of any part of any telephone or other conversations between you and Robert Bentley.

15. Any and all documents, electronic data, and information evidencing or relating to Statements of Economic Interests filed by you with the Alabama Ethics Commission.

16. Any and all documents, electronic data, information, or other things that you believe are relevant, in any way, to the proposed Articles of Impeachment Against Governor Bentley, a copy of which is enclosed as Attachment 1, or the investigation pertaining thereto.

1 HR367  
2 176360-2  
3 By Representatives Henry, Whorton (I), Sessions, Ball,  
4 Patterson, Hanes, Whorton (R), Holmes (M), Standridge, Moore  
5 (B), Crawford, Farley, Williams (JW), Ainsworth, Ford, Todd,  
6 Wilcox, Butler, Nordgren, Williams (P), Morrow, Ingram and  
7 Mooney  
8 RFD: Judiciary  
9 First Read: 28-APR-16

2  
3  
4  
5  
6  
7  
8 ARTICLES OF IMPEACHMENT AGAINST GOVERNOR BENTLEY.

9  
10 WHEREAS, in 2010, Governor Bentley was elected the  
11 53rd Governor of the State of Alabama and was reelected to a  
12 second term in 2014; and

13 WHEREAS, Section 173 of the Constitution of Alabama  
14 of 1901 provides that the Governor and other constitutional  
15 officers of this state may be impeached upon the adoption of  
16 articles of impeachment by this body and upon trial by the  
17 Senate, acting as a court of impeachment; and

18 WHEREAS, two formal complaints have been filed with  
19 the Alabama Ethics Commission to determine whether Governor  
20 Bentley violated state ethics laws by misusing state property;  
21 and

22 WHEREAS, in recognition of the gravity of the  
23 adoption of these articles of impeachment and upon findings  
24 that Governor Bentley has violated the public trust, this body  
25 concludes Governor Bentley should be impeached for cause; now  
26 therefore,

1                   BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF  
2           THE LEGISLATURE OF ALABAMA, That Governor Bentley is impeached  
3           for cause and that the following articles of impeachment,  
4           based upon the findings in this resolution, be transmitted to  
5           the Senate for trial as provided in Section 173 of the  
6           Constitution of Alabama of 1901:

7                   ARTICLE I.

8                   Willful Neglect of Duty.

9                   Credible evidence exists to create probable cause to  
10           believe that, in his conduct while Governor of the State of  
11           Alabama, he willfully neglected his duty as Governor by  
12           failing to faithfully execute the laws of this state and by  
13           refusing to perform his constitutional and statutory duties.

14                   ARTICLE II.

15                   Corruption in Office.

16                   Credible evidence exists to create probable cause to  
17           believe that, in his conduct while Governor of the State of  
18           Alabama, he unlawfully misused state property, misappropriated  
19           state resources, and consistently acted in violation of law to  
20           promote his own personal agenda.

BEFORE THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES

**In re: The Impeachment of Robert Bentley  
Governor of Alabama**

**OBJECTION OF JRM ENTERPRISES, INC. TO SUBPOENA OR,  
IN THE ALTERNATIVE, MOTION TO QUASH SUBPOENA**

Comes now JRM Enterprises, Inc. (“JRM”), by and through undersigned counsel, and hereby objects to the subpoena served upon it in this matter for the production of documents or, in the alternative, moves to quash said subpoena. As grounds for said objections and motion, JRM shows as follows.

1. The said subpoena, a copy of which is attached hereto as Exhibit A, was caused to be served on JRM by the Judiciary Committee of the Alabama House of Representatives (“the Committee”). It purportedly was issued in connection with the Committee’s investigation of the proposed impeachment of Governor Robert Bentley.
2. There is no authority in Alabama for the issuance of the subpoena by the Committee, its Chair, its subcommittee, or its special counsel.
3. The issuance of the subpoena is unlawful, and the subpoena is unenforceable. In support of the unlawfulness of the issuance of the subpoena and the unenforceability of the subpoena, JRM adopts by reference and incorporates herein the legal grounds, arguments, and rationales set forth in the objection filed by Governor Robert Bentley to the subpoena served on him by the Judiciary Committee.
4. JRM is a private corporation owned entirely by Jonathan Mason, and the subpoena seeks to invade its privacy, its other rights, and the rights of its sole shareholder, in impermissible ways.
5. The subpoena is grossly overbroad.
6. The subpoena is grossly intrusive.
7. The subpoena is harassing and abusive.
8. The subpoena seeks information outside the possession, custody or control of JRM.
9. The subpoena seeks information that is within the public domain and, therefore, that is equally accessible to the Committee and its Special Counsel.
10. The subpoena seeks information that goes far beyond any legitimate inquiry into allegedly impeachable conduct by the Governor.

11. Attempting to search for and produce the information sought by the subpoena would be unduly and unbelievably burdensome and oppressive, both in terms of time and expense.

12. Even if there were legal authority for the issuance of the subpoena, the committee lacks jurisdiction to seek information not relevant to its investigation, and, given the vagueness of the Articles of Impeachment, many of the documents requested are either not relevant, or one cannot reasonably determine whether or not they are relevant. The Committee has no jurisdiction to conduct a fishing expedition in hopes of finding, as opposed to investigating, some basis for a charge.

13. Taken as a whole, the subpoena constitutes an abuse of process.

14. With respect to its claims asserted herein that the subpoena is unreasonable in its content and scope, and is overly broad, unduly burdensome, harassing, unnecessarily intrusive, and abusive, JRM adopts by reference and incorporates herein the legal grounds, arguments, and rationales set forth in the objection filed by Governor Robert Bentley to the subpoena served on him by the Judiciary Committee.

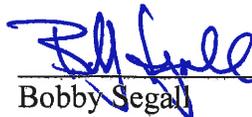
15. The subpoena denies JRM due process and other constitutional protections under the Alabama and United States Constitutions in that, among other things, it is being improperly used as a tool to investigate matters pending in other forums and to investigate allegedly criminal matters.

16. The subpoena attempts to invade the attorney-client privilege, the attorney work product privilege and other privileges protected by law.

17. In raising objections to the issuance of the subpoena and in challenging the enforceability of the subpoena, JRM does so without waiving any of its or its sole owner's state or federal constitutional, statutory, or other rights and protections, including without limitation the right of association, right to due process, right to avoid self-incrimination, right to Equal Protection, right to privacy, the attorney client privilege, and all other of its and his rights and protections, all of which it and he hereby assert and rely upon.

WHEREFORE, premises considered, JRM objects to the subpoena and to each request set forth therein and in the alternative, moves to quash the subpoena.

Respectfully submitted,



---

Bobby Segal  
Attorney for JRM Enterprises, Inc.  
And Jonathan Mason

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the above and foregoing upon the following persons on this the 10th day of October, 2016:

**Via Email**

Jackson R. Sharman  
Lightfoot, Franklin & White LLC  
400 20<sup>th</sup> Street North  
Birmingham, Alabama 35203

**By Hand Delivery**

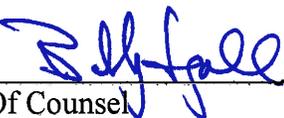
Tracy Arnold, Clerk  
Alabama House of Representatives Judicial Committee  
Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130

**By Hand Delivery**

Jeff Woodard, Clerk  
Alabama House of Representatives  
Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130

**By Hand Delivery**

Othni J. Lathram, Director  
Alabama Law Institute  
Alabama State House, Suite 207  
Montgomery, Alabama 36130

  
\_\_\_\_\_  
Of Counsel

BEFORE THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES

TO: JRM Enterprises, Inc.  
c/o Robert D. Segall, Esq.  
COPELAND, FRANCO, SCREWS & GILL  
444 South Perry Street  
Montgomery, Alabama 36104

SUBPOENA

PURSUANT TO THE COMMITTEE RULES OF THE HOUSE JUDICIARY COMMITTEE FOR THE IMPEACHMENT OF GOVERNOR ROBERT BENTLEY, THE JUDICIARY COMMITTEE OF THE ALABAMA HOUSE OF REPRESENTATIVES ("THE COMMITTEE") HEREBY COMMANDS YOU:

To appear before the Committee and be questioned at the place, date, and time specified below:

Place: \_\_\_\_\_

Date: \_\_\_\_\_

Time: \_\_\_\_\_

To produce the materials, identified in the attached Exhibit A, to the Committee at the place, date, and time specified below:

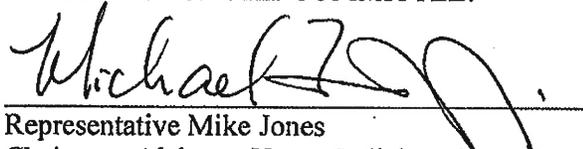
Place: 400 20<sup>th</sup> Street North, Birmingham, Alabama 35203

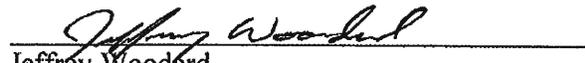
Date: Monday, October 10, 2016

Time: By no later than 5:00 p.m.

ON BEHALF OF THE COMMITTEE:

ISSUED BY:

  
\_\_\_\_\_  
Representative Mike Jones  
Chairman, Alabama House Judiciary Committee

  
\_\_\_\_\_  
Jeffrey Woodard  
Clerk, Alabama House of Representatives

Date: 9-27-2016

Date: 9-29-16

Any questions pertaining to this Subpoena should be directed to the Special Counsel for the Committee:

Jackson R. Sharman III  
400 20th Street North  
Birmingham, Alabama 35203  
Telephone: (205) 581-0700  
Email: [jsharman@lightfootlaw.com](mailto:jsharman@lightfootlaw.com)



**BEFORE THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES**

**TO: JRM Enterprises, Inc.  
c/o Robert D. Segall, Esq.  
COPELAND, FRANCO, SCREWS & GILL  
444 South Perry Street  
Montgomery, Alabama 36104**

**SUBPOENA  
EXHIBIT A**

**Definitions and Instructions**

- A. The term "Office of the Governor" as used herein refers to Governor Robert Bentley in his official capacity and all current or former members of Governor Robert Bentley's Staff, including but expressly not limited to those assigned to the following offices: Executive Office, Chief of Staff and Deputy Chief of Staff, Legal Office, Communications Office, Legislative Office, Constituent Services Office, Scheduling Office, Appointments Office, Policy Office, Administration Office, Office of the First Lady, and Governor's Mansion.
- B. Documents responsive to any items shall be produced together, in electronic or paper file folders or with other enclosures that separate the files by item number. If a document is responsive to more than one item, it shall be produced in response to the item to which it is primarily responsive.

**Documents and Things Requested**

1. Any and all documents JRM Enterprises, Inc. ("JRM") has ever submitted to the Secretary of State of Alabama, including but expressly not limited to certificate(s) of name reservation, and certificate(s) of formation.
2. JRM's articles of incorporation, bylaws, and all amendments to bylaws.
3. Minutes for any meetings of JRM's shareholders and directors.
4. All federal and state tax returns, including all schedules and attachments, from JRM's formation to the present.
5. A complete list of all of JRM's directors, stockholders, officers and employees, including their title and contact information, and organizational charts or diagrams showing the relationships between and among all such persons.
6. Any and all documents, electronic data, and information evidencing or relating to any and all donations, contributions, compensation, reimbursement, or other payments of any kind made to JRM by the State of Alabama, the Office of the Governor, the University of Alabama, the Alabama Council for Excellent Government, RCM Communications, Inc., Bentley for Governor, Inc., or Governor Robert Bentley in his personal capacity.
7. Any and all documents, electronic data, and information evidencing or relating to any and all compensation, reimbursements, expenses, and payments of any kind by JRM to the State of Alabama, the Office of the Governor, Rebekah Mason, Jon Mason, the Alabama Council for Excellent

Government, RCM Communications, Inc., Robert Bentley for Governor, Inc., or Governor Robert Bentley in his personal capacity.

8. Any and all documents, electronic data, and information evidencing or relating to State business.

9. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, between any of JRM's directors, officers, and employees and any of the following persons, including any attorney or other person acting for or on behalf of either JRM or them:

- a. the Office of the Governor;
- b. Governor Robert Bentley in his personal capacity;
- c. Dianne Bentley;
- d. any other member of the Bentley family;
- e. Rebekah Mason;
- f. Spencer Collier;
- g. any director, officer, employee, agent, or representative of RCM Communications, Inc.;
- h. any director, officer, employee, agent, or representative of Alabama Council for Excellent Government;
- i. any director, officer, employee, agent, or representative of Bentley for Governor, Inc.

10. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, sent to or received by any of JRM's directors, officers, and employees concerning:

- a. the Office of the Governor;
- b. Governor Robert Bentley in his personal capacity;
- c. Dianne Bentley;
- d. any other member of the Bentley family;
- e. Rebekah Mason;
- f. Spencer Collier;
- g. RCM Communications, Inc.;
- h. Alabama Council for Excellent Government;
- i. Bentley for Governor, Inc.;

- j. State aircraft;
- k. Matt Hart, Mike Duffy, or any other person involved in the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard;
- l. the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.

11. Any and all documents, electronic data, and information evidencing or relating to any of the following:

- a. the Office of the Governor;
- b. Governor Robert Bentley in his personal capacity;
- c. Dianne Bentley;
- d. any other member of the Bentley family;
- e. Rebekah Mason;
- f. Spencer Collier;
- g. RCM Communications, Inc.;
- h. Alabama Council for Excellent Government;
- i. Bentley for Governor, Inc.;
- j. State aircraft;
- k. Matt Hart, Mike Duffy, or any other person involved in the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard;
- l. the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.

12. Any and all documents, electronic data, information, or other things that you believe are relevant, in any way, to the proposed Articles of Impeachment Against Governor Bentley, a copy of which is enclosed as Attachment 1, or the investigation pertaining thereto.

1 HR367  
2 176360-2  
3 By Representatives Henry, Whorton (I), Sessions, Ball,  
4 Patterson, Hanes, Whorton (R), Holmes (M), Standridge, Moore  
5 (B), Crawford, Farley, Williams (JW), Ainsworth, Ford, Todd,  
6 Wilcox, Butler, Nordgren, Williams (P), Morrow, Ingram and  
7 Mooney  
8 RFD: Judiciary  
9 First Read: 28-APR-16

2  
3  
4  
5  
6  
7  
8 ARTICLES OF IMPEACHMENT AGAINST GOVERNOR BENTLEY.  
9

10 WHEREAS, in 2010, Governor Bentley was elected the  
11 53rd Governor of the State of Alabama and was reelected to a  
12 second term in 2014; and

13 WHEREAS, Section 173 of the Constitution of Alabama  
14 of 1901 provides that the Governor and other constitutional  
15 officers of this state may be impeached upon the adoption of  
16 articles of impeachment by this body and upon trial by the  
17 Senate, acting as a court of impeachment; and

18 WHEREAS, two formal complaints have been filed with  
19 the Alabama Ethics Commission to determine whether Governor  
20 Bentley violated state ethics laws by misusing state property;  
21 and

22 WHEREAS, in recognition of the gravity of the  
23 adoption of these articles of impeachment and upon findings  
24 that Governor Bentley has violated the public trust, this body  
25 concludes Governor Bentley should be impeached for cause; now  
26 therefore,

1                   BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF  
2           THE LEGISLATURE OF ALABAMA, That Governor Bentley is impeached  
3           for cause and that the following articles of impeachment,  
4           based upon the findings in this resolution, be transmitted to  
5           the Senate for trial as provided in Section 173 of the  
6           Constitution of Alabama of 1901:

7                   ARTICLE I.

8                   Willful Neglect of Duty.

9                   Credible evidence exists to create probable cause to  
10           believe that, in his conduct while Governor of the State of  
11           Alabama, he willfully neglected his duty as Governor by  
12           failing to faithfully execute the laws of this state and by  
13           refusing to perform his constitutional and statutory duties.

14                   ARTICLE II.

15                   Corruption in Office.

16                   Credible evidence exists to create probable cause to  
17           believe that, in his conduct while Governor of the State of  
18           Alabama, he unlawfully misused state property, misappropriated  
19           state resources, and consistently acted in violation of law to  
20           promote his own personal agenda.

**IN THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES**

**In re** )  
**The Impeachment of Robert** )  
**Bentley, Governor of Alabama** )

**OBJECTION TO “SUBPOENA” OR,  
IN THE ALTERNATIVE, MOTION TO QUASH “SUBPOENA”**

The law does not grant subpoena authority to the Judiciary Committee, its chairman or a “special counsel” hired by the Committee. To the contrary, the Alabama legislature has specifically considered whether to permit the Judiciary Committee to issue subpoenas, and has declined to do so. Nevertheless, in an unlawful exercise of blind ambition by the Committee’s lawyer and political brazenness by certain members of the Committee, a document titled “subpoena,” was sent by the Committee’s lawyer to the Office of the Governor (this document will be referred to herein as “Subpoena” for simplicity). The Subpoena demands enormous volumes of information from the Executive Branch of Alabama government, which the Committee’s lawyer, a private citizen, is apparently interested in browsing through. As explained below, the Subpoena is both unlawful and unenforceable. It is also patently abusive, outrageously overbroad, unduly burdensome and far outside the legitimate scope of this Committee’s inquiry into the Articles of Impeachment brought against Governor Bentley. Accordingly, the Office of the Governor and Governor Bentley in his official capacity object to the Subpoena and, in the alternative, move to quash the Subpoena.

**I. THE SUBPOENA WAS ISSUED WITHOUT AUTHORITY**

**A. Alabama Law Does Not Permit Issuance of the Subpoena**

There is no provision of the Alabama Constitution or of the Alabama statutory code that confers on the House Judiciary Committee, its chairman or its outside lawyer the authority to

issue or enforce subpoenas. And indeed, no such authority exists.

In fact, the legislature has repeatedly recognized that the Judiciary Committee does not have subpoena authority, and the House of Representatives specifically *declined* to provide subpoena authority to the Committee in connection with this impeachment investigation. At the time the House was considering articles of impeachment against the Governor, legislation was proposed to provide for subpoena authority to standing legislative committees. That proposed legislation specifically recognized that “[e]xisting law does not provide for a comprehensive method for legislative committees to subpoena witnesses and documents.” House Bill 557 (April 19, 2016) (Exhibit A) (emphasis added); Senate Bill 69 (February 2, 2016) (Exhibit B) (same); *see also* House Bill 57 (August 18, 2016) (Exhibit C). Given this recognized lack of subpoena authority, the proposed legislation “would provide standing committees of the House of Representatives ... with the authority to subpoena witnesses to testify before the committee and to subpoena documents as needed to conduct the business of the respective committee.”<sup>1</sup> House Bill 557; Senate Bill 69; *see also* House Bill 57.

Moreover, in legislation drafted specifically to address this impeachment investigation, it was recognized that “**there is no specific provision [under existing law] for compelling testimony or the production of evidence in an impeachment investigation conducted pursuant to rules of the House of Representatives.**” House Bill 57 (emphasis added). Unlike House Bill 557 and Senate Bill 69, this bill did not contemplate vesting this (or any) Committee with subpoena authority. Nor did the bill recognize or contemplate any authority by the full House to issue or enforce subpoenas in connection with the House’s constitutional impeachment

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<sup>1</sup> Nor does the legislature have the power to enforce subpoenas. Indeed it has repeatedly recognized as much. *See, e.g.*, House Bill 557 (“This bill would further provide for enforcement by the circuit court regarding persons failing to properly respond to a legislative subpoena.”); House Bill 57 (“A person failing to obey the order may be punished by the court for contempt.”).

authority. Rather, House Bill 57 sought to “require the Circuit Court for the 15th Judicial Circuit to issue a subpoena to compel testimony and the production of evidence upon application by the committee.” *Id.* The House declined to adopt House Bill 57, House Bill 557, Senate Bill 69 or any other legislation to authorize the issuance or enforcement of subpoenas in connection with this investigation.<sup>2</sup>

It is clear that this choice was deliberate. Indeed, the legislature has intentionally provided subpoena authority in some circumstances and not in others. For example, Ala. Code § 29-2-41 confers subpoena authority on the Contract Review Oversight Committee. But here, the legislature decided *not* to confer subpoena authority to the Judiciary Committee in connection with this impeachment investigation (or for any other purpose). That the Committee, its chairman and its Special Counsel are nevertheless claiming such authority is bizarre and outrageous. The Subpoena issued to the Governor’s Office is patently invalid.

**B. No “Plenary” Authority Under the Constitution Authorizes Issuance of the Subpoena.**

Special Counsel has claimed that the Committee has so-called “plenary” subpoena power simply by virtue of the impeachment authority vested in the House of Representatives by Ala. Const. Art. VII, § 173. Special Counsel is incorrect.

Certainly, it is the case that some legislative bodies have, in certain circumstances, been found to possess inherent or plenary subpoena authority. *See, e.g., Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975) (“Issuance of subpoenas such as the one in question here has long been held to be a legitimate use by Congress of its power to investigate.”); *Committee on*

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<sup>2</sup> Even the Chairman of the Committee has recognized that there is no precedent for this Committee’s assumption of subpoena authority. *E.g.*, Committee ready to test subpoena power on Bentley impeachment, *available at* [www.al.com](http://www.al.com) (Sept. 27, 2016). Even members of the Judiciary Committee recognized that the Committee lacks the authority to issue and enforce subpoenas. *See* Impeachment committee approves rules allowing for Bentley subpoena, *available at* [www.theplainsman.com](http://www.theplainsman.com) (Sept. 27, 2016).

*Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 64 (2003) (“Because this dispute concerns an allegation that Ms. Miers and Mr. Bolten failed to comply with duly issued congressional subpoenas, and such subpoena power derives implicitly from Article I of the Constitution, this case arises under the Constitution for purposes of § 1331.”).

These cases are very different from the Subpoena at issue here.

First, in each of these cases – and indeed in every case of which the Governor’s Office is aware – the legislative body claiming plenary authority had actually claimed such authority. We are aware of no court that has found that a legislative committee could claim subpoena authority that was specifically denied it by the full legislative body of which it is a part. Such a conclusion would be preposterous.

Second, to the extent that there exists plenary authority to issue a subpoena, that authority belongs to the House of Representatives as a whole, not a Committee or Subcommittee, or to the chairman or outside lawyer for a Committee. It is the House of Representatives that has impeachment authority pursuant to Article VII, § 173 of the Alabama Constitution. Article VII makes no mention of Committees or Subcommittees. The Subpoena was not issued by the full House. And even if the House had subpoena power in connection with its impeachment authority (which the Governor’s Office does not concede), it has expressly declined to delegate that authority to this Committee. *See* House Bill 57; House Bill 557.

Third, even if the House could be deemed to have inherent subpoena authority by virtue of its impeachment power, and even if it had delegated such authority to this Committee or its Subcommittee, any such hypothetical subpoena power would not be without limits. In those contexts where courts have found that a legislative body does have subpoena authority, the exercise of such power is appropriate only where the legislative body is acting “with respect to

matters that the Constitution places within the jurisdiction of either House.” *Eastland*, 421 U.S. at 504. The United States Supreme Court has expressly instructed that “Congress is not invested with a ‘general’ power to inquire into private affairs. The subject of any inquiry always must be one on which legislation could be had.” *Id.* In other words, subpoena authority, to the extent it exists, may be exercised solely in connection with and “in furtherance of a legitimate task” of the legislative body. *Id.* at 505. Here, it is plain that the Judiciary Committee has overstepped any reasonable bounds and gone far outside of what could possibly be considered a legitimate investigation into allegedly impeachable conduct.

Neither the House nor the Committee has identified any conduct by the Governor that is even potentially impeachable, or even allegations that if true, might appropriately lead to impeachment. In fact, and as conceded by Special Counsel, this Committee is on a fishing expedition for information upon which to base any ascertainable impeachable offense. *See* August 25, 2016 Letter from Jack Sharman (claiming that the “impeachable offenses cannot be defined in advance of full investigation of the facts ....”). Special Counsel’s transparent tactic is thus to use an immense net to conduct a fishing expedition in the hopes of getting lucky and finding anything to justify this impeachment investigation. There can be no other explanation for the Subpoena’s demand for 46 categories of documents (some of which have multiple subcategories), seeking the likes of:

- Information concerning each and every employee of the Office of the Governor during the entirety of the Governor’s tenure in office, including all employment policies in place in the Governor’s Office , the identities of all such employees, and the work, cellular and “mobile device” numbers of all Governor’s Office employees. (Request Nos. 1-3)
- All documents and electronic data concerning any use of State aircraft by any employee of the Office of the Governor or by any person at the direction of the Office of the Governor -- whether or not the Governor and/or Ms. Mason were traveling or had requested such travel -- for the entirety of the Governor’s tenure in office. (Request No. 7)

- All documents and electronic data concerning any request for reimbursement made by Governor Bentley, without regard to when or for what the reimbursement was sought. (Request No. 12)
- All documents and electronic data concerning any files relating to: Dianne Bentley, the Governor’s campaign (Bentley for Governor, Inc.), the Alabama Council for Excellent Government, Matt Hart, Mike Duffy “or any other person involved in the investigation, indictment, prosecution or trial of” Mike Hubbard, and “the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.” (Request No. 23)
- All documents and electronic data concerning “the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.” (Request No. 43; *see also* Request No. 23)

Even if the House could be deemed to have authority to subpoena by virtue of its “plenary” impeachment authority, and even if it had conferred that authority on this Committee or a subcommittee (which it did not), such authority would not permit this boundless dragnet for information from the Executive Branch.

**C. The Subpoena Is Also Invalid Because the Committee’s Proceedings Deny the Governor Due Process**

Even if the Subpoena somehow could survive all of the above, it would nevertheless be ruled invalid by a court because it has been issued in connection with proceedings that lack constitutionally mandated due process and, thus, this Committee is not acting in “furtherance of a legitimate task” of the House of Representatives. *Eastland*, 421 U.S. at 505. In fact, the Committee continues to refuse to recognize the authority of the Alabama Supreme Court, which has repeatedly held that the subject of impeachment proceedings is entitled to due process. *See generally*, *The Constitutional Standard for Impeachment of a Governor of Alabama* (August, 2016); *see also State v. Blake*, 225 Ala. 124, 126 (1932); *State ex rel. Strange v. Clark*, No. 1151021, at p. 7 (Ala. July 27, 2016); *Lewis v. State ex rel. Evans*, 387 So.2d 795, 800 (Ala. 1980); *State v. Hasty*, 184 Ala. 121, 124 (1913); *State ex rel. James v. Reed*, 364 So.2d 303, 307

& n.3 (Ala. 1978); *McCarley v. Sanders*, 309 F. Supp. 8, 11 (M.D. Ala. 1970); Ala. Const. Art. V, § 127. The Committee also continues to refuse to recognize that the House of Representatives, when it authorized this Committee to conduct its investigation, directed it to afford the Governor due process. *See* House Rule 79.1. The Committee has even chosen to disregard its own finding that due process must legally be provided to the Governor. *See* Background on House Judiciary Impeachment Rules.

Despite the above, the Committee and its Special Counsel insists that the Governor is not entitled to due process, and these proceedings continue to deprive the Governor of basic due process rights.

First, the Committee's investigation is being conducted pursuant to Articles of Impeachment that are unconstitutionally vague and do not state the charges against Governor Bentley with the required specificity. *See* Governor Robert Bentley's Motion to Suspend. In fact, the Articles do not state *any* basis for the charges against the Governor beyond reciting the conclusory allegations of corruption in office and willful neglect of duty. As is discussed more fully below, this complete derogation of the constitutional requirement to state the impeachment charges with sufficient specificity has resulted in a Subpoena that is sweepingly overbroad. *See infra* Part II of this Objection. Indeed, the entire purpose of the Subpoena is admittedly to fish for any possible justification for the Articles of Impeachment. *See* August 25, 2016 Letter from Jack Sharman. An impeachment in Alabama, however, is considered a criminal proceeding at which the accused must be afforded due process. *State ex rel. Strange v. Clark*, No. 1151021, at p. 7 (Ala. July 27, 2016); *see also Lewis v. State ex rel. Evans*, 387 So.2d 795, 800-801 (Ala. 1980). "Under Article 1, Section 6 [of the Alabama Constitution], the right of the accused to demand the nature and cause of the accusation is a fundamental component of the right to due

process; the defendant must fully and intelligently understand the charge to adequately prepare a defense.” *Newberry v. State*, 493 So.2d 995, 997 (Ala. 1986); *Gayden v. State*, 262 Ala. 468, 469 (1955) (“No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding ...”) (quotation marks omitted); *Nelson v. State*, 50 Ala. App. 285, 288 (Ala. Crim. App. 1973) (same).

Thus, in Alabama, even those officers who are empowered by statute and court rule with subpoena authority have limits on that power. *Ex parte Fitch*, 715 So.2d 873, 875-6 (Ala. Crim. App. 1997). So, for example, in a criminal case, a subpoena cannot be used as a discovery tool and may not be “employed as a fishing expedition.” *Id.* Here, the Committee purports to assume “plenary” authority with no bounds and to confer that authority on a private citizen to engage in a sweeping fishing expedition, evidently looking for any basis upon which to justify the Articles of Impeachment. Such actions are outside the scope of the authority of any law enforcement officer in Alabama, and certainly exceed any possible legitimate constitutional authority of the House and of this Committee.

Second, the Committee is unconstitutionally biased in that three of its members are also the Governor’s accusers and/or have made public statements demonstrating that they are personally biased against the Governor and, in fact, have prejudged the matter of his impeachment. *See* Governor Robert Bentley’s Motion for Recusal of Committee Members. The inclusion of those Committee members violates the Governor’s due process right to a “competent *and impartial* tribunal legally constituted to determine the right involved....” *Med.*

*Servs. Admin. v. Duke*, 378 So. 2d 685, 686 (Ala. 1979) (quotation marks omitted) (emphasis added).

Moreover, Special Counsel has announced his intention -- and in fact has begun -- to conduct this matter as a secret investigation with no participation by the Governor, his counsel or even this Committee. This investigation is in direct violation of the Governor's due process rights, which require that the Governor be afforded, at a minimum, "an orderly proceeding appropriate to the case or adapted to its nature, just to the parties affected, and adapted to the ends to be attained; one in which a person has an opportunity to be heard, and to defend, enforce, and protect his rights before a competent and impartial tribunal legally constituted to determine the right involved...." *Med. Servs. Admin.*, 378 So. 2d at 686 (quotation marks omitted). This failure to comply with due process renders the course on which the Committee has embarked outside of the legitimate scope of any impeachment authority conferred on it by the House. Accordingly any subpoena issued in connection with this matter would be invalid.

Finally, as discussed below, the sweepingly broad scope of the Subpoena encompasses documents and information concerning matters that, as a matter of law, cannot form the basis of a charge of impeachment and, as a matter of law, are immune from discovery pursuant to applicable privileges and immunities. As such, the Subpoena is not legitimately within any conceivable constitutional mandate of the House or any possible authority that this Committee might have to issue subpoenas. Accordingly, the Subpoena signed by Chairman Jones and served by Special Counsel is invalid.

## **II. THE SUBPOENA IS UNREASONABLE, OVERLY BROAD, UNDULY BURDENSOME AND HARASSING**

The Subpoena served by Special Counsel is fatally overbroad and it would be unduly burdensome and cause an unreasonable and unnecessary expense to the citizens of Alabama for

the Governor's Office to search for and produce the documents requested by the Subpoena. The Subpoena delves into matters extraneous to any legitimate inquiry by this Committee, seeks documents outside of the possession, custody or control of the Office of the Governor, seeks documents that have already been voluntarily produced by the Governor's Office, and constitutes an unlimited fishing expedition that would cost the taxpayers hundreds of thousands of dollars. This transparent attempt to uncover fodder for the Governor's political foes to use against him is beneath the dignity of this Committee and a tremendous waste of taxpayer resources.

**A. The Subpoena Constitutes an Unlimited and Unwarranted Fishing Expedition Into Matters for Which the Governor Cannot, as a Matter of Law, Be Impeached.**

The Subpoena on its face seeks documents and information concerning the Governor's first term in office, which cannot form the basis for impeaching the Governor. Accordingly, the Subpoena is overbroad, seeks documents and information not reasonably related to this Committee's legitimate inquiry and, in fact, constitutes an unwarranted fishing expedition.

The Subpoena, in its "Definitions and Instructions" states that "[u]nless otherwise specified, all items shall encompass the period of time beginning January 17, 2011 to the present." *See also* Requests Nos. 1-5, 7-11, 18-21, 23-35, 37, 42-46 (which do not specify a time period and, therefore, expressly encompass documents from January 17, 2011 to the present); Requests Nos. 6, 12-17 (seeking documents and information from January 1, 2013 to the present), and Requests Nos. 22, 36, 38-40 (seeking documents and information from January 1, 2014 to the present). Moreover, Requests Nos. 23 and 44 expressly seek every single document and scrap of electronically stored information concerning the Governor's "2014 gubernatorial campaign, including but not limited to Bentley for Governor, Inc." The Subpoena thus expressly undertakes a far-ranging inquiry into the Governor's first term and his campaign.

However, the Supreme Court of Alabama has concluded that an official “cannot be removed because of his conduct during a previous term.” *Lewis*, 387 So. 2d at 807; *see also Parker*, 333 So. 2d at 808; *State v. Hasty*, 184 Ala. at 125. The re-election of the Governor to a second term “cut[] off the right to remove him from the subsequent term for said conduct during the previous term.” *Hasty*, 184 Ala. at 125. “It seems to be the policy of our Constitution to make each term independent of the other and to disassociate the conduct under one term from the qualification or right to fill another term, at least so far as the same may apply to impeachment proceedings, and as distinguished from the right to indict and convict an offending official. *Id.* (“We therefore sustain the motion of respondent to strike from the information all grounds of impeachment based upon his conduct during the previous term of office.”). Accordingly, the Office of the Governor objects to the Subpoena, generally, and to the Requests identified above, specifically, as overly broad, not reasonably limited in temporal scope and on the grounds that they constitute an improper fishing expedition into matters that are not within the impeachment power of the House, all to the cost and detriment of the taxpayers of Alabama.

**B. The Subpoena Is Not Reasonably Limited to Matters within the Legitimate Scope of the Committee’s Inquiry.**

The Subpoena seeks documents and information far beyond what could be deemed relevant to the charges set forth in the Articles of Impeachment. The inquiry embodied in the Subpoena would require the Governor’s Office to search each and every piece of paper and millions of emails at taxpayer expense for information that bears no relationship to any impeachment inquiry that could legitimately be undertaken. Indeed, it is clear from the Subpoena that its true purpose is to seek to uncover some potential fodder for the Governor’s political foes, all on the taxpayers’ dime.

As the Governor's Office has made the Committee aware, the Articles of Impeachment are unconstitutionally vague and do not adequately inform the Governor of the charges being brought against him. Seeking to capitalize on the ambiguity in the Articles of Impeachment, Special Counsel -- with the assistance of Chairman Jones -- seeks an unlimited review of forty-six incredibly broad categories of information. Those requests, however, largely bear no relationship to the charges against the Governor as even the Special Counsel purports to understand them.

The Articles of Impeachment charge the Governor with "willful neglect of duty" and "corruption in office." According to Special Counsel in his August 25, 2016 letter: "I know that you have been paying close attention to the series of events that led to this investigation. The underlying main concerns that have driven these legislative inquiries are well-publicized and are not so unascertainable as to not allow the Governor to prepare or to respond fully to the Committee's demands for information." (Exhibit D) It is, therefore, the understanding of the Governor's Office that the Articles of Impeachment arise out of certain media reports concerning the Governor's purported relationship with Rebekah Mason, his termination of Spencer Collier and Mr. Collier's claims that the Governor purportedly misused state resources to further and/or conceal a relationship with Ms. Mason. *See also* House Resolution 226 (Exhibit E) (identifying the grounds for impeachment as being based on: "the Governor's inappropriate relationship with a married senior political advisor and official action taken to conceal this relationship, as well as official action taken to the detriment of the Secretary of the Alabama Law Enforcement Agency (ALEA) and other agency employees").

In contrast, the Subpoena seeks documents and information completely unrelated to these issues, including, among other things:

- Information concerning each and every employee of the Office of the Governor during the entirety of the Governor's tenure in office, including all employment policies in place in the Governor's Office, the identities of all such employees, and the work, cellular and "mobile device" numbers of all Governor's Office employees. (Request Nos. 1-3)
- All documents and electronic data concerning any use of State aircraft by any employee of the Office of the Governor or by any person at the direction of the Office of the Governor -- whether or not the Governor and/or Ms. Mason were traveling or had requested such travel -- for the entirety of the Governor's tenure in office. (Request No. 7)
- All documents and electronic data concerning any lease or charter of any aircraft for travel by the Governor for the entirety of the Governor's tenure in office. (Request No. 11)
- All documents and electronic data concerning any request for reimbursement made by Governor Bentley, without regard to when or for what the reimbursement was sought. (Request No. 12)
- All documents and electronic data concerning any request by any person for reimbursement from the National Governor's Association or the Republican Governor's Association from January 1, 2013 to the present without regard to who submitted the request or for what the reimbursement was sought. (Request Nos. 14 and 15)
- All documents and electronic data concerning any request by any person for reimbursement from Bentley for Governor, Inc. from January 1, 2013 to the present without regard to who submitted the request or for what the reimbursement was sought. (Request No. 16)
- All documents and electronic data concerning any non-disclosure agreement "signed by or proffered to any person by or on behalf of" the Governor's Office. (Request No. 20)
- All documents and electronic data "evidencing or relating to any and all temporary or permanent removals, reassignments, replacements or terminations of any person in the Governor's Office. (Request No. 21)
- All documents and electronic data concerning any files relating to:
  - Dianne Bentley,
  - the Governor's campaign (Bentley for Governor, Inc.),
  - the Alabama Council for Excellent Government,

- Matt Hart, Mike Duffy “or any other person involved in the investigation, indictment, prosecution or trial of” Mike Hubbard, and
- “the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.”

(Request No. 23)

- All documents and electronic data concerning the Alabama Council for Excellent Government (Request No. 42; *see also* Request Nos. 46 and 23)
- All documents and electronic data concerning and “the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.” (Request No. 43; *see also* Request No. 23)
- All documents and electronic data concerning the Governor’s 2014 gubernatorial campaign, including but not expressly limited to Bentley for Governor, Inc.” (Request No. 44; *see also* Request Nos. 46 and 23)
- All documents and electronic data concerning any Statement of Economic Interest filed by the Office of the Governor. (Request No. 45)
- All documents and electronic data concerning any communications with the Governor’s Office relating to:
  - the Alabama Council for Excellent Government,
  - JRM Enterprises and/or
  - Bentley for Governor, Inc.

(Request No. 46; *see also* Request No. 23)

There is simply no basis for this unlimited inquiry into matters that are not conceivably related to any legitimate investigation by the Committee. Moreover, a search for every single document or pieces of electronic data relating to the topics listed above -- which would entail, among other things, a search of over a million emails -- would cost the Alabama taxpayers hundreds of thousands of dollars, all to permit Special Counsel -- a private citizen -- to conduct a “star chamber”-like fishing expedition into matters that do not bear on the claims made in the Articles of Impeachment. Accordingly, the Office of the Governor and Governor Bentley object

to the Subpoena, generally, and to the Requests identified above, specifically, on the grounds that they are not reasonably limited in subject matter, are overly broad and harassing and on the grounds that it would be unduly burdensome and oppressive to search for a produce the information sought, which does not in any way reasonably relate to any legitimate investigation of the impeachment charges brought.

**C. The Subpoena Expressly Seeks the Production of Attorney Client Privileged Communications**

The Subpoena improperly attempts to subvert the attorney client privilege and expressly seeks documents that are immune from disclosure as privileged. In particular, the Subpoena seeks *all* documents and data:

- Relating to “any nondisclosure or confidentiality agreements signed or proffered to any person by or on behalf of the Office of the Governor,” regardless of whether those documents reflect legal advice to the Office of the Governor. (Request No. 20)
- Relating to “any and all temporary or permanent removals, reassignments, replacements or terminations of any persons in the Office of the Governor,” regardless of whether those documents reflect legal advice to the Office of the Governor. (Request No. 21)
- Relating to “any and all temporary or permanent removals, reassignments, replacements, or terminations of any officers or employees of the Alabama Law Enforcement Agency or any of its subordinate agencies, departments, or divisions,” regardless of whether those documents reflect legal advice to the Office of the Governor. (Request No. 22)
- Relating to “any formal or informal files maintained” by the Governor’s Office (including its legal counsel) concerning ten topics, regardless of whether those documents reflect legal advice to the Office of the Governor. (Request No. 23)
- Relating to communications between the Office of the Governor and Jon Mason -- the head of Serve Alabama, the Governor’s faith-based initiative -- regardless of whether attorneys for the Governor’s Office or the agency were included on the communications or whether the communications were for the purpose of obtaining legal advice. (Request No. 34)
- Relating to meetings at which the Governor and Spencer Collier were present during the time in which Mr. Collier was the Secretary of ALEA, regardless of whether the meetings included attorneys for the Office of the Governor and ALEA or were for the purpose of obtaining legal advice. (Request No. 36)

- Relating to meetings at which the Governor and Ms. Mason -- the Governor's communications director/chief political advisor -- were present, regardless of whether the meetings included attorneys for the Office of the Governor or were for the purpose of obtaining legal advice. (Request No. 37)
- Relating to communications between the Office of the Governor and Spencer Collier during the time in which Mr. Collier was the head of ALEA, regardless of whether the communications included attorneys for the Office of the Governor or ALEA or were for the purpose of obtaining legal advice. (Request No. 38)
- Relating to communications between the Office of the Governor and Stan Stabler during the time in which Mr. Collier was being investigated and during the time in which Mr. Stabler was the Secretary of ALEA, regardless of whether the communications included attorneys for the Office of the Governor or ALEA or were for the purpose of obtaining legal advice. (Request No. 39)
- Relating to communications between the Office of the Governor and Ray Lewis during the time in which Mr. Lewis was the head of the Governor's protective detail, regardless of whether the communications included attorneys for the Office of the Governor or ALEA or were for the purpose of obtaining legal advice. (Request No. 40)
- Concerning the medical leave and termination of Spencer Collier, regardless of whether those documents reflect legal advice to the Office of the Governor. (Request No. 41)
- Concerning the Alabama Council for Excellent Government, regardless of whether those documents reflect legal advice to the Office of the Governor. (Request No. 42; *see also* Request No. 23)
- Concerning the "investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard" regardless of whether those documents reflect legal advice to the Office of the Governor. (Request No. 43; *see also* Request No. 23)
- Concerning the Governor's 2014 gubernatorial campaign, regardless of whether those documents reflect legal advice to the Office of the Governor. (Request No. 44; *see also* Request No. 23)
- Relating to any "Statements of Economic Interests filed by the Office of the Governor with the Alabama Ethics Commission," regardless of whether those documents reflect legal advice to the Office of the Governor. (Request No. 45)
- Concerning communications on five topics, regardless of whether those communications included an attorney for the Office of the Governor or were for the purpose of obtaining legal advice. (Request No. 46)

These Requests plainly encompass attorney client and common interest privileged communications within their scope. Moreover, Requests Nos. 33, 34 38, 39 and 40 all expressly include documents relating to communications by and between attorneys for the Governor, his chief political advisor and/or attorneys for agencies of the executive branch or meetings at which such attorneys were present, regardless of whether the communications or the meetings were for the purposes of obtaining legal advice.

Privileged communications are immune from disclosure. *E.g.*, Ala. R. Evid. 502(b). Both a public officer and public organization or entity may be a party to and claim privilege with respect to attorney client privileged communications. *See* Ala. R. Evid. 502(a)(1) (defining “client”); *Ex parte City of Leeds*, 677 So.2d 1171, 1173 (Ala. 1996). The Subpoena not only fails to recognize this absolute immunity for privileged communications, but affirmatively and expressly seeks the production of documents that are immune from disclosure. Accordingly, the Office of the Governor objects to the Subpoena and to the Requests identified above on the grounds that they improperly seek the production of documents and information that are privileged.

**D. The Subpoena Is Unreasonably and Oppressively Overbroad, Seeks Irrelevant Information and Compliance with the Subpoena as Drafted Would Result in a Tremendous and Unnecessary Expense to Alabama Taxpayers**

To the extent that the Requests in the Subpoena could possibly be deemed to seek information reasonably within the scope of this Committee’s authority, the Subpoena is grossly overbroad, seeks duplicative information, seeks information outside of the possession, custody or control of the Office of the Governor, and seeks information that has already been voluntarily produced to Special Counsel - a fact that Special Counsel has ignored in his quest to press the unwarranted claim that the Governor’s Office has not been cooperative in this process. The

search for and production of each and every document or scrap of electronic data responsive to these Requests -- which would entail a search and review of millions of emails -- would result in a tremendous waste of taxpayer money.

The Subpoena seeks, among other things:

(1) “The complete calendar of Governor Robert Bentley in native electronic format, including any and all electronic data and information evidencing or reflecting any changes made at any time thereto.” (Request No. 4)

The Governor’s calendar for his second term has been produced. To reproduce it, in “native” format would be unreasonably burdensome and wasteful of taxpayer resources. Moreover, the production of “all electronic data and information evidencing or reflecting any changes made” to the Governor’s calendar would similarly be needlessly wasteful and Special Counsel has provided no justification for the production of such information which would, in fact, reflect the day-to-day administration of the Governor’s calendar. In the absence of any claim that the Governor’s calendar was somehow tampered with -- an absurdity -- the requested information is irrelevant. Accordingly, the Office of the Governor objects to this Request on the grounds that the information sought has been produced and, to the extent it has not, the Request is overly broad, unreasonably burdensome, seeks information not relevant to the impeachment of the Governor and calls for the production of confidential and private information of individuals unrelated to this impeachment matter.

(2) The Governor’s daily and weekly schedules from January 1, 2013 to the present, “including any and all documents evidencing or relating to any changes made at any time thereto.” (Request No. 6)

The Governor's Office objects to this Request as unreasonably cumulative and duplicative of Request No. 4 and reasserts those objections set forth in response to Request No 4 herein.

(3) All documents concerning any work, services or goods performed or provided by Ms. Mason, Jon Mason, RCM Communications, or JRM Enterprises for or to the State of Alabama, the Governor, the Office of the Governor, the University of Alabama, Alabama Council for Excellent Government, or Bentley for Governor, Inc. (Request No. 18)

The Office of the Governor objects to this Request on the grounds that it seeks the production of information that is expressly outside of the possession, custody or control of the Office of the Governor. Should the Committee wish to obtain records relating to services or work provided to the State of Alabama, Governor Bentley individually, the University of Alabama, the Alabama Council for Excellent Government or Bentley for Governor, Inc., it should seek such records from those persons or entities. Moreover, to the extent this Request seeks documents concerning work or services provided to the Office of the Governor, this Request is so overbroad as to be unintelligible. For example, all documents relating to any work or services performed or provided by Ms. Mason would, as drafted, encompass each and every email or other communication sent or received by Ms. Mason while acting as the director of communications or chief political advisor to the Office of the Governor, regardless of the topic or the date. To require the Office of the Governor to search for and produce all such communications, which are wholly irrelevant to this matter, would be unduly burdensome and oppressive and would result in a substantial and needless expenditure of taxpayer dollars on a fishing

expedition. Accordingly, the Governor's Office objects to this Request as vague, ambiguous, overly broad, unduly burdensome and harassing.

(4) All compensation paid to Ms. Mason, Jon Mason, RCM Communications, Inc. or JRM Enterprises, Inc. (Request No. 19)

The Governor's Office objects to this Request as unreasonably cumulative and duplicative of Request No. 18 and reasserts those objections set forth in response to Request No 18 herein.

(5) All documents concerning the removal, reassignment, replacement, or termination of any officers or employees of ALEA. (Request No. 22)

The Governor's Office objects to this Request on the grounds that it seeks documents outside of the possession, custody and control of the Office of the Governor and expressly within the possession, custody and control of ALEA. Moreover, the Office of the Governor objects to this Request as overbroad in that it seeks the production of documents that are wholly irrelevant to this impeachment investigation. That is, the impeachment is based, in part, on the supposed termination or removal of ALEA personnel, including Mr. Collier, purportedly based on or because of their claims that the Governor had misused state funds. *See, e.g.*, House Resolution 226. This Request is not so limited, but rather extends to the termination or removal of any ALEA officer or employee - not just officers and employees removed by or at the direction of the Governor's Office and regardless of the basis for such removal. To the extent that this Request does seek relevant information, for example information concerning the termination of Mr. Collier, the Governor's Office has already voluntarily produced responsive documents and the production of those documents again, in response to this

Subpoena, would be wasteful and burdensome. Moreover, requiring the Governor's Office to search through its files and emails for every single piece of paper or piece of electronic data related to this topic would result in an enormous waste of taxpayer resources for information that is simply not relevant to this Committee's investigation.

(6) All documents concerning any file in the Office of the Governor relating to: Spencer Collier, Jon Mason, or JRM Enterprises, Inc. (Request No. 23(a), (c) and (h))

The Governor's Office objects to this Request as overbroad in that it seeks the production of documents that are wholly irrelevant to this impeachment investigation. For example, any file that the Governor's Office might maintain concerning Jon Mason -- who is the director of Serve Alabama -- would be completely irrelevant to this investigation. Similarly, any general file maintained concerning Spencer Collier, the former head of ALEA, is irrelevant and any possibly relevant information is encompassed within other, more specific requests. *See* Request No. 41. Accordingly, the Governor objects to the production of general "files" (to the extent such files could be deemed to exist) concerning Mr. Mason, his company or Mr. Collier as overly broad and outside of the legitimate scope of this Committee's inquiry.

(7) A list of all email accounts used by the Governor. (Request No. 26)

The Governor's Office objects to this Request on the grounds that it seeks information outside of the possession, custody or control of the Office of the Governor. As has been reported on in the press, the Governor does not maintain a State of Alabama email address.

(8) A "complete" list of all cellular phones or mobile devices issued to or used by Governor Bentley, including telephone numbers, account numbers, the name of the carrier, dates

of use or service and all bills and usage histories for any such phone or device. (Request Nos. 29 and 30)

The Governor's Office objects to this Request on the grounds that it seeks information outside of the possession, custody or control of the Office of the Governor. To the extent this Request seeks information concerning any state issued cellular telephone or mobile device, this Request is overly broad, unduly burdensome and harassing. There is no basis for the Committee to seek or have access to a record of each and every communication that the Governor has had with any person for the entirety of his two terms in office. Accordingly, the Office of the Governor objects to this Request as outside the scope of any legitimate inquiry, overly broad and harassing.

(9) All communications between the Governor and Ms. Mason, regardless of topic or date. (Request No. 33)

The Office of the Governor objects to this Request on the grounds that it seeks the production of documents outside of the possession, custody or control of the Governor's Office and expressly within the possession, custody or control of Governor Bentley and Ms. Mason. The Office of the Governor further objects to this Request on the grounds that it is overly broad and is not reasonably limited to communications that would fall within the legitimate scope of this Committee's inquiry. Rather, it seeks the production of every communication between the Governor of Alabama and the Governor's communications director/senior political advisor regardless of topic. Moreover, requiring the Governor's Office to search through its files and emails for every single piece of paper or piece of electronic data related to this topic would result in an enormous waste

of taxpayer resources for information that is simply not relevant to this Committee's investigation.

(10) All communications between the Governor and Jon Mason, regardless of topic of date. (Request No. 34)

The Office of the Governor objects to this Request on the grounds that it seeks the production of documents outside of the possession, custody or control of the Governor's Office and expressly within the possession, custody or control of Governor Bentley, Mr. Mason and/or Serve Alabama. The Office of the Governor further objects to this Request on the grounds that it is overly broad and is not reasonably limited to communications that would fall within the legitimate scope of this Committee's inquiry. Rather, it seeks the production of every communication between the Governor of Alabama and the head of Serve Alabama (a faith-based initiative) regardless of topic. Moreover, requiring the Governor's Office to search through its files and emails for every single piece of paper or piece of electronic data related to this topic would result in an enormous waste of taxpayer resources for information that is simply not relevant to this Committee's investigation.

(11) Any audio or video recordings of any part of any telephone or other conversations between the Governor and Ms. Mason. (Request No. 35)

The Office of the Governor objects to this Request on the grounds that it seeks the production of documents that are outside of the possession, custody or control of the Office of the Governor and/or are within the public domain and, as such, equally accessible to Special Counsel as they are to the Office of the Governor. The Governor's

Office further objects to this Request on the grounds that it is overly broad and not reasonably calculated to lead to evidence relevant to any potentially impeachable offense.

(12) All documents concerning any meetings at which both the Governor and Spencer Collier were present from January 1, 2014 to the present, regardless of topic. (Request No. 36)

The Office of the Governor objects to this Request on the grounds that it is overly broad and is not reasonably limited to documents that would fall within the legitimate scope of this Committee's inquiry. Rather, it seeks the production of every single document concerning any meeting between the Governor of Alabama and the head of ALEA regardless of topic. There is simply no justification for the sweeping scope of this Request. Moreover, requiring the Governor's Office to search through its files and emails for every single piece of paper or piece of electronic data related to this topic would result in an enormous waste of taxpayer resources for information that is simply not relevant to this Committee's investigation.

(13) All documents concerning any meeting at which both the Governor and Ms. Mason were present, regardless of topic, date or other attendees. (Request No. 37)

The Office of the Governor objects to this Request on the grounds that it is overly broad and is not reasonably limited to documents that would fall within the legitimate scope of this Committee's inquiry. Rather, it seeks the production of every document concerning any meeting between the Governor of Alabama and the Governor's director of communications/chief political advisor, regardless of topic. There is simply no justification for the sweeping scope of this Request. Moreover, requiring the Governor's Office to search through its files and emails for every single piece of paper or piece of

electronic data related to this topic would result in an enormous waste of taxpayer resources for information that is simply not relevant to this Committee's investigation.

(14) All communications between the Office of the Governor and Spencer Collier, Stan Stabler or Ray Lewis from January 1, 2014 to the present, regardless of topic. (Request Nos. 38-40)

The Office of the Governor objects to these Requests on the grounds that they are overly broad and not reasonably limited to documents that would fall within the legitimate scope of this Committee's inquiry. Rather, these Requests seek the production of every communication between any member of the Office of the Governor and Mr. Collier, Mr. Stabler and Mr. Lewis (the two Secretaries of ALEA and the head of the Governor's protective detail), regardless of topic. There is simply no justification for the sweeping scope of these Requests. Moreover, requiring the Governor's Office to search through its files and emails for every single piece of paper or piece of electronic data related to these topics would result in an enormous waste of taxpayer resources for information that is simply not relevant to this Committee's investigation.

(15) All documents concerning the medical leave and termination of Spencer Collier. (Request No. 41)

The Office of the Governor objects to this Request on the grounds that it has voluntarily produced documents responsive to this Request and requiring the Office of the Governor to reproduce those documents again in response to the Subpoena would be wasteful and unduly burdensome. Moreover, requiring the Governor's Office to search through its files and emails for every single piece of paper or piece of electronic data

related to this topic would result in an enormous waste of taxpayer resources for information that is simply not relevant to this Committee's investigation.

(16) Virtually every document sent or received by or concerning Rebekah Mason, who was first the communications director for the Office of the Governor and, later, senior political advisor, including:

(a) "The complete calendar of Rebekah Mason in native electronic format, including any and all electronic data and information evidencing or reflecting any changes made at any time thereto." (Request No. 5)

The Office of the Governor objects to each of these Requests on the grounds that, taken together, they are overly broad, unduly burdensome and harassing and go far beyond any legitimate inquiry into impeachable conduct by the Governor. As such, these Requests amount to an abuse of process. The Governor's Office further objects to this Request on the grounds that it seeks information irrelevant to this Committee's investigation. The Governor's Office further objects to this Request on the grounds that it seeks the production of information that is outside of the possession, custody or control of the Office of the Governor.

(b) every piece of paper related to any use of state ground transportation by Ms. Mason. (Request No. 8)

The Office of the Governor objects to each of these Requests on the grounds that, taken together, they are overly broad, unduly burdensome and harassing and go far beyond any legitimate inquiry into impeachable conduct by the Governor. As such, these Requests amount to an abuse of process. The Governor's Office further objects to this Request on the grounds that it seeks information irrelevant to this Committee's

investigation. Moreover, requiring the Governor's Office to search through its files and emails for every single piece of paper or piece of electronic data related to this topic would result in an enormous waste of taxpayer resources for information that is simply not relevant to this Committee's investigation.

(c) every piece of paper relating to any visits by Ms. Mason to the Governor's Mansion or Wynfield Estates. (Request Nos. 9 and 10)

The Office of the Governor objects to each of these Requests on the grounds that, taken together, they are overly broad, unduly burdensome and harassing and go far beyond any legitimate inquiry into impeachable conduct by the Governor. As such, these Requests amount to an abuse of process. The Governor's Office further objects to this Request on the grounds that it seeks information irrelevant to this Committee's investigation. The Governor's Office further objects to this Request on the grounds that it seeks the production of information that is outside of the possession, custody or control of the Office of the Governor. Moreover, requiring the Governor's Office to search through its files and emails for every single piece of paper or piece of electronic data related to this topic would result in an enormous waste of taxpayer resources for information that is simply not relevant to this Committee's investigation.

(d) every piece of paper relating to any lease or charter of any aircraft for travel by Ms. Mason. (Request No. 11)

The Office of the Governor objects to each of these Requests on the grounds that, taken together, they are overly broad, unduly burdensome and harassing and go far beyond any legitimate inquiry into impeachable conduct by the Governor. As such, these Requests amount to an abuse of process. The Governor's Office further objects to this

Request on the grounds that it seeks information irrelevant to this Committee's investigation. The Governor's Office further objects to this Request on the grounds that it seeks the production of information that is outside of the possession, custody or control of the Office of the Governor. Moreover, requiring the Governor's Office to search through its files and emails for every single piece of paper or piece of electronic data related to this topic would result in an enormous waste of taxpayer resources for information that is simply not relevant to this Committee's investigation.

(e) every piece of paper relating to any Request for reimbursement from State funds submitted on behalf of Ms. Mason. (Request No. 13)

The Office of the Governor objects to each of these Requests on the grounds that, taken together, they are overly broad, unduly burdensome and harassing and go far beyond any legitimate inquiry into impeachable conduct by the Governor. As such, these Requests amount to an abuse of process. The Governor's Office further objects to this Request on the grounds that it seeks information irrelevant to this Committee's investigation. The Governor's Office further objects to this Request on the grounds that it seeks the production of information that is outside of the possession, custody or control of the Office of the Governor. Moreover, requiring the Governor's Office to search through its files and emails for every single piece of paper or piece of electronic data related to this topic would result in an enormous waste of taxpayer resources for information that is simply not relevant to this Committee's investigation.

(f) every piece of paper relating to any Request for reimbursement from State funds "for any expense relating to Rebekah Mason." (Request No. 17)

The Office of the Governor objects to each of these Requests on the grounds that, taken together, they are overly broad, unduly burdensome and harassing and go far beyond any legitimate inquiry into impeachable conduct by the Governor. As such, these Requests amount to an abuse of process. The Governor's Office further objects to this Request on the grounds that it seeks information irrelevant to this Committee's investigation. The Governor's Office further objects to this Request as vague and ambiguous and, as currently drafted, incapable of being understood in its reference to expenses "relating to Rebekah Mason." Moreover, requiring the Governor's Office to search through its files and emails for every single piece of paper or piece of electronic data related to this unintelligible topic would result in an enormous waste of taxpayer resources for information that is simply not relevant to this Committee's investigation.

(g) every piece of paper relating to any "work, services or goods performed or provided by Rebekah Mason" or her business, RCM Communications, Inc. for the Office of the Governor. (Request No. 18)

The Office of the Governor objects to each of these Requests on the grounds that, taken together, they are overly broad, unduly burdensome and harassing and go far beyond any legitimate inquiry into impeachable conduct by the Governor. As such, these Requests amount to an abuse of process. The Governor's Office further objects to this Request on the grounds that it seeks information irrelevant to this Committee's investigation. The Governor's Office further objects to this Request on the grounds that it seeks the production of information that is outside of the possession, custody or control of the Office of the Governor. Moreover, requiring the Governor's Office to search through its files and emails for every single piece of paper or piece of electronic data

related to this topic would result in an enormous waste of taxpayer resources for information that is simply not relevant to this Committee's investigation.

(h) every piece of paper concerning any file in the Office of the Governor relating to Ms. Mason or her company, RCM Communications, Inc. (Request No. 23(b) and (g))

The Office of the Governor objects to each of these Requests on the grounds that, taken together, they are overly broad, unduly burdensome and harassing and go far beyond any legitimate inquiry into impeachable conduct by the Governor. As such, these Requests amount to an abuse of process. The Governor's Office further objects to this Request on the grounds that it seeks information irrelevant to this Committee's investigation. The Governor's Office further objects to this Request on the grounds that it seeks the production of information that is outside of the possession, custody or control of the Office of the Governor. Moreover, requiring the Governor's Office to search through its files and emails for every single piece of paper or piece of electronic data related to this topic would result in an enormous waste of taxpayer resources for information that is simply not relevant to this Committee's investigation.

(i) All documents relating to Ms. Mason's job titles, duties, or performance. (Request No. 24)

The Office of the Governor objects to each of these Requests on the grounds that, taken together, they are overly broad, unduly burdensome and harassing and go far beyond any legitimate inquiry into impeachable conduct by the Governor. As such, these Requests amount to an abuse of process. The Governor's Office further objects to this Request on the grounds that it seeks information irrelevant to this Committee's

investigation. The Governor's Office further objects to this Request on the grounds that it seeks the production of information that is outside of the possession, custody or control of the Office of the Governor. Moreover, requiring the Governor's Office to search through its files and emails for every single piece of paper or piece of electronic data related to this topic would result in an enormous waste of taxpayer resources for information that is simply not relevant to this Committee's investigation.

(j) Ms. Mason's personnel file. (Request No. 25)

The Office of the Governor objects to each of these Requests on the grounds that, taken together, they are overly broad, unduly burdensome and harassing and go far beyond any legitimate inquiry into impeachable conduct by the Governor. As such, these Requests amount to an abuse of process. The Governor's Office further objects to this Request on the grounds that it seeks information irrelevant to this Committee's investigation.

(k) a list of all email accounts used by Ms. Mason. (Request No. 27)

The Office of the Governor objects to each of these Requests on the grounds that, taken together, they are overly broad, unduly burdensome and harassing and go far beyond any legitimate inquiry into impeachable conduct by the Governor. As such, these Requests amount to an abuse of process. The Governor's Office further objects to this Request on the grounds that it seeks information irrelevant to this Committee's investigation. The Governor's Office further objects to this Request on the grounds that it seeks the production of information that is outside of the possession, custody or control of the Office of the Governor.

(l) an electronic copy, in native format, of all email accounts assigned to or used by Ms. Mason. (Request No. 28)

The Office of the Governor objects to each of these Requests on the grounds that, taken together, they are overly broad, unduly burdensome and harassing and go far beyond any legitimate inquiry into impeachable conduct by the Governor. As such, these Requests amount to an abuse of process. The Governor's Office further objects to this Request on the grounds that it seeks information irrelevant to this Committee's investigation. The Governor's Office further objects to this Request on the grounds that it seeks the production of information that is outside of the possession, custody or control of the Office of the Governor.

(m) a "complete" list of all cellular phones or mobile devices issued to or used by Rebekah Mason, including telephone numbers, account numbers, the name of the carrier, dates of use or service and all bills and usage histories for any such phone or device. (Request Nos. 31 and 32)

The Office of the Governor objects to each of these Requests on the grounds that, taken together, they are overly broad, unduly burdensome and harassing and go far beyond any legitimate inquiry into impeachable conduct by the Governor. As such, these Requests amount to an abuse of process. The Governor's Office further objects to this Request on the grounds that it seeks information irrelevant to this Committee's investigation. The Governor's Office further objects to this Request on the grounds that it seeks the production of information that is outside of the possession, custody or control of the Office of the Governor.

(n) Every communication sent or received by any member of the Office of the Governor concerning Ms. Mason, RCM Communications or JRM Enterprises. (Request No. 46(a), (c) and (d))

The Office of the Governor objects to each of these Requests on the grounds that, taken together, they are overly broad, unduly burdensome and harassing and go far beyond any legitimate inquiry into impeachable conduct by the Governor. As such, these Requests amount to an abuse of process. The Governor's Office further objects to this Request on the grounds that it seeks information irrelevant to this Committee's investigation. Moreover, requiring the Governor's Office to search through its files and emails for every single piece of paper or piece of electronic data related to this topic would result in an enormous waste of taxpayer resources for information that is simply not relevant to this Committee's investigation.

### **III. CONCLUSION**

Accordingly, Governor Bentley and the Office of the Governor respectfully object to the Subpoena and to each of the Requests set forth therein and, in the alternative, move to quash the Subpoena.

Respectfully Submitted this, the 10th day of October, 2016,

ROBERT BENTLEY, GOVERNOR  
OF ALABAMA and THE OFFICE OF  
THE GOVERNOR OF THE STATE OF  
ALABAMA,

By: /s/Ross H. Garber

Ross H. Garber (*pro hac vice*)  
Susan S. Murphy (*pro hac vice*)  
Shipman & Goodwin LLP  
1875 K. St, NW  
Washington, D.C. 20006  
202-469-7798  
[rgarber@goodwin.com](mailto:rgarber@goodwin.com)  
[smurphy2@goodwin.com](mailto:smurphy2@goodwin.com)

-and-

David B. Byrne, Chief Legal Advisor  
Office of the Governor  
State Capitol  
Montgomery, Alabama 36130  
[David.Byrne@governor.alabama.gov](mailto:David.Byrne@governor.alabama.gov)

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing via email upon the following persons on this the 10th day of October, 2016:

Jackson R. Sharman  
Lightfoot, Franklin & White LLC  
400 20<sup>th</sup> Street North  
Birmingham, Alabama 35203

and a copy of the above and foregoing will be served by hand delivery upon the following persons on the 11th day of October, 2016:

Tracy Arnold, Clerk  
Alabama House of Representatives Judicial Committee  
Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130

Jeff Woodard, Clerk  
Alabama House of Representatives  
Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130

Othni J. Lathram, Director  
Alabama Law Institute  
Alabama State House, Suite 207  
Montgomery, Alabama 36130

/s/Ross H. Garber  
Of Counsel

EXHIBIT A

1 HB557  
2 173268-1  
3 By Representatives Mooney, Wingo, Williams (JW), Whorton (R),  
4 Shedd, Crawford, Hanes, Harbison, Holmes (M) and Fridy  
5 RFD: State Government  
6 First Read: 19-APR-16

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SYNOPSIS: Existing law does not provide for a comprehensive method for legislative committees to subpoena witnesses and documents.

This bill would provide standing committees of the House of Representatives and standing committees of the Senate with the authority to subpoena witnesses to testify before the committee and to subpoena documents as needed to conduct the business of the respective committee.

This bill would further provide for enforcement by the circuit court regarding persons failing to properly respond to a legislative subpoena.

This bill would provide for payment of certain expenses of witnesses.

A BILL  
TO BE ENTITLED  
AN ACT

1                   Relating to standing legislative committees; to  
2 provide the authority to subpoena witnesses and documents; and  
3 to provide for enforcement and witness compensation.

4 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

5                   Section 1. For purposes of this act "committee"  
6 means any standing committee of the House of Representatives  
7 or of the Senate.

8                   Section 2. (a) A committee may issue subpoenas,  
9 including subpoenas duces tecum, for the following purposes:

10                   (1) To enforce the attendance of witnesses for  
11 purposes of testifying concerning pending legislation or other  
12 subject matters as may be assigned to the committee by rule or  
13 resolution.

14                   (2) To enforce the production of records, documents,  
15 papers, or other items of evidence necessary to conduct the  
16 business of the committee.

17                   (b) Any subpoenas issued by a committee may be  
18 delivered to the Secretary of the Senate or the Clerk of the  
19 House of Representatives, as appropriate, who shall promptly  
20 serve or have served the subpoena upon the party named in the  
21 subpoena.

22                   (c) The Secretary of the Senate and the Clerk of the  
23 House of Representatives may appoint any person over the age  
24 of 18 years to serve subpoenas on behalf of the Secretary or  
25 Clerk.

26                   (d) A subpoena provided for by this act shall be  
27 signed by the chair of the committee issuing the subpoena.

1 (e) A subpoena provided for by this act shall be in  
2 the usual form of subpoenas issued by courts of record in the  
3 state that require the attendance of witnesses or the  
4 production of evidence. A subpoena is sufficient if it:

5 (1) States the particular committee before which the  
6 proceeding will be conducted.

7 (2) Is addressed to the witness.

8 (3) Requires the attendance of the witness at a time  
9 and place certain.

10 Section 3. (a) Any person who, having been served  
11 with a subpoena provided for by this act, fails to appear, or  
12 who, having appeared, willfully refuses to answer any question  
13 propounded by any member of the committee or who willfully  
14 refuses to produce any papers, documents, records, or other  
15 items of evidence, requested and deemed to be material by the  
16 committee, shall be in violation of this act.

17 (b) If a witness summoned by subpoena under this act  
18 fails to appear or, having appeared, fails to answer or  
19 produce documents as ordered, the chair of the committee shall  
20 certify those facts to the Circuit Court of the 15th Judicial  
21 Circuit. The circuit court, upon a finding that the person has  
22 violated this act, shall impose injunctive action to enforce  
23 the requirements of this act and may punish the violator for  
24 contempt as provided by law.

25 Section 4. (a) All witnesses subpoenaed to appear  
26 under this act, before giving their testimony, shall take an

1 oath or make an affirmation as provided by law for witnesses  
2 appearing in a court of law to give testimony.

3 (b) The chair of the committee may administer oaths  
4 or affirmations to witnesses appearing before his or her  
5 committee. Violation of such oath or affirmation is subject to  
6 the perjury laws of this state and to a determination by the  
7 circuit court of contempt.

8 Section 5. (a) If a witness refuses to testify on  
9 the basis of his or her privilege against self-incrimination  
10 and the person presiding over the committee meeting  
11 communicates to the witness that the witness is required to  
12 testify, the witness may not refuse to testify. However, the  
13 witness may not be held criminally liable or held to answer  
14 criminally based upon any fact or act directly related to that  
15 which he or she is required to testify. No statement made by  
16 the witness or paper produced by the witness during such  
17 required testimony shall be considered competent evidence in  
18 any criminal proceeding against the witness except in the  
19 prosecution for perjury or a finding of contempt.

20 (b) A witness may be sworn to testify under penalty  
21 of perjury without the immunity provided for in subsection (a)  
22 if all of the following conditions are met.

23 (1) The following statement is read or otherwise  
24 communicated to the witness:

25 "Alabama law provides that a person subpoenaed to  
26 testify before a committee of the Alabama Legislature cannot  
27 be held criminally liable or be held to answer criminally

1 based upon any fact or act directly related to that which he  
2 or she is required to testify about other than for perjury  
3 committed in testifying or a finding of contempt. However,  
4 this committee will not require your testimony. The committee  
5 does not wish to be placed in a position where it can be  
6 claimed that you received immunity from any possible criminal  
7 prosecution because of your testimony before this committee.  
8 Because you are not being given immunity from criminal  
9 prosecution, you have a constitutional right to refuse to  
10 testify before this committee. If you desire to waive your  
11 right not to testify and testify voluntarily, you will be  
12 given the opportunity to testify subject to all of the  
13 following conditions:

14 a. "If you do not wish to answer a question, you  
15 will so state.

16 b. "In the absence of such a statement, your answer  
17 to each question will be entirely voluntary.

18 c. "If you choose to testify, you will be sworn  
19 under oath and will be subject to criminal prosecution for  
20 perjury committed in testifying.

21 d. "If you choose to testify voluntarily, you are  
22 reminded that any self-incriminating statements you make can  
23 be used against you in criminal proceedings."

24 (2) After the statement quoted above is communicated  
25 to the witness, the witness shall answer the following  
26 questions in the affirmative:

1           a. "Do you understand these statements regarding  
2 your rights before this committee?"

3           b. "Do you wish to testify voluntarily under the  
4 conditions presented?"

5           (c) The consent to testify and subsequent testimony  
6 pursuant to subsection (b) constitute a knowing waiver of the  
7 privilege of the witness against self-incrimination.

8           Section 6. Any person subpoenaed to appear as a  
9 witness before a committee shall be entitled to compensation,  
10 including travel pay, as provided by law for witnesses  
11 subpoenaed to appear in civil cases in courts of record of  
12 this state. Upon requisitions signed by the chair of the  
13 committee, these payments shall be paid out of any funds  
14 appropriated to the use of the Legislature by means of  
15 warrants drawn by the State Comptroller on the State Treasury.

16           Section 7. (a) Nothing in this act shall be  
17 construed as inconsistent with any existing authority of the  
18 Legislature to exercise, in all proper cases, all other powers  
19 as expressly declared in the Constitution of Alabama of 1901.

20           (b) This act shall be read in para materia with  
21 other laws and practice which provide for the issuance of  
22 subpoenas by committees of the Legislature.

23           Section 8. All laws or parts of laws which conflict  
24 with this act are repealed.

25           Section 9. This act shall become effective  
26 immediately upon its passage and approval by the Governor, or  
27 upon its otherwise becoming a law.



EXHIBIT B

1 SB69  
2 173268-1  
3 By Senators Brewbaker, Whatley, Scofield, Livingston, Ward,  
4 Shelnutt, Smitherman, Orr, Albritton, Stutts, Marsh, Allen,  
5 Sanford, Bussman, Pittman, Holtzclaw, Reed, Glover and Melson  
6 RFD: Judiciary  
7 First Read: 02-FEB-16

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SYNOPSIS: Existing law does not provide for a comprehensive method for legislative committees to subpoena witnesses and documents.

This bill would provide standing committees of the House of Representatives and standing committees of the Senate with the authority to subpoena witnesses to testify before the committee and to subpoena documents as needed to conduct the business of the respective committee.

This bill would further provide for enforcement by the circuit court regarding persons failing to properly respond to a legislative subpoena.

This bill would provide for payment of certain expenses of witnesses.

A BILL  
TO BE ENTITLED  
AN ACT

1           Relating to standing legislative committees; to  
2 provide the authority to subpoena witnesses and documents; and  
3 to provide for enforcement and witness compensation.

4 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

5           Section 1. For purposes of this act "committee"  
6 means any standing committee of the House of Representatives  
7 or of the Senate.

8           Section 2. (a) A committee may issue subpoenas,  
9 including subpoenas duces tecum, for the following purposes:

10           (1) To enforce the attendance of witnesses for  
11 purposes of testifying concerning pending legislation or other  
12 subject matters as may be assigned to the committee by rule or  
13 resolution.

14           (2) To enforce the production of records, documents,  
15 papers, or other items of evidence necessary to conduct the  
16 business of the committee.

17           (b) Any subpoenas issued by a committee may be  
18 delivered to the Secretary of the Senate or the Clerk of the  
19 House of Representatives, as appropriate, who shall promptly  
20 serve or have served the subpoena upon the party named in the  
21 subpoena.

22           (c) The Secretary of the Senate and the Clerk of the  
23 House of Representatives may appoint any person over the age  
24 of 18 years to serve subpoenas on behalf of the Secretary or  
25 Clerk.

26           (d) A subpoena provided for by this act shall be  
27 signed by the chair of the committee issuing the subpoena.

1 (e) A subpoena provided for by this act shall be in  
2 the usual form of subpoenas issued by courts of record in the  
3 state that require the attendance of witnesses or the  
4 production of evidence. A subpoena is sufficient if it:

5 (1) States the particular committee before which the  
6 proceeding will be conducted.

7 (2) Is addressed to the witness.

8 (3) Requires the attendance of the witness at a time  
9 and place certain.

10 Section 3. (a) Any person who, having been served  
11 with a subpoena provided for by this act, fails to appear, or  
12 who, having appeared, willfully refuses to answer any question  
13 propounded by any member of the committee or who willfully  
14 refuses to produce any papers, documents, records, or other  
15 items of evidence, requested and deemed to be material by the  
16 committee, shall be in violation of this act.

17 (b) If a witness summoned by subpoena under this act  
18 fails to appear or, having appeared, fails to answer or  
19 produce documents as ordered, the chair of the committee shall  
20 certify those facts to the Circuit Court of the 15th Judicial  
21 Circuit. The circuit court, upon a finding that the person has  
22 violated this act, shall impose injunctive action to enforce  
23 the requirements of this act and may punish the violator for  
24 contempt as provided by law.

25 Section 4. (a) All witnesses subpoenaed to appear  
26 under this act, before giving their testimony, shall take an

1 oath or make an affirmation as provided by law for witnesses  
2 appearing in a court of law to give testimony.

3 (b) The chair of the committee may administer oaths  
4 or affirmations to witnesses appearing before his or her  
5 committee. Violation of such oath or affirmation is subject to  
6 the perjury laws of this state and to a determination by the  
7 circuit court of contempt.

8 Section 5. (a) If a witness refuses to testify on  
9 the basis of his or her privilege against self-incrimination  
10 and the person presiding over the committee meeting  
11 communicates to the witness that the witness is required to  
12 testify, the witness may not refuse to testify. However, the  
13 witness may not be held criminally liable or held to answer  
14 criminally based upon any fact or act directly related to that  
15 which he or she is required to testify. No statement made by  
16 the witness or paper produced by the witness during such  
17 required testimony shall be considered competent evidence in  
18 any criminal proceeding against the witness except in the  
19 prosecution for perjury or a finding of contempt.

20 (b) A witness may be sworn to testify under penalty  
21 of perjury without the immunity provided for in subsection (a)  
22 if all of the following conditions are met.

23 (1) The following statement is read or otherwise  
24 communicated to the witness:

25 "Alabama law provides that a person subpoenaed to  
26 testify before a committee of the Alabama Legislature cannot  
27 be held criminally liable or be held to answer criminally

1 based upon any fact or act directly related to that which he  
2 or she is required to testify about other than for perjury  
3 committed in testifying or a finding of contempt. However,  
4 this committee will not require your testimony. The committee  
5 does not wish to be placed in a position where it can be  
6 claimed that you received immunity from any possible criminal  
7 prosecution because of your testimony before this committee.  
8 Because you are not being given immunity from criminal  
9 prosecution, you have a constitutional right to refuse to  
10 testify before this committee. If you desire to waive your  
11 right not to testify and testify voluntarily, you will be  
12 given the opportunity to testify subject to all of the  
13 following conditions:

14 a. "If you do not wish to answer a question, you  
15 will so state.

16 b. "In the absence of such a statement, your answer  
17 to each question will be entirely voluntary.

18 c. "If you choose to testify, you will be sworn  
19 under oath and will be subject to criminal prosecution for  
20 perjury committed in testifying.

21 d. "If you choose to testify voluntarily, you are  
22 reminded that any self-incriminating statements you make can  
23 be used against you in criminal proceedings."

24 (2) After the statement quoted above is communicated  
25 to the witness, the witness shall answer the following  
26 questions in the affirmative:

1           a. "Do you understand these statements regarding  
2 your rights before this committee?"

3           b. "Do you wish to testify voluntarily under the  
4 conditions presented?"

5           (c) The consent to testify and subsequent testimony  
6 pursuant to subsection (b) constitute a knowing waiver of the  
7 privilege of the witness against self-incrimination.

8           Section 6. Any person subpoenaed to appear as a  
9 witness before a committee shall be entitled to compensation,  
10 including travel pay, as provided by law for witnesses  
11 subpoenaed to appear in civil cases in courts of record of  
12 this state. Upon requisitions signed by the chair of the  
13 committee, these payments shall be paid out of any funds  
14 appropriated to the use of the Legislature by means of  
15 warrants drawn by the State Comptroller on the State Treasury.

16           Section 7. (a) Nothing in this act shall be  
17 construed as inconsistent with any existing authority of the  
18 Legislature to exercise, in all proper cases, all other powers  
19 as expressly declared in the Constitution of Alabama of 1901.

20           (b) This act shall be read in para materia with  
21 other laws and practice which provide for the issuance of  
22 subpoenas by committees of the Legislature.

23           Section 8. All laws or parts of laws which conflict  
24 with this act are repealed.

25           Section 9. This act shall become effective  
26 immediately upon its passage and approval by the Governor, or  
27 upon its otherwise becoming a law.



EXHIBIT C

1 HB57  
2 176740-3  
3 By Representative Jones  
4 RFD: Public Safety and Homeland Security  
5 First Read: 18-AUG-16

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SYNOPSIS: Under existing law, there is no specific provision for compelling testimony or the production of evidence in an impeachment investigation conducted pursuant to rules of the House of Representatives.

This bill would require the Circuit Court for the 15th Judicial Circuit to issue a subpoena to compel testimony and the production of evidence upon application by the committee.

A BILL  
TO BE ENTITLED  
AN ACT

Requiring the Circuit Court for the 15th Judicial Circuit to compel testimony and the production of evidence upon application of a committee of the House of Representatives conducting an impeachment investigation.  
BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

1                   Section 1. If, pursuant to the Rules of the House of  
2 Representatives or a House Resolution adopted by the House of  
3 Representatives, a committee of the House of Representatives  
4 is conducting an impeachment investigation, the Circuit Court  
5 for the 15th Judicial Circuit, upon application by the chair  
6 of the committee or his or her representative, shall issue a  
7 subpoena or order requiring the person to appear before the  
8 committee, its counsel, or investigator and produce all  
9 evidence and give all testimony relating to the matter in  
10 issue. A person failing to obey the order may be punished by  
11 the court for contempt.

12                   Section 2. This act shall become effective  
13 immediately following its passage and approval by the  
14 Governor, or its otherwise becoming law.

EXHIBIT D



## ALABAMA HOUSE OF REPRESENTATIVES

### JUDICIARY COMMITTEE

**JACK SHARMAN**  
SPECIAL COUNSEL  
LIGHTFOOT, FRANKLIN & WHITE LLC  
400 20TH STREET NORTH  
BIRMINGHAM, ALABAMA 35203

August 25, 2016

*Via Electronic and U.S. Mail*

Joseph C. Espy, III, Esq.  
Melton, Espy & Williams, P.C.  
255 Dexter Avenue  
Montgomery, Alabama 36104  
[jespy@mewlegal.com](mailto:jespy@mewlegal.com)

Ross H. Garber, Esq.  
Susan S. Murphy, Esq.  
Shipman & Goodwin LLP  
1875 K Street NW, Suite 600  
Washington, DC 20006-1251  
[rgarber@goodwin.com](mailto:rgarber@goodwin.com)  
[smurphy2@goodwin.com](mailto:smurphy2@goodwin.com)

David Byrne, Esq.  
Chief Legal Advisor  
Carrie Ellis McCollum, Esq.  
Office of the Governor of Alabama  
State Capitol  
600 Dexter Avenue  
Montgomery, Alabama 36130  
[dbyrne@alabama.gov](mailto:dbyrne@alabama.gov)  
[carrie.mccollum@governor.alabama.gov](mailto:carrie.mccollum@governor.alabama.gov)

**Re: Impeachment Investigation of Governor Robert Bentley**

Dear Counselors:

Thank you for your letter of August 17, 2016 and also for Mr. Garber's telephone call. We all appreciate the seriousness of the impeachment investigation started by House Resolution 367. In these circumstances, it is certainly wise to keep our lines of communication open. Both the Committee and I appreciate that effort on your part.

With regard to the renewed Motion to Suspend Proceedings and the renewed Motion for Recusal, the Committee has those under advisement.

In the meantime, several points bear clarification.

### **The Governor Will Have Due Process**

First, the Governor's concerns about "due process" are ill founded and show some misunderstanding of the stage of proceedings.<sup>1</sup> We are in the investigation stage. In an actual impeachment proceeding, the Governor will be provided process. Of course, we might dispute the amount of "process" that is "due," but neither I nor the Committee have any reason to doubt that a sufficient procedural system will apply to the impeachment proceedings – if any occur.

### **The Committee's Investigation Is Undertaken To Discharge The Committee's Duties to the House**

Second, we are conducting an investigation on behalf of and at the instruction of the Committee, as contemplated by House Resolution 367. The Committee takes its delegated authority and instructions from the House very seriously. We are seeking documents and interviewing or taking testimony from witnesses. An impeachment investigation, like the impeachment process as a whole, is not neatly analogous to any other legal, political or constitutional structure. Indeed, it partakes of all of those characteristics. Perhaps a pertinent analogy at the moment is to a grand jury investigation: serious issues have been raised but an investigation is required to ascertain their gravity (or lack of gravity).

As accomplished white-collar defense and government-investigations lawyers, you know that the rights and remedies of a subject of a grand jury investigation are severely limited. Such an investigation is not a "joint" investigation with counsel for the subject of the investigation, nor will this one be. Rather, I intend to do as I was charged by the Committee – conduct a factual investigation, make a recommendation and report to the Committee, and assist the Committee in any impeachment proceedings that it sees fit to recommend to the House.

### **An Impeachment Proceeding Is Not A Criminal Proceeding**

Third, an impeachment proceeding – and much less, an impeachment investigation – is not a criminal proceeding. This letter is not the appropriate forum for a full discussion of those issues, but there is ample law and scholarly opinion that, whatever an impeachment is, it is not a criminal proceeding. The criminal standard of proof ("beyond a reasonable doubt") does not apply. Impeachable offenses may include but are not limited to "crimes." There is no legislative equivalent to a grand jury's secrecy: indeed, documents and testimony obtained in our investigation will eventually be public record.

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<sup>1</sup> For convenience, I will use the terms "Governor" or "Governor Bentley" for both the Office of the Governor and Governor Bentley in his personal capacity, unless the context requires greater specificity.

As a leading impeachment scholar notes, “the starting point . . . is that impeachment is ‘a proceeding purely of a political nature. It is not so much designed to punish an offender as to secure the state against gross official misdemeanors. It touches neither his person nor his property, but simply divests him of his political capacity,’ that is it disqualifies him to hold office.”<sup>2</sup>

Even at the federal level, where the Constitution provides that a President may be impeached for “high Crimes and Misdemeanors,” U.S.Const. Art. II §4, the overwhelming authority is that impeachment is not limited to “crimes” in our common, modern, statutory understanding of that term. *See generally* Constitutional Grounds for Presidential Impeachment, Report by the Staff of the Impeachment Inquiry, 2<sup>nd</sup> Sess., 93<sup>rd</sup> Cong., House Committee Print (the “Rodino Report”) at 22-25 (February 22, 1974).<sup>3</sup> This “non-criminal” understanding is confirmed in the text of the provisions of the Alabama Constitution that address the grounds for impeachment of a governor.<sup>4</sup> Thus, the rules of the House are the rules that govern, rather than cognates to the federal or Alabama Rules of Criminal Procedure. Should the Governor be menaced with state or federal prosecution, of course, the full array of federal and state criminal law standards – constitutional, procedural and substantive – would kick in. A legislative impeachment investigation – indeed, any legislative investigation – has a constitutional and legal mandate different from that of the criminal justice system.

#### **Failure to Cooperate With The Committee’s Investigation Can Be Additional Grounds For Impeachment**

Fourth, I note the Governor’s long-standing position that he intends to be transparent and to cooperate with the Committee in order to put these matters behind him.<sup>5</sup> Similarly, the Committee intends to conduct a swift, unhindered investigation that starts with the collection of documents, most of which are public records. In that light, it is disappointing to receive “general objections” and reservations of rights amounting to a refusal to respond to the Committee’s investigatory efforts. As I mentioned to Ross in our recent telephone call, I am certainly happy to listen to questions about specific requests or to proposals on how to narrow them. The

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<sup>2</sup> Raoul Berger, *Impeachment: The Constitutional Problems* (Cambridge: Harvard Univ. Press, 1973) at 79 (quoting Joseph Story, *Commentaries On The Constitution of the United States*, 5<sup>th</sup> ed. 2 vols. (Boston: Little, Brown, 1905) §803).

<sup>3</sup> The Rodino Report, named for the late Peter Rodino (D-NJ), was prepared by the staff of the House Judiciary Committee as the Committee conducted its inquiry into the impeachment of President Nixon.

<sup>4</sup> “The governor . . . may be removed from office for willful neglect of duty, corruption in office, incompetency, or intemperance in the use of intoxicating liquors or narcotics to such an extent, in view of the dignity of the office and importance of its duties, as unfits the officer for the discharge of such duties, or for any offense involving moral turpitude while in office, or committed under color thereof, or connected therewith . . .” Ala. Const. § 173.

<sup>5</sup> “We’re going to be very cooperative with the legislature,” Bentley said. “We have nothing to hide. We have no charges against us at all. We have nothing to hide. The truth always has a sound. And I can tell you, we tell the truth and we’ve done nothing wrong. We’ll work with them and it’s really not a problem. They are trying to feel their way through this process so we’ll let them do that.” Paul Gattis, *Gov. Robert Bentley: People of Alabama ‘not interested in impeachment,’* [http://www.al.com/news/huntsville/index.ssf/2016/06/gov\\_robert\\_bentley\\_people\\_of\\_a.html](http://www.al.com/news/huntsville/index.ssf/2016/06/gov_robert_bentley_people_of_a.html) (last visited August 24, 2016).

Governor does not have standing, however, to “object” to the Committee’s information requests or to decline to cooperate in the investigation.

Indeed, although I trust that matters will not come to this point, the Governor’s failure to cooperate with the Committee’s investigation can itself be grounds for impeachment.

**The Constitutional Standard for Impeachment  
Is Distinct From the Scope of the Committee’s Investigation**

Fifth, your letter refers to the document you previously submitted to the Committee addressing, among other things, what you understand to be the “constitutional standard” for the impeachment of a governor in Alabama. As I mentioned to Ross, that is indeed an important question and will likely be part of our final report and recommendation, either as an integral part of the report or as a free-standing submission to the Committee. What constitutional or evidentiary standard an individual member of the House might ultimately apply to articles of impeachment has minimal bearing on facts to be gathered and information to be obtained: “As the factual investigation progresses, it will become possible to state more specifically the constitutional, legal and conceptual framework within which the staff and the Committee work.” (Rodino Report at 2). In addition, “impeachable offenses cannot be defined in advance of full investigation of the facts.” Investigatory Powers of the Committee in the Judiciary With Respect to Its Impeachment Inquiry, Report, Together With Additional and Dissenting Views, 2<sup>nd</sup> Sess., 105<sup>th</sup> Cong., House Committee Print (October 7, 1998) (the “Hyde Report”).<sup>6</sup> In other words, as in any investigation, what is relevant to the Committee’s investigation is of greater scope than what may be pertinent, once a particular legal standard is settled upon, to the Committee’s decision.

**The Governor Is Not Impeached But Is Rather  
The Subject of an Impeachment Investigation**

Sixth, in your correspondence and submissions to the Committee, as well as in my phone call with Ross, you have frequently referred to the fact that, if there is an impeachment of a governor in Alabama, the Constitution calls for the governor to be removed from office pending trial in the Senate. That is true. That is also a reason why we should all understand that the Committee is conducting an impeachment *investigation* and that the impeachment *decision* has not actually been made. Had it been made, Governor Bentley would not currently be in office. House Resolution 367 and revised Rule 79.1 contemplate an investigation; a report and recommendation to the Committee; the Committee’s consideration of the report and recommendation; a referral (or not) by the Committee to the full House; and then a vote by the

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<sup>6</sup> The Hyde Report, named for the late Henry Hyde (R-IL), was prepared by the House Judiciary Committee as the Committee conducted its inquiry into the impeachment of President Clinton.

Governor Bentley Counsel  
August 25, 2016  
Page 5

House. Only if all those things happen will the Governor be “impeached.” To draw upon my earlier analogy to the grand jury, we are not in a “post-indictment” situation.

### **The Articles Govern The Investigation**

Seventh, the Governor at several points complains of the vagueness and brevity of the Articles. The subject of an investigation always appreciates more detail and elaboration. The House has spoken, however. We will work with the Articles as drafted. In addition, I know that you have been paying close attention to the series of events that led to this investigation. The underlying main concerns that have driven these legislative inquiries are well-publicized and are not so unascertainable as to not allow the Governor to prepare or to respond fully to the Committee’s demands for information. In addition, in our document requests, we have been quite specific as to date ranges, names, offices and events. (For your easy reference, a copy of those document demands is provided herewith as “Attachment A”).

\* \* \* \*

I hope this letter has been helpful to you. The Committee looks forward to the Governor’s full cooperation in its investigation, beginning with production to the Committee of documents necessary for its investigation.

With best wishes, I am

Sincerely yours,



Jack Sharman

cc: The Honorable Mike Jones, Chairman, Alabama House Judiciary Committee

# **Attachment A**

**BEFORE THE HOUSE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES**

**In Re: The Impeachment Investigation of  
Governor Robert Bentley**

**DOCUMENT REQUEST TO THE OFFICE OF THE GOVERNOR**

**TO: Governor Robert Bentley  
Office of the Governor of Alabama  
c/o Ross H. Garber, Esq.  
SHIPMAN & GOODWIN LLP  
1875 K. St., NW  
Washington, D.C. 20006**

**David B. Byrne, Jr., Esq.  
Chief Legal Advisor  
Office of the Governor of Alabama  
State Capitol  
600 Dexter Avenue  
Montgomery, Alabama 36130**

**Definitions and Instructions**

A. The term "Office of the Governor" as used herein refers to Governor Robert Bentley in his official capacity and all current or former members of Governor Robert Bentley's Staff, including but expressly not limited to those assigned to the following offices: Executive Office, Chief of Staff and Deputy Chief of Staff, Legal Office, Communications Office, Legislative Office, Constituent Services Office, Scheduling Office, Appointments Office, Policy Office, Administration Office, Office of the First Lady, and Governor's Mansion. These requests are directed to the Office of the Governor as defined herein and shall be construed to include all documents or things in the possession, custody, or control of any and all persons encompassed by that term.

B. Unless otherwise specified, all Requests shall encompass the period of time beginning January 17, 2011 to the present.

C. Documents responsive to any Request shall be produced together, in electronic or paper file folders or with other enclosures that separate the files by Request number. If a document is responsive to more than one Request, it shall be produced in response to the Request to which it is primarily responsive.

### **Documents and Things Requested**

1. All State employment policies applicable to the Office of the Governor.
2. Current and previous staff lists, directories, and organizational charts and diagrams for the Office of the Governor.
3. For all current and former members of the Office of the Governor, a list of their work telephone(s) and State-issued cellular telephone(s) and mobile device(s).
4. The complete calendar of Governor Robert Bentley in native electronic format, including any and all electronic data and information evidencing or reflecting any changes made at any time thereto.
5. The complete calendar of Rebekah Mason in native electronic format, including any and all electronic data and information evidencing or reflecting any changes made at any time thereto.
6. For the period of time beginning January 1, 2013 to present, daily and weekly schedules of Governor Robert Bentley, including any and all documents evidencing or relating to any changes made at any time thereto.
7. Any and all documents, electronic data, and information evidencing or relating to the use of State aircraft by, or at the direction of, the Office of the Governor, including but expressly not limited to, all requests for travel, flight plans, flight logs, and flight manifests.
8. Any and all documents, electronic data, and information evidencing or relating to ground transportation of or for Rebekah Mason, including but expressly not limited to all requests to any State agency, route plans, and vehicle manifests.
9. Any and all documents, electronic data, and information evidencing or relating to any and all visits by Rebekah Mason to the Governor's Mansion and its appurtenant facilities.
10. Any and all documents, electronic data, and information evidencing or relating to any and all visits by Rebekah Mason to Wynfield Estate and its appurtenant facilities.
11. Any and all documents, electronic data, and information evidencing or relating to leasing or chartering aircraft for travel by Governor Robert Bentley or Rebekah Mason.
12. Any and all documents, electronic data, and information evidencing or relating to any requests for reimbursement from State funds, including all supporting documentation, submitted by or on behalf of Governor Robert Bentley from January 1, 2013 to the present.
13. Any and all documents, electronic data, and information evidencing or relating to any requests for reimbursement from State funds, including all supporting documentation, submitted by or on behalf of Rebekah Mason from January 1, 2013 to the present.

14. Any and all documents, electronic data, and information evidencing or relating to any requests for reimbursement, including all supporting documentation, submitted to the National Governors Association from January 1, 2013 to the present.

15. Any and all documents, electronic data, and information evidencing or relating to any requests for reimbursement, including all supporting documentation, submitted to the Republican Governors Association from January 1, 2013 to the present.

16. Any and all documents, electronic data, and information evidencing or relating to any requests for reimbursement, including all supporting documentation, submitted to Bentley for Governor, Inc. from January 1, 2013 to the present.

17. Any and all documents, electronic data, and information evidencing or relating to any requests for reimbursement from State funds, including all supporting documentation, for any expense relating to Rebekah Mason submitted by or on behalf of the Office of the Governor from January 1, 2013 to the present.

18. Any and all documents, electronic data, and information evidencing or relating to any and all work, services, or goods performed or provided by Rebekah Mason, RCM Communications, Inc., Jon Mason, or JRM Enterprises, Inc. for or to the State of Alabama, Governor Robert Bentley, the Office of the Governor, the University of Alabama, Alabama Council for Excellent Government, or Bentley for Governor, Inc.

19. Any and all documents, electronic data, and information evidencing or relating to any and all compensation, reimbursements, expenses, and payments of any kind to Rebekah Mason, RCM Communications, Inc., Jon Mason, or JRM Enterprises, Inc.

20. Any and all documents, electronic data, and information evidencing or relating to any nondisclosure or confidentiality agreements signed by or proffered to any person by or on behalf of the Office of the Governor.

21. Any and all documents, electronic data, and information evidencing or relating to any and all temporary or permanent removals, reassignments, replacements, or terminations of any persons in the Office of the Governor.

22. Any and all documents, electronic data, and information evidencing or relating to any and all temporary or permanent removals, reassignments, replacements, or terminations of any officers or employees of the Alabama Law Enforcement Agency or any of its subordinate agencies, departments, or divisions from January 1, 2014 to present.

23. Any and all documents, electronic data, and information evidencing or relating to any formal or informal files maintained, whether electronically or otherwise, by or within the Office of the Governor related to any of the following:

- a. Spencer Collier;
- b. Rebekah Mason;

- c. Jon Mason;
- d. Dianne Bentley;
- e. Bentley for Governor, Inc.;
- f. Alabama Council for Excellent Government;
- g. RCM Communications, Inc.;
- h. JRM Enterprises, Inc.;
- i. Matt Hart, Mike Duffy, or any other person involved in the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.
- j. the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.

24. Any and all documents, electronic data, and information evidencing or relating to the job titles, duties, or performance of Rebekah Mason.

25. Rebekah Mason's personnel file.

26. A list of any and all email accounts used by Governor Robert Bentley.

27. A list of any and all email accounts used by Rebekah Mason.

28. An electronic copy in native format of any and all email accounts assigned to or used by Rebekah Mason.

29. A complete list of any and all cellular phones or mobile devices issued to or used by Governor Robert Bentley, including for each phone or device the telephone number, account number, the name of the carrier, and dates of use or service.

30. All bills and usage histories for any cellular phone or mobile device listed in response to the previous Request.

31. A complete list of any and all cellular phones or mobile devices issued to or used by Rebekah Mason, including for each phone or device the telephone number, account number, the name of the carrier, and dates of use or service.

32. All bills and usage histories for any cellular phone or mobile device listed in response to the previous Request.

33. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, between Governor Robert Bentley and Rebekah Mason, including any attorney or other person acting for or on behalf of either of them.

34. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, between Governor Robert Bentley and Jon Mason, including any attorney or other person acting for or on behalf of either of them.

35. Any and all audio or video recordings of any part of any telephone or other conversations between Governor Robert Bentley and Rebekah Mason.

36. Any and all documents, electronic data, and information evidencing or relating to any meetings at which both Governor Robert Bentley and Spencer Collier were present from January 1, 2014 to the present.

37. Any and all documents, electronic data, and information evidencing or relating to any meetings at which both Governor Robert Bentley and Rebekah Mason were present.

38. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, between the Office of the Governor and Spencer Collier, including any attorney or other person acting for or on behalf of either of them, from January 1, 2014 to present.

39. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, between the Office of the Governor and Stan Stabler, including any attorney or other person acting for or on behalf of either of them, from January 1, 2014 to present.

40. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, between the Office of the Governor and Ray Lewis, including any attorney or other person acting for or on behalf of either of them, from January 1, 2014 to present.

41. Any and all documents, electronic data, and information evidencing or relating in any way to the substance of the press release by the Office of the Governor on March 22, 2016 (which is attached hereto as **Attachment 1**), including but expressly not limited to:

- a. placing Spencer Collier on medical leave;
- b. internal review of the Alabama Law Enforcement Agency or any of its subordinate agencies, departments or divisions;
- c. misuse of State funds by the Alabama Law Enforcement Agency or any of its subordinate agencies departments or divisions;
- d. termination of Spencer Collier.

42. Any and all documents, electronic data, and information evidencing or relating to the Alabama Council for Excellent Government.

43. Any and all documents, electronic data, and information evidencing or relating to the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.

44. Any and all documents, electronic data, and information evidencing or relating to the 2014 gubernatorial campaign, including but expressly not limited to Bentley for Governor, Inc.

45. Any and all documents, electronic data, and information evidencing or relating to Statements of Economic Interests filed by the Office of the Governor with the Alabama Ethics Commission.

46. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, sent to or received by the Office of the Governor concerning:

- a. Rebekah Mason;
- b. Alabama Council for Excellent Government;
- c. RCM Communications, Inc.;
- d. JRM Enterprises, Inc.;
- e. Bentley for Governor, Inc.

**BEFORE THE HOUSE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES**

**In Re: The Impeachment Investigation of  
Governor Robert Bentley**

**DOCUMENT REQUEST TO GOVERNOR ROBERT BENTLEY**

**TO: The Honorable Robert Bentley  
Governor of Alabama  
c/o Joseph C. Espy III, Esq.  
MELTON, ESPY & WILLIAMS, P.C.  
255 Dexter Avenue  
Montgomery, Alabama 36104**

**Definitions and Instructions**

- A. The term “you” or “your” as used herein refers to Governor Robert Bentley in his personal capacity.
- B. Unless otherwise specified, all Requests shall encompass the time from January 17, 2011 to the present.
- C. Documents responsive to any Request shall be produced together, in file folders or with other enclosures that segregate the files by Request number. If a document is responsive to more than one Request, it shall be produced in response to the Request to which it is primarily responsive.

**Documents and Things Requested**

- 1. All statements for any checking, savings, or investment account in your name, jointly or individually.
- 2. All federal and state income tax returns, including all schedules, attachments, and W-2s.
- 3. Any and all documents, electronic data, and information evidencing or relating to any and all work, services, or goods performed for or provided to the State of Alabama, Bentley for Governor, Inc. or you by Rebekah Mason, RCM Communications, Inc., Jon Mason, or JRM Enterprises, Inc.
- 4. Any and all documents, electronic data, and information evidencing or relating to any and all compensation, reimbursements, expenses, and payments of any kind made by the State of Alabama, Bentley for Governor, Inc. or you or on your behalf to Rebekah Mason, RCM Communications, Inc., Jon Mason, JRM Enterprises, Inc., Alabama Council for Excellent Government, or Bentley for Governor, Inc.

5. Any and all documents, electronic data, and information evidencing or relating to your daily and weekly schedule.

6. A complete list of any and all cellular phones or mobile devices owned or used by you, including for each phone or device the telephone number, account number, the name of the carrier, and the dates of use or service.

7. All bills and usage histories for any cellular phone or mobile device listed in response to the previous Request.

8. A complete list of any and all email accounts and social media accounts owned or used by you.

9. Any and all audio or video recordings of any part of any telephone or other conversations between you and Rebekah Mason.

10. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, between you and any of the following persons, including any attorney or other person acting for or on behalf of either you or them:

- a. Rebekah Mason;
- b. Jon Mason;
- c. Spencer Collier;
- d. Stan Stabler;
- e. Ray Lewis;
- f. Cooper Shattuck.

11. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, sent to or received by you concerning:

- a. Spencer Collier;
- b. Rebekah Mason;
- c. Jon Mason;
- d. Alabama Council for Excellent Government;
- e. RCM Communications, Inc.;
- f. JRM Enterprises, Inc.;

g. Matt Hart, Mike Duffy, or any other person involved in the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard;

h. The investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.

12. Any and all documents, electronic data, and information evidencing or relating to any meetings at which both you and Spencer Collier were present from January 1, 2014 to the present.

13. Any and all documents, electronic data, and information evidencing or relating to any meetings at which both you and Rebekah Mason were present.

14. Any and all documents, electronic data, and information evidencing or relating to any of the following:

a. Rebekah Mason;

b. Jon Mason;

c. RCM Communications, Inc.;

d. JRM Enterprises, Inc.;

e. reimbursements to you by or from the State of Alabama, the National Governors Association, the Republican Governors Association, or Bentley for Governor, Inc.;

f. Alabama Council for Excellent Government.

15. Any and all documents, electronic data, and information evidencing or relating to any and all work, services, or goods performed or provided by Rebekah Mason, RCM Communications, Inc., Jon Mason, or JRM Enterprises, Inc. for or to the State of Alabama, Governor Robert Bentley, the Office of the Governor, the University of Alabama, Alabama Council for Excellent Government, or Bentley for Governor, Inc.

16. Any and all documents, electronic data, and information evidencing or relating to Statements of Economic Interests filed by you with the Alabama Ethics Commission.

EXHIBIT E

1 HR226  
2 176360-1  
3 By Representatives Henry, Butler, Farley, Todd, Williams (JW),  
4 Williams (P), Ball, Sessions, Crawford, Holmes (M) and  
5 Standridge  
6 RFD: Rules  
7 First Read: 05-APR-16

2  
3  
4  
5  
6  
7  
8 ARTICLES OF IMPEACHMENT AGAINST GOVERNOR BENTLEY.

9  
10 WHEREAS, in 2010, Governor Bentley was elected the  
11 53rd Governor of the State of Alabama and was reelected to a  
12 second term in 2014; and

13 WHEREAS, Section 173 of the Constitution of Alabama  
14 of 1901 provides that the Governor and other constitutional  
15 officers of this state may be impeached upon the adoption of  
16 articles of impeachment by this body and upon trial by the  
17 Senate, acting as a court of impeachment; and

18 WHEREAS, recent developments and findings relating  
19 to the Governor's inappropriate relationship with a married  
20 senior political advisor and official action taken to conceal  
21 this relationship, as well as official action taken to the  
22 detriment of the Secretary of the Alabama Law Enforcement  
23 Agency (ALEA) and other agency employees, demonstrate that he  
24 is unfit to serve the State of Alabama and that he has failed  
25 to faithfully protect and defend the Constitution of Alabama  
26 of 1901 and the laws of this state; and

1           WHEREAS, Governor Bentley has admitted to engaging  
2           in an inappropriate, extramarital relationship with a married  
3           senior political advisor; the release of recordings and  
4           transcripts of recordings substantiating the inappropriate  
5           relationship has garnered both statewide and national  
6           attention and criticism; and

7           WHEREAS, the senior political advisor, by  
8           subterfuge, has avoided required public financial disclosures  
9           and compliance with applicable ethics laws for state officers  
10          and employees through the establishment of an entity from  
11          which she was compensated; and

12          WHEREAS, Governor Bentley removed the Secretary of  
13          ALEA and directed or encouraged the termination, demotion, or  
14          involuntary transfer of other agency employees alleging misuse  
15          of state funds; an audit of ALEA's finances by the Alabama  
16          Department of Examiners of Public Accounts has revealed no  
17          discrepancies or misuse of funds and the former Secretary of  
18          ALEA has stated that his termination was based, in part, upon  
19          his discovery of the inappropriate relationship between  
20          Governor Bentley and his political advisor and his cooperation  
21          with the Attorney General in an ongoing judicial proceeding  
22          contrary to Governor Bentley's directive; and

23          WHEREAS, two formal complaints have been filed with  
24          the Alabama Ethics Commission to determine whether Governor  
25          Bentley violated state ethics laws by using state property in  
26          the furtherance of the inappropriate relationship with his

1 senior political advisor and whether he has used his position  
2 to interfere with any investigations; and

3 WHEREAS, in recognition of the gravity of the  
4 adoption of these articles of impeachment and upon findings  
5 that Governor Bentley has violated the public trust, this body  
6 concludes Governor Bentley should be impeached for cause; now  
7 therefore,

8 BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF  
9 THE LEGISLATURE OF ALABAMA, That Governor Bentley is impeached  
10 for cause and that the following articles of impeachment,  
11 based upon the findings in this resolution, be transmitted to  
12 the Senate for trial as provided in Section 173 of the  
13 Constitution of Alabama of 1901:

14 ARTICLE I.

15 Willful Neglect of Duty.

16 There is credible evidence from which to infer that,  
17 in his conduct while Governor of the State of Alabama, he has  
18 willfully neglected his duty as Governor by failing to  
19 faithfully execute the laws of this state and by refusing to  
20 perform his constitutional and statutory duties and has  
21 consistently acted in violation of law to promote his own  
22 personal agenda.

23 ARTICLE II.

24 Corruption in Office.

25 There is credible evidence from which to infer that,  
26 in his conduct while Governor of the State of Alabama, he has  
27 unlawfully used state property in furtherance or concealment

1 of an inappropriate relationship with a senior political  
2 advisor and has made administrative decisions, including  
3 termination, demotion, or the involuntary transfer of  
4 Executive Branch employees, based solely upon the furtherance  
5 of that inappropriate relationship. Furthermore, the lack of  
6 transparency of the senior political advisor's compensation  
7 arrangement and status further demonstrate corrupt motives and  
8 suggest circumvention of state ethics laws. Governor Bentley  
9 has betrayed his trust as Governor and has undermined the  
10 integrity of his office.

11 ARTICLE III.

12 Incompetency.

13 There is credible evidence from which to infer that,  
14 in his conduct while Governor of the State of Alabama, he has  
15 exhibited poor judgment and continues to make decisions that  
16 are detrimental to the people of this state and has proven to  
17 be wholly ineffective as Governor. Governor Bentley's abuse of  
18 his official duties and powers consistently demonstrates  
19 diminished competency, honesty, principles, and morality.

20 ARTICLE IV.

21 Offenses of Moral Turpitude.

22 The Alabama Supreme Court has defined "moral  
23 turpitude" to mean something immoral in itself, regardless of  
24 the fact that it is punished by law, including an act that is  
25 not merely prohibited, but is inherently immoral. By his own  
26 admission, Governor Bentley has engaged in an extramarital  
27 relationship with a married political advisor and has used his

1 office in furtherance and concealment of this relationship.  
2 Governor Bentley's conduct is inherently immoral and renders  
3 him unfit to serve in the highest office in this state.

**Before the Judiciary Committee of the Alabama House of Representatives**

In re: Proposed Impeachment of Governor Robert Bentley

**OBJECTION TO, AND MOTION TO QUASH, SUBPOENA**

Comes now Michael H. Echols, CPA, by and through his attorney Bernard Harwood, Jr., and objects to, and moves to quash, the subpoena annexed hereto as “Exhibit A,” and as grounds of the objection and motion, states the following, separately and severally:

1. Most, if not all, of the materials sought by the subpoena would represent confidential information imparted to Mr. Echols in his role as a CPA representing his clients. Alabama State Board of Public Accountancy Rule 30-X-6-.04 (1) prohibits disclosure of “any confidential information obtained in the course of a professional engagement except with the consent of the client,” but with an exception for “compliance with a validly issued subpoena or summons enforceable by order of a court.” Likewise, the recently revised Code of Professional Conduct of the American Institute of CPAs addresses client confidentiality. AICPA Section 1.700 “Confidential Information” starts off with subsection 1.700.001, which declares that “A member in public practice shall not disclose any confidential client information without the specific consent of the client.” Subsection 1.700.100 allows disclosure in compliance with “a validly issued and enforceable subpoena or summons. . . .” Mr. Echols does not have client consent for disclosure and, as explained in ground 2, counsel for Mr. Echols does not believe the subject subpoena is one validly issued and enforceable.
2. The subpoena was signed on September 27, 2016 by Representative Mike Jones “On Behalf Of The Committee,” in his role as “Chairman, Alabama House Judiciary Committee,” and then “Issued” by the Clerk of the Alabama House of Representatives on September 29, 2016. It purports to issue “Pursuant to the Committee Rules of the House Judiciary Committee” and to represent the act and command of that Committee. The Rules in question, adopted by the Committee on September 27<sup>th</sup> and expressly applicable only to the investigation of the impeachment charges, authorize in Rule 3(b), the Chair of the Committee to direct the Clerk of the House” to issue subpoenas duces tecum in the name of the Committee requiring a person to appear before the Committee or Special Counsel,” and bring with him or her the materials specified by the subpoena. Thus, the sole authority cited for issuance of a subpoena duces tecum, such as is here challenged, is the Committee’s own declaration of such authority. Mr. Echols’ counsel is aware of no provision of the Alabama Constitution, or the Alabama Code, or any decision of the State’s appellate courts, conferring or recognizing authority for the issuance of a subpoena duces tecum such as the one directed to Mr. Echols. In fact, legislation proposed earlier this year, at the time the House was contemplating articles of impeachment against Governor Bentley, explicitly acknowledged that “[e]xisting law does not provide for a comprehensive method for legislative committees to subpoena witnesses and documents,” and sought to authorize a method. See, House Bill 557 (April 19, 2016) and Senate Bill 60 (February 2, 2016). See also House Bill 57 (August 18, 2016). The proposed legislation would have provided standing committees of the House of Representatives

“with the authority to subpoena witnesses to testify before the committee and to subpoena documents as needed to conduct the business of the respective committee.” *Id.* House Bill 57 was designed to provide a method for procuring the issuance of subpoenas for an impeachment investigation, and explained the need for one because “there is no specific provision for compelling testimony or the production of evidence in an impeachment investigation conducted pursuant to rules of the House of Representatives.” The method proposed was for “the Circuit Court for the 15<sup>th</sup> Judicial Circuit [Montgomery County] to issue a subpoena to compel testimony and the production of evidence upon application by the committee.” None of those proposed bills were adopted. Special Counsel for the Committee is understood to have asserted the existence of a “plenary” subpoena power derived as a necessary incident to the impeachment authority vested in the House of Representatives under Section 173 of Article VII of the Constitution of Alabama of 1901. While that section provides for “articles or charges” of impeachment to be “preferred by the house of representatives,” it in no way alludes to or implicates the issuance of subpoenas by the House and, in any event, even if the House itself was thought to have an implied power in that regard, it would not be one that independently could be exercised by only a committee of the House.

3. The scope and reach of the subpoena, particularly when measured against the two proposed articles of impeachment attached to the subpoena, manifestly represent a “fishing expedition” of extremely broad dimensions, clearly intended as an attempt to discover possibly relevant information that might possibly exist, as opposed to a means to obtain evidence known to exist. As such, the subpoena exceeds its permissible scope. An impeachment proceeding “is criminal in nature.” State ex rel. Strange, [Ms. 1151021, July 27, 2016] 2016 WL 4044903, \_\_\_ So.3d \_\_\_ (Ala. 2016). The impeachment process “is, in its nature, highly penal and is governed by the rules of law applicable to criminal prosecutions.” State ex rel. Attorney General v. Hasty, 184 Ala. 121, 124 (Ala. 1913). Rule 17.3 of the Alabama Rules of Criminal Procedure, captioned “Subpoena Duces Tecum,” addresses the use of that device. Subsection (c) of that rule provides: “The court, on motion made promptly, may dismiss or modify a subpoena duces tecum if compliance therewith would be unreasonable, oppressive, or unlawful.” The Committee Comments to Rule 17.3 emphasize that “[t]his rule is not intended to be a discovery device . . . .” Courts have also mandated that a subpoena duces tecum, under Rule 17.3, “should not be employed as a ‘fishing expedition.’” Ex parte Fitch, 715 So.2d 873, 875-76 (Ala. Crim. App. 1997). Therefore, “The right to compel material pursuant to subpoena is . . . limited to the compulsion of ‘evidence’ and is not a right to compel the production of documents that refer to evidence or that provide leads that will assist in the identification of evidence or to ascertain the existence of witnesses or evidence.” State v. Lewis, 36 So.3d 72, 79-80 (Ala. Crim. App. 2008) (quoting People v. Morrison, 559 N.Y.S. 2d 1013, 1017-18 (N.Y. City Crim. Ct. 1990)). Under Rule 17.3, “to require production prior to trial, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general ‘fishing expedition.’”

Maples v. State, 758 So.2d 1, 34-35 (Ala. Crim. App.), aff'd sub nom. Ex parte Maples, 758 So.2d 81 (Ala. 1999).

4. The extensive facial reach of the descriptions of subpoenaed documents, in all but one instance embracing a time period extending back to January 17, 2011, and limited in scope only by such general, amorphous references as “evidencing or relating to” various categories or persons/entities, or which (Item 11) Mr. Echols might “believe are relevant, in any way, to the proposed Articles of Impeachment,” is unreasonable, overly broad and unduly burdensome, expensive and time consuming to attempt compliance with.

### **Conclusion**

Based on the circumstances and considerations set out above, Mr. Echols, through his counsel, respectfully objects to the subpoena, and to each demand for production of documents, separately and severally, and moves to quash the same.

Submitted this 10<sup>th</sup> day of October, 2016.

Michael H. Echols, CPA

By: 

Bernard Harwood, Jr.  
ROSEN HARWOOD, P.A.  
2200 Jack Warner Parkway  
Suite 200  
Tuscaloosa, AL 35401  
205-344-5000 (main switchboard)  
205-469-1157 (direct line)  
[bharwood@rosenharwood.com](mailto:bharwood@rosenharwood.com)

### **CERTIFICATE OF SERVICE**

I hereby certify that I have today served a copy of Objection/Motion upon Jackson R. Sharman, Special Counsel to the House Judiciary Committee, by email directed to him in care of his law partner Wes Gilchrist, as authorized by Mr. Gilchrist during an October 5, 2016 telephone conversation between him and me.

This 10<sup>th</sup> day of October, 2016.

  
\_\_\_\_\_  
Of Counsel

# EXHIBIT A

## BEFORE THE JUDICIARY COMMITTEE OF THE ALABAMA HOUSE OF REPRESENTATIVES

TO: Mr. Michael H. Echols  
c/o Hon. R. Bernard Harwood, Jr.  
ROSEN HARWOOD  
2200 Jack Warner Parkway, Ste. 200  
Tuscaloosa, Alabama 35401

SUBPOENA

PURSUANT TO THE COMMITTEE RULES OF THE HOUSE JUDICIARY COMMITTEE FOR THE IMPEACHMENT OF GOVERNOR ROBERT BENTLEY, THE JUDICIARY COMMITTEE OF THE ALABAMA HOUSE OF REPRESENTATIVES ("THE COMMITTEE") HEREBY COMMANDS YOU:

To appear before the Committee and be questioned at the place, date, and time specified below:

Place: \_\_\_\_\_

Date: \_\_\_\_\_

Time: \_\_\_\_\_

To produce the materials, identified in the attached Exhibit A, to the Committee at the place, date, and time specified below:

Place: 400 20<sup>th</sup> Street North, Birmingham, Alabama 35203

Date: Monday, October 10, 2016

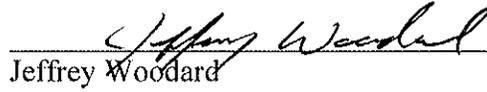
Time: By no later than 5:00 p.m.

ON BEHALF OF THE COMMITTEE:

ISSUED BY:



Representative Mike Jones  
Chairman, Alabama House Judiciary Committee



Jeffrey Woodard  
Clerk, Alabama House of Representatives

Date: 9-27-2016

Date: 9-29-16

Any questions pertaining to this Subpoena should be directed to the Special Counsel for the Committee:

Jackson R. Sharman III  
400 20th Street North  
Birmingham, Alabama 35203  
Telephone: (205) 581-0700  
Email: [jsharman@lightfootlaw.com](mailto:jsharman@lightfootlaw.com)

**BEFORE THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES**

**TO: Mr. Michael H. Echols  
c/o Hon. R. Bernard Harwood, Jr.  
ROSEN HARWOOD  
2200 Jack Warner Parkway, Ste. 200  
Tuscaloosa, Alabama 35401**

**SUBPOENA  
EXHIBIT A**

**Definitions and Instructions**

- A. The term "Office of the Governor" as used herein refers to Governor Robert Bentley in his official capacity and all current or former members of Governor Robert Bentley's Staff, including but expressly not limited to those assigned to the following offices: Executive Office, Chief of Staff and Deputy Chief of Staff, Legal Office, Communications Office, Legislative Office, Constituent Services Office, Scheduling Office, Appointments Office, Policy Office, Administration Office, Office of the First Lady, and Governor's Mansion.
- B. Unless otherwise specified, all items shall encompass the period of time beginning January 17, 2011 to the present.
- C. Documents responsive to any items shall be produced together, in electronic or paper file folders or with other enclosures that separate the files by item number. If a document is responsive to more than one item, it shall be produced in response to the item to which it is primarily responsive.

**Documents and Things Requested**

1. Any and all documents, electronic data, and information evidencing or relating to any and all work, services, or goods performed or provided by you for or to the Alabama Council for Excellent Government; RCM Communications, Inc., JRM Enterprises, Inc., Bentley for Governor, Inc., Governor Robert Bentley in his personal capacity, or Rebekah Mason, from January 1, 2014 to the present.
2. Any and all documents, electronic data, and information evidencing or relating to any and all compensation, reimbursements, expenses, and payments of any kind made to Bentley for Governor, Inc. by the State of Alabama, the Office of the Governor, Rebekah Mason, Jon Mason, the Alabama Council for Excellent Government, RCM Communications, Inc., JRM Enterprises, Inc., or Governor Robert Bentley in his personal capacity.
3. Any and all documents, electronic data, and information evidencing or relating to any and all compensation, reimbursements, expenses, and payments of any kind made by Bentley for Governor, Inc. to the State of Alabama, the Office of the Governor, Rebekah Mason, Jon Mason, the Alabama Council for Excellent Government, RCM Communications, Inc., JRM Enterprises, Inc., or Governor Robert Bentley in his personal capacity.
4. Any and all documents, electronic data, and information evidencing or relating to any and all compensation, reimbursements, expenses, and payments of any kind made to the Alabama

Council for Excellent Government by the State of Alabama, the Office of the Governor, Rebekah Mason, Jon Mason, Bentley for Governor, Inc., RCM Communications, Inc., JRM Enterprises, Inc., or Governor Robert Bentley in his personal capacity.

5. Any and all documents, electronic data, and information evidencing or relating to any and all compensation, reimbursements, expenses, and payments of any kind made by the Alabama Council for Excellent Government to the State of Alabama, the Office of the Governor, Rebekah Mason, Jon Mason, Bentley for Governor, Inc., RCM Communications, Inc., JRM Enterprises, Inc., or Governor Robert Bentley in his personal capacity.

6. Any and all documents, electronic data, and information evidencing or relating to any compensation, loans, gifts, payments, or other transfers of money or things of value between Governor Robert Bentley in his personal capacity and Rebekah Mason.

7. Any and all notes, memoranda, analysis, summaries, or compilations of records, prepared or maintained by you, solely or working with others, relating to the financial activity or conduct of Governor Robert Bentley in either his official or personal capacity.

8. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, between you and any of the following persons, including any attorney or other person acting for or on behalf of either you or them:

- a. the Office of the Governor;
- b. Governor Robert Bentley in his personal capacity;
- c. Dianne Bentley;
- d. Rebekah Mason;
- e. Jon Mason;
- f. any director, officer, employee, agent, or representative of Alabama Council for Excellent Government;
- g. any director, officer, employee, agent, or representative of Bentley for Governor, Inc.;
- h. any director, officer, employee, agent, or representative of RCM Communications, Inc.;
- i. any director, officer, employee, agent, or representative of JRM Enterprises, Inc.

9. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, between you and any person, whether sent by you, sent to you, or copied to you, concerning:

- a. the Office of the Governor;
- b. Governor Robert Bentley in his personal capacity;
- c. Dianne Bentley;

- d. Rebekah Mason;
- e. Bentley for Governor, Inc.;
- f. Alabama Council for Excellent Government;
- g. RCM Communications, Inc.;
- h. JRM Enterprises, Inc.

10. Any and all documents, electronic data, and information evidencing or relating to any of the following:

- a. the Office of the Governor;
- b. Rebekah Mason;
- c. Alabama Council for Excellent Government;
- d. Bentley for Governor, Inc.;
- e. RCM Communications, Inc.;
- f. JRM Enterprises, Inc.

11. Any and all documents, electronic data, information, or other things that you believe are relevant, in any way, to the proposed Articles of Impeachment Against Governor Bentley, a copy of which is enclosed as Attachment 1, or the investigation pertaining thereto.

1 HR367  
2 176360-2  
3 By Representatives Henry, Whorton (I), Sessions, Ball,  
4 Patterson, Hanes, Whorton (R), Holmes (M), Standridge, Moore  
5 (B), Crawford, Farley, Williams (JW), Ainsworth, Ford, Todd,  
6 Wilcox, Butler, Nordgren, Williams (P), Morrow, Ingram and  
7 Mooney  
8 RFD: Judiciary  
9 First Read: 28-APR-16

2  
3  
4  
5  
6  
7  
8 ARTICLES OF IMPEACHMENT AGAINST GOVERNOR BENTLEY.  
9

10 WHEREAS, in 2010, Governor Bentley was elected the  
11 53rd Governor of the State of Alabama and was reelected to a  
12 second term in 2014; and

13 WHEREAS, Section 173 of the Constitution of Alabama  
14 of 1901 provides that the Governor and other constitutional  
15 officers of this state may be impeached upon the adoption of  
16 articles of impeachment by this body and upon trial by the  
17 Senate, acting as a court of impeachment; and

18 WHEREAS, two formal complaints have been filed with  
19 the Alabama Ethics Commission to determine whether Governor  
20 Bentley violated state ethics laws by misusing state property;  
21 and

22 WHEREAS, in recognition of the gravity of the  
23 adoption of these articles of impeachment and upon findings  
24 that Governor Bentley has violated the public trust, this body  
25 concludes Governor Bentley should be impeached for cause; now  
26 therefore,

1                   BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF  
2           THE LEGISLATURE OF ALABAMA, That Governor Bentley is impeached  
3           for cause and that the following articles of impeachment,  
4           based upon the findings in this resolution, be transmitted to  
5           the Senate for trial as provided in Section 173 of the  
6           Constitution of Alabama of 1901:

7                   ARTICLE I.

8                   Willful Neglect of Duty.

9                   Credible evidence exists to create probable cause to  
10           believe that, in his conduct while Governor of the State of  
11           Alabama, he willfully neglected his duty as Governor by  
12           failing to faithfully execute the laws of this state and by  
13           refusing to perform his constitutional and statutory duties.

14                   ARTICLE II.

15                   Corruption in Office.

16                   Credible evidence exists to create probable cause to  
17           believe that, in his conduct while Governor of the State of  
18           Alabama, he unlawfully misused state property, misappropriated  
19           state resources, and consistently acted in violation of law to  
20           promote his own personal agenda.

BEFORE THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES

**In re: The Impeachment of Robert Bentley  
Governor of Alabama**

**OBJECTION OF RCM COMMUNICATIONS, INC. TO SUBPOENA OR,  
IN THE ALTERNATIVE, MOTION TO QUASH SUBPOENA**

Comes now RCM Communications, Inc. ("RCM"), by and through undersigned counsel, and hereby objects to the subpoena served upon it in this matter for the production of documents or, in the alternative, moves to quash said subpoena. As grounds for said objections and motion, RCM shows as follows.

1. The said subpoena, a copy of which is attached hereto as Exhibit A, was caused to be served on RCM by the Judiciary Committee of the Alabama House of Representatives ("the Committee"). It purportedly was issued in connection with the Committee's investigation of the proposed impeachment of Governor Robert Bentley.
2. There is no authority in Alabama for the issuance of the subpoena by the Committee, its Chair, its subcommittee, or its special counsel.
3. The issuance of the subpoena is unlawful, and the subpoena is unenforceable. In support of the unlawfulness of the issuance of the subpoena and the unenforceability of the subpoena, RCM adopts by reference and incorporates herein the legal grounds, arguments, and rationales set forth in the objection filed by Governor Robert Bentley to the subpoena served on him by the Judiciary Committee.
4. RCM is a private corporation owned entirely by Rebekah Mason, and the subpoena seeks to invade its privacy, its other rights, and the rights of its sole shareholder, in impermissible ways.
5. The subpoena is grossly overbroad.
6. The subpoena is grossly intrusive.
7. The subpoena is harassing and abusive.
8. The subpoena seeks information outside the possession, custody or control of RCM.
9. The subpoena seeks information that is within the public domain and, therefore, that is equally accessible to the Committee and its Special Counsel.
10. The subpoena seeks information that goes far beyond any legitimate inquiry into allegedly impeachable conduct by the Governor.

11. Attempting to search for and produce the information sought by the subpoena would be unduly and unbelievably burdensome and oppressive, both in terms of time and expense.

12. Even if there were legal authority for the issuance of the subpoena, the committee lacks jurisdiction to seek information not relevant to its investigation, and, given the vagueness of the Articles of Impeachment, many of the documents requested are either not relevant, or one cannot reasonably determine whether or not they are relevant. The Committee has no jurisdiction to conduct a fishing expedition in hopes of finding, as opposed to investigating, some basis for a charge.

13. Taken as a whole, the subpoena constitutes an abuse of process.

14. With respect to its claims asserted herein that the subpoena is unreasonable in its content and scope, and is overly broad, unduly burdensome, harassing, unnecessarily intrusive, and abusive, RCM adopts by reference and incorporates herein the legal grounds, arguments, and rationales set forth in the objection filed by Governor Robert Bentley to the subpoena served on him by the Judiciary Committee.

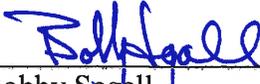
15. The subpoena denies RCM due process and other constitutional protections under the Alabama and United States Constitutions in that, among other things, it is being improperly used as a tool to investigate matters pending in other forums and to investigate allegedly criminal matters.

16. The subpoena attempts to invade the attorney-client privilege, the attorney work product privilege and other privileges protected by law.

17. In raising objections to the issuance of the subpoena and in challenging the enforceability of the subpoena, RCM does so without waiving any of its or its sole owner's state or federal constitutional, statutory, or other rights and protections, including without limitation the right of association, right to due process, right to avoid self-incrimination, right to Equal Protection, right to privacy, the attorney client privilege, and all other of its and her rights and protections, all of which it and she hereby assert and rely upon.

WHEREFORE, premises considered, RCM objects to the subpoena and to each request set forth therein and in the alternative, moves to quash the subpoena.

Respectfully submitted,

  
\_\_\_\_\_  
Bobby Segall  
Attorney for RCM Communications, Inc.

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the above and foregoing upon the following persons on this the 10th day of October, 2016:

**Via Email**

Jackson R. Sharman  
Lightfoot, Franklin & White LLC  
400 20<sup>th</sup> Street North  
Birmingham, Alabama 35203

**By Hand Delivery**

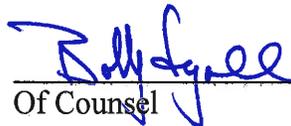
Tracy Arnold, Clerk  
Alabama House of Representatives Judicial Committee  
Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130

**By Hand Delivery**

Jeff Woodard, Clerk  
Alabama House of Representatives  
Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130

**By Hand Delivery**

Othni J. Lathram, Director  
Alabama Law Institute  
Alabama State House, Suite 207  
Montgomery, Alabama 36130

  
\_\_\_\_\_  
Of Counsel

BEFORE THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES

TO: RCM Communications, Inc.  
c/o Robert D. Segall, Esq.  
COPELAND, FRANCO, SCREWS & GILL  
444 South Perry Street  
Montgomery, Alabama 36104

SUBPOENA

PURSUANT TO THE COMMITTEE RULES OF THE HOUSE JUDICIARY COMMITTEE FOR THE IMPEACHMENT OF GOVERNOR ROBERT BENTLEY, THE JUDICIARY COMMITTEE OF THE ALABAMA HOUSE OF REPRESENTATIVES ("THE COMMITTEE") HEREBY COMMANDS YOU:

- To appear before the Committee and be questioned at the place, date, and time specified below:

Place: \_\_\_\_\_

Date: \_\_\_\_\_

Time: \_\_\_\_\_

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Place: 400 20<sup>th</sup> Street North, Birmingham, Alabama 35203

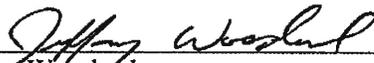
Date: Monday, October 10, 2016

Time: By no later than 5:00 p.m.

ON BEHALF OF THE COMMITTEE:

ISSUED BY:

  
\_\_\_\_\_  
Representative Mike Jones  
Chairman, Alabama House Judiciary Committee

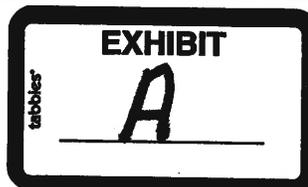
  
\_\_\_\_\_  
Jeffrey Woodard  
Clerk, Alabama House of Representatives

Date: 9-27-2016

Date: 9-29-16

Any questions pertaining to this Subpoena should be directed to the Special Counsel for the Committee:

Jackson R. Sharman III  
400 20th Street North  
Birmingham, Alabama 35203  
Telephone: (205) 581-0700  
Email: [jsharman@lightfootlaw.com](mailto:jsharman@lightfootlaw.com)



**BEFORE THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES**

**TO: RCM Communications, Inc.  
c/o Robert D. Segall, Esq.  
COPELAND, FRANCO, SCREWS & GILL  
444 South Perry Street  
Montgomery, Alabama 36104**

**SUBPOENA  
EXHIBIT A**

**Definitions and Instructions**

- A. The term "Office of the Governor" as used herein refers to Governor Robert Bentley in his official capacity and all current or former members of Governor Robert Bentley's Staff, including but expressly not limited to those assigned to the following offices: Executive Office, Chief of Staff and Deputy Chief of Staff, Legal Office, Communications Office, Legislative Office, Constituent Services Office, Scheduling Office, Appointments Office, Policy Office, Administration Office, Office of the First Lady, and Governor's Mansion.
- B. Documents responsive to any items shall be produced together, in electronic or paper file folders or with other enclosures that separate the files by item number. If a document is responsive to more than one item, it shall be produced in response to the item to which it is primarily responsive.

**Documents and Things Requested**

1. Any and all documents RCM Communications, Inc. ("RCM") has ever submitted to the Secretary of State of Alabama, including but expressly not limited to certificate(s) of name reservation, and certificate(s) of formation.
2. RCM's articles of incorporation, bylaws, and all amendments to bylaws.
3. Minutes for any meetings of RCM's shareholders and directors.
4. All federal and state tax returns, including all schedules and attachments, from RCM's formation to the present.
5. A complete list of all of RCM's directors, stockholders, officers and employees, including their title and contact information, and organizational charts or diagrams showing the relationships between and among all such persons.
6. Any and all documents, electronic data, and information evidencing or relating to any and all donations contributions, compensation, reimbursement, or other payments of any kind made to RCM by the State of Alabama, the Office of the Governor, the University of Alabama, the Alabama Council for Excellent Government, JRM Enterprises, Inc., Robert Bentley for Governor, Inc., or Governor Robert Bentley in his personal capacity.
7. Any and all documents, electronic data, and information evidencing or relating to any and all compensation, reimbursements, expenses, and payments of any kind by RCM to the State of Alabama, the Office of the Governor, Rebekah Mason, Jon Mason, the Alabama Council for Excellent

Government, JRM Enterprises, Inc., Robert Bentley for Governor, Inc., or Governor Robert Bentley in his personal capacity.

8. Any and all documents, electronic data, and information evidencing or relating to State business.

9. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, between any of JRM's directors, officers, and employees and any of the following persons, including any attorney or other person acting for or on behalf of either JRM or them:

- a. the Office of the Governor;
- b. Governor Robert Bentley in his personal capacity;
- c. Dianne Bentley;
- d. any other member of the Bentley family;
- e. Rebekah Mason;
- f. Spencer Collier;
- g. any director, officer, employee, agent, or representative of JRM Enterprises, Inc.;
- h. any director, officer, employee, agent, or representative of Alabama Council for Excellent Government;
- i. any director, officer, employee, agent, or representative of Bentley for Governor, Inc.

10. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, sent to or received by any of JRM's directors, officers, and employees concerning:

- a. the Office of the Governor;
- b. Governor Robert Bentley in his personal capacity;
- c. Dianne Bentley;
- d. any other member of the Bentley family;
- e. Rebekah Mason;
- f. Spencer Collier;
- g. JRM Enterprises, Inc.;
- h. Alabama Council for Excellent Government;
- i. Bentley for Governor, Inc.;

- j. State aircraft;
- k. Matt Hart, Mike Duffy, or any other person involved in the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard;
- l. the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.

11. Any and all documents, electronic data, and information evidencing or relating to any of the following:

- a. the Office of the Governor;
- b. Governor Robert Bentley in his personal capacity;
- c. Dianne Bentley;
- d. any other member of the Bentley family;
- e. Rebekah Mason;
- f. Spencer Collier;
- g. JRM Enterprises, Inc.;
- h. Alabama Council for Excellent Government;
- i. Bentley for Governor, Inc.;
- j. State aircraft;
- k. Matt Hart, Mike Duffy, or any other person involved in the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard;
- l. the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.

12. Any and all documents, electronic data, information, or other things that you believe are relevant, in any way, to the proposed Articles of Impeachment Against Governor Bentley, a copy of which is enclosed as Attachment 1, or the investigation pertaining thereto.

1 HR367  
2 176360-2  
3 By Representatives Henry, Whorton (I), Sessions, Ball,  
4 Patterson, Hanes, Whorton (R), Holmes (M), Standridge, Moore  
5 (B), Crawford, Farley, Williams (JW), Ainsworth, Ford, Todd,  
6 Wilcox, Butler, Nordgren, Williams (P), Morrow, Ingram and  
7 Mooney  
8 RFD: Judiciary  
9 First Read: 28-APR-16

8 ARTICLES OF IMPEACHMENT AGAINST GOVERNOR BENTLEY.  
9

10 WHEREAS, in 2010, Governor Bentley was elected the  
11 53rd Governor of the State of Alabama and was reelected to a  
12 second term in 2014; and

13 WHEREAS, Section 173 of the Constitution of Alabama  
14 of 1901 provides that the Governor and other constitutional  
15 officers of this state may be impeached upon the adoption of  
16 articles of impeachment by this body and upon trial by the  
17 Senate, acting as a court of impeachment; and

18 WHEREAS, two formal complaints have been filed with  
19 the Alabama Ethics Commission to determine whether Governor  
20 Bentley violated state ethics laws by misusing state property;  
21 and

22 WHEREAS, in recognition of the gravity of the  
23 adoption of these articles of impeachment and upon findings  
24 that Governor Bentley has violated the public trust, this body  
25 concludes Governor Bentley should be impeached for cause; now  
26 therefore,

1                   BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF  
2           THE LEGISLATURE OF ALABAMA, That Governor Bentley is impeached  
3           for cause and that the following articles of impeachment,  
4           based upon the findings in this resolution, be transmitted to  
5           the Senate for trial as provided in Section 173 of the  
6           Constitution of Alabama of 1901:

7                   ARTICLE I.

8                   Willful Neglect of Duty.

9                   Credible evidence exists to create probable cause to  
10           believe that, in his conduct while Governor of the State of  
11           Alabama, he willfully neglected his duty as Governor by  
12           failing to faithfully execute the laws of this state and by  
13           refusing to perform his constitutional and statutory duties.

14                   ARTICLE II.

15                   Corruption in Office.

16                   Credible evidence exists to create probable cause to  
17           believe that, in his conduct while Governor of the State of  
18           Alabama, he unlawfully misused state property, misappropriated  
19           state resources, and consistently acted in violation of law to  
20           promote his own personal agenda.

**BEFORE THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES**

**In re: The Impeachment of Robert Bentley  
Governor of Alabama**

**OBJECTION OF REBEKAH MASON TO SUBPOENA OR,  
IN THE ALTERNATIVE, MOTION TO QUASH SUBPOENA**

Comes now Rebekah Mason (“Mrs. Mason”), by and through undersigned counsel, and hereby objects to the subpoena served upon her in this matter for the production of documents or, in the alternative, moves to quash said subpoena. As grounds for said objections and motion, Mrs. Mason shows as follows.

1. The said subpoena, a copy of which is attached hereto as Exhibit A, was caused to be served on Mrs. Mason by the Judiciary Committee of the Alabama House of Representatives (“the Committee”). It purportedly was issued in connection with the Committee’s investigation of the proposed impeachment of Governor Robert Bentley.
2. There is no authority in Alabama for the issuance of the subpoena by the Committee, its Chair, its subcommittee, or its special counsel.
3. The issuance of the subpoena is unlawful, and the subpoena is unenforceable. In support of the unlawfulness of the issuance of the subpoena and the unenforceability of the subpoena, Mrs. Mason adopts by reference and incorporates herein the legal grounds, arguments, and rationales set forth in the objection filed by Governor Robert Bentley to the subpoena served on him by the Judiciary Committee.
4. Mrs. Mason is a private citizen, and the subpoena seeks to invade her privacy, and her rights as a private citizen, in impermissible ways.
5. The subpoena is grossly overbroad.
6. The subpoena is grossly intrusive.
7. The subpoena is harassing and abusive.
8. The subpoena seeks information outside the possession, custody or control of Mrs. Mason.
9. The subpoena seeks information that is within the public domain and, therefore, that is equally accessible to the Committee and its Special Counsel.
10. The subpoena seeks information that goes far beyond any legitimate inquiry into allegedly impeachable conduct by the Governor.

11. Attempting to search for and produce the information sought by the subpoena would be unduly and unbelievably burdensome and oppressive, both in terms of time and expense.

12. Even if there were legal authority for the issuance of the subpoena, the committee lacks jurisdiction to seek information not relevant to its investigation, and, given the vagueness of the Articles of Impeachment, many of the documents requested are either not relevant, or one cannot reasonably determine whether or not they are relevant. The Committee has no jurisdiction to conduct a fishing expedition in hopes of finding, as opposed to investigating, some basis for a charge.

13. Taken as a whole, the subpoena constitutes an abuse of process.

14. With respect to her claims asserted herein that the subpoena is unreasonable in its content and scope, and is overly broad, unduly burdensome, harassing, unnecessarily intrusive, and abusive, Mrs. Mason adopts by reference and incorporates herein the legal grounds, arguments, and rationales set forth in the objection filed by Governor Robert Bentley to the subpoena served on him by the Judiciary Committee.

15. The subpoena denies Mrs. Mason due process and other constitutional protections under the Alabama and United States Constitutions in that, among other things, it is being improperly used as a tool to investigate matters pending in other forums and to investigate allegedly criminal matters.

16. The subpoena attempts to invade the attorney-client privilege, the attorney work product privilege and other privileges protected by law.

17. In raising objections to the issuance of the subpoena and in challenging the enforceability of the subpoena, Mrs. Mason does so without waiving any of her state or federal constitutional, statutory, or other rights and protections, including without limitation her right of association, right to due process, right to avoid self-incrimination, right to Equal Protection, right to privacy, her attorney client privilege, and all other of her rights and protections, all of which she hereby asserts and relies upon both with respect to the subpoena served on her and the one served on RCM Communications, Inc.

WHEREFORE, premises considered, Mrs. Mason objects to the subpoena and to each request set forth therein and in the alternative, moves to quash the subpoena.

Respectfully submitted,



\_\_\_\_\_  
Bobby Segall  
Attorney for Rebekah Mason

**CERTIFICATE OF SERVICE**

I hereby certify that I have served a copy of the above and foregoing upon the following persons on this the 10th day of October, 2016:

**Via Email**

Jackson R. Sharman  
Lightfoot, Franklin & White LLC  
400 20<sup>th</sup> Street North  
Birmingham, Alabama 35203

**By Hand Delivery**

Tracy Arnold, Clerk  
Alabama House of Representatives Judicial Committee  
Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130

**By Hand Delivery**

Jeff Woodard, Clerk  
Alabama House of Representatives  
Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130

**By Hand Delivery**

Othni J. Lathram, Director  
Alabama Law Institute  
Alabama State House, Suite 207  
Montgomery, Alabama 36130

  
\_\_\_\_\_  
Of Counsel

BEFORE THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES

TO: Mrs. Rebekah Mason  
c/o Robert D. Segall, Esq.  
COPELAND, FRANCO, SCREWS & GILL  
444 South Perry Street  
Montgomery, Alabama 36104

SUBPOENA

PURSUANT TO THE COMMITTEE RULES OF THE HOUSE JUDICIARY COMMITTEE FOR THE IMPEACHMENT OF GOVERNOR ROBERT BENTLEY, THE JUDICIARY COMMITTEE OF THE ALABAMA HOUSE OF REPRESENTATIVES ("THE COMMITTEE") HEREBY COMMANDS YOU:

To appear before the Committee and be questioned at the place, date, and time specified below:

Place: \_\_\_\_\_

Date: \_\_\_\_\_

Time: \_\_\_\_\_

To produce the materials, identified in the attached Exhibit A, to the Committee at the place, date, and time specified below:

Place: 400 20<sup>th</sup> Street North, Birmingham, Alabama 35203

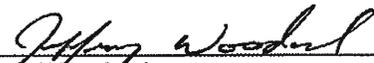
Date: Monday, October 10, 2016

Time: By no later than 5:00 p.m.

ON BEHALF OF THE COMMITTEE:

ISSUED BY:

  
Representative Mike Jones  
Chairman, Alabama House Judiciary Committee

  
Jeffrey Woodard  
Clerk, Alabama House of Representatives

Date: 9-27-2016

Date: 9-29-16

Any questions pertaining to this Subpoena should be directed to the Special Counsel for the Committee:

Jackson R. Sharman III  
400 20th Street North  
Birmingham, Alabama 35203  
Telephone: (205) 581-0700  
Email: [jsharman@lightfootlaw.com](mailto:jsharman@lightfootlaw.com)



**BEFORE THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES**

**TO: Mrs. Rebekah Mason  
c/o Robert D. Segall, Esq.  
COPELAND, FRANCO, SCREWS & GILL  
444 South Perry Street  
Montgomery, Alabama 36104**

**SUBPOENA  
EXHIBIT A**

**Definitions and Instructions**

- A. The term "Office of the Governor" as used herein refers to Governor Robert Bentley in his official capacity and all current or former members of Governor Robert Bentley's Staff, including but expressly not limited to those assigned to the following offices: Executive Office, Chief of Staff and Deputy Chief of Staff, Legal Office, Communications Office, Legislative Office, Constituent Services Office, Scheduling Office, Appointments Office, Policy Office, Administration Office, Office of the First Lady, and Governor's Mansion.
- B. Unless otherwise specified, all items shall encompass the period of time beginning January 17, 2011 to the present.
- C. Documents responsive to any items shall be produced together, in electronic or paper file folders or with other enclosures that separate the files by item number. If a document is responsive to more than one item, it shall be produced in response to the item to which it is primarily responsive.

**Documents and Things Requested**

1. A complete copy of your personnel file(s) with the State of Alabama or the Office of the Governor.
2. Any and all documents, electronic data, and information evidencing or relating to your daily and weekly schedule from January 17, 2011 to March 30, 2016.
3. Your federal and state income tax returns, including all schedules, attachments, and W-2s, for 2011 to the present.
4. Any and all documents, electronic data, and information evidencing or relating to any and all work, services, or goods you performed for or provided to the State of Alabama, the Office of the Governor, the Alabama Council for Excellent Government, Bentley for Governor, Inc. or Governor Robert Bentley in his personal capacity.
5. Any and all documents, electronic data, and information evidencing or relating to any and all compensation, reimbursements, expenses, and payments of any kind made to you by the State of Alabama, the Office of the Governor, the Alabama Council for Excellent Government, RCM Communications, Inc., JRM Enterprises, Inc., or Bentley for Governor, Inc.
6. Any and all documents, electronic data, and information evidencing or relating to any and all compensation, reimbursements, expenses, and payments of any kind made by you to the State

of Alabama, the Office of the Governor, the Alabama Council for Excellent Government, RCM Communications, Inc., JRM Enterprises, Inc., or Bentley for Governor, Inc.

7. Any and all documents, electronic data, and information evidencing or relating to any loans, gifts, payments, or other transfers of money or things of value to you from or on behalf of Governor Robert Bentley in his personal capacity.
8. All statements for any checking, savings, or investment account into which, or from which, any of the compensation, reimbursements, expenses, loans, gifts, payments, or other transfers of money or things of value referred to in Requests 5 through 7 were deposited or withdrawn.
9. Any and all documents, electronic data, and information evidencing or relating to any requests for reimbursement from State funds, including all supporting documentation, submitted by you or on your behalf from January 1, 2013 to the present.
10. Any and all documents, electronic data, and information evidencing or relating to your job titles, duties, or performance with or for the Office of the Governor, the State of Alabama, Bentley for Governor, Inc., or the 2014 gubernatorial campaign of Governor Robert Bentley.
11. Any and all documents, electronic data, and information evidencing or relating to any filings you have submitted to, or training you have received from, the Alabama Ethics Commission.
12. Any and all documents, things, or electronic data that you removed from State property.
13. Any and all documents, electronic data, and information that you have received since March 30, 2016 evidencing or relating to State business.
14. Any and all documents, electronic data, and information evidencing or relating to any meetings at which both Governor Robert Bentley and Spencer Collier were present from January 1, 2014 to the present.
15. Any and all documents, electronic data, and information evidencing or relating to any nondisclosure or confidentiality agreements signed by you or proffered to you by or on behalf of Governor Robert Bentley, in his personal capacity, or the Office of the Governor.
16. A complete list of any and all cellular phones or mobile devices owned or used by you, including for each phone or device the telephone number, account number, the name of the carrier, and the dates of use or service.
17. All bills and usage histories for any cellular phone or mobile device listed in response to the previous Request.
18. A complete list of any and all email accounts and social media accounts owned or used by you.
19. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letters, notes, emails, text messages, and voice messages, between you and any of the following persons, including any attorney or other person acting for or on behalf of either you or them:
  - a. the Office of the Governor;
  - b. Governor Robert Bentley in his personal capacity;

- c. Dianne Bentley;
- d. any other member of the Bentley family;
- e. Spencer Collier;
- f. Stan Stabler;
- g. Ray Lewis;
- h. any director, officer, employee, agent, or representative of Alabama Council for Excellent Government ;
- i. any director, officer, employee, agent, or representative of Bentley for Governor, Inc.;
- j. any director, officer, employee, agent, or representative of RCM Communications, Inc.

20. Any and all documents, electronic data, and information evidencing or relating to any communications, including but expressly not limited to letter, notes, emails, text messages, and voice messages, sent to or received by you concerning:

- a. the Office of the Governor;
- b. Governor Robert Bentley in his personal capacity;
- c. Dianne Bentley;
- d. any other member of the Bentley family;
- e. Spencer Collier;
- f. Stan Stabler;
- g. Ray Lewis;
- h. Bentley for Governor, Inc.;
- i. Alabama Council for Excellent Government;
- j. Alabama Law Enforcement Agency or any of its subordinate agencies, departments, or divisions;
- k. State aircraft;
- l. RCM Communications, Inc.;
- m. JRM Enterprises, Inc.;
- n. Matt Hart, Mike Duffy, or any other person involved in the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard;

- o. the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.

21. Any and all documents, electronic data, and information evidencing or relating to any of the following:

- a. The Office of the Governor;
- b. Governor Robert Bentley in his personal capacity;
- c. Dianne Bentley;
- d. any other member of the Bentley family;
- e. Alabama Council for Excellent Government or any of its current or former directors or officers;
- f. Alabama Law Enforcement Agency or any of its subordinate agencies, departments, or divisions, including any current or former officers or employees of any of the foregoing;
- g. State aircraft;
- h. RCM Communications, Inc.;
- i. JRM Enterprises, Inc.;
- j. Matt Hart, Mike Duffy, or any other person involved in the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard;
- k. the investigation, indictment, prosecution, or trial of former Alabama Speaker of the House Mike Hubbard.

22. Any and all audio or video recordings of any part of any telephone or other conversations between you and Governor Robert Bentley.

23. Any and all documents, electronic data, and information evidencing or relating to Statements of Economic Interests filed by you with the Alabama Ethics Commission.

24. Any and all documents, electronic data, information, or other things that you believe are relevant, in any way, to the proposed Articles of Impeachment Against Governor Bentley, a copy of which is enclosed as Attachment 1, or the investigation pertaining thereto.

1 HR367  
2 176360-2  
3 By Representatives Henry, Whorton (I), Sessions, Ball,  
4 Patterson, Hanes, Whorton (R), Holmes (M), Standridge, Moore  
5 (B), Crawford, Farley, Williams (JW), Ainsworth, Ford, Todd,  
6 Wilcox, Butler, Nordgren, Williams (P), Morrow, Ingram and  
7 Mooney  
8 RFD: Judiciary  
9 First Read: 28-APR-16

2  
3  
4  
5  
6  
7  
8 ARTICLES OF IMPEACHMENT AGAINST GOVERNOR BENTLEY.  
9

10 WHEREAS, in 2010, Governor Bentley was elected the  
11 53rd Governor of the State of Alabama and was reelected to a  
12 second term in 2014; and

13 WHEREAS, Section 173 of the Constitution of Alabama  
14 of 1901 provides that the Governor and other constitutional  
15 officers of this state may be impeached upon the adoption of  
16 articles of impeachment by this body and upon trial by the  
17 Senate, acting as a court of impeachment; and

18 WHEREAS, two formal complaints have been filed with  
19 the Alabama Ethics Commission to determine whether Governor  
20 Bentley violated state ethics laws by misusing state property;  
21 and

22 WHEREAS, in recognition of the gravity of the  
23 adoption of these articles of impeachment and upon findings  
24 that Governor Bentley has violated the public trust, this body  
25 concludes Governor Bentley should be impeached for cause; now  
26 therefore,

1                   BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF  
2           THE LEGISLATURE OF ALABAMA, That Governor Bentley is impeached  
3           for cause and that the following articles of impeachment,  
4           based upon the findings in this resolution, be transmitted to  
5           the Senate for trial as provided in Section 173 of the  
6           Constitution of Alabama of 1901:

7                   ARTICLE I.

8                   Willful Neglect of Duty.

9                   Credible evidence exists to create probable cause to  
10           believe that, in his conduct while Governor of the State of  
11           Alabama, he willfully neglected his duty as Governor by  
12           failing to faithfully execute the laws of this state and by  
13           refusing to perform his constitutional and statutory duties.

14                   ARTICLE II.

15                   Corruption in Office.

16                   Credible evidence exists to create probable cause to  
17           believe that, in his conduct while Governor of the State of  
18           Alabama, he unlawfully misused state property, misappropriated  
19           state resources, and consistently acted in violation of law to  
20           promote his own personal agenda.

**IN THE JUDICIARY COMMITTEE  
OF THE ALABAMA HOUSE OF REPRESENTATIVES**

**In re** )  
**The Impeachment of Robert** )  
**Bentley, Governor of Alabama** )

**EMERGENCY MOTION TO AFFORD DUE PROCESS PROTECTIONS**

The Governor of Alabama must be afforded due process in the proceedings before the House, including this Committee. Well established United States Supreme Court precedent requires it. Well established Alabama Supreme Court precedent requires it. The federal and Alabama Constitutions require it. The House Rule authorizing this Committee’s work requires it. And this Committee has previously acknowledged that it must provide the Governor due process. Nevertheless, the Special Counsel engaged to assist the Committee in conducting its investigation has usurped the Committee’s role and has refused to afford the Governor even the barest rudiments of due process. He has now issued, purportedly on behalf of this Committee, a letter setting forth procedures for this Committee’s work, including an abbreviated “hearing” that would result in an unprecedented deprivation of due process and a radical departure from basic principles of fairness and comity for a co-equal branch of Alabama government. These actions violate both the federal and Alabama Constitutions and the separation of powers principles therein.

As is fully explained in the attached white paper prepared by the Office of the Governor:<sup>1</sup>

- Well-established principles of constitutional law recognize that because the Judiciary Committee’s role has been designed to be “accusatory” and “adjudicatory,” it must meet strict standards of due process. The role of the full House of Representatives in

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<sup>1</sup> *Due Process in Impeachment Proceedings Before the Alabama House of Representatives*, attached hereto as Exhibit A.

impeachments is certainly “adjudicatory,” and it plainly must provide the Governor with due process.<sup>2</sup>

- The Alabama Supreme Court has held that officials subject to impeachment must be provided the highest levels of due process. The Supreme Court has said this clearly, repeatedly and recently. To be sure, these holdings have been in the context of impeachment of lower-level state officers pursuant to Section 174 of the Constitution, as opposed to an impeachment of a Governor pursuant to Section 173. But Alabama has never impeached a Governor, and there is no rational basis for believing the Supreme Court would afford the state’s Governor less due process than these other officials.<sup>3</sup> It should be noted that a federal court has ruled that Alabama legislators may not be expelled without due process and the Governor facing impeachment is entitled to no less.<sup>4</sup>
- The elements of due process would not be onerous for the Judiciary Committee to provide the Governor. They include notice of the potential charges against him; a procedure that gives him adequate time and opportunity to prepare a case (for example, by providing him with exhibits and a list of witnesses); disclosure of exculpatory information; the right to hear and cross examine all witnesses; the application of reasonable Rules of Evidence; the presumption of innocence; and, ultimately, the consideration of all of the evidence by the full House of Representatives.<sup>5</sup>

Both the Alabama and federal Constitutions demand that the House of Representatives and its Judiciary Committee afford the Governor due process, as the House has recognized in passing House Rule 79.1 and as this Committee recognized in drafting its rules.

The Governor has received notice from Special Counsel to the Committee that the Committee intends to adopt the schedule and procedures set forth on Exhibit B hereto, pursuant to which the Committee will accept a “report” from Special Counsel and conduct limited, expedited hearings. The procedure contemplated by the Committee Counsel affords none of the necessary due process protections and, indeed, contemplates a process by which the Governor -- with only three days’ notice -- must defend against Special Counsel’s “report” in a forum where there are no rules of evidence, no ability for the Governor to raise legal issues before the

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<sup>2</sup> *Id.* at pp. 3-9.

<sup>3</sup> *Id.* at pp. 9-13.

<sup>4</sup> *Id.* at 13-14.

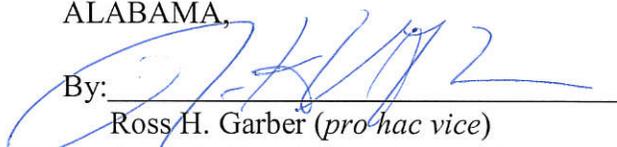
<sup>5</sup> *Id.* at 14-16.

Committee, Special Counsel is not required to call the witnesses against the Governor, no exculpatory evidence has been provided to the Governor and the Governor is restricted in the evidence he can present. The schedule and procedure contemplated by the Committee and its Special Counsel are fundamentally unfair and a thinly veiled rush to judgment.

Accordingly, Governor Bentley and the Office of the Governor respectfully object to the procedure contemplated by Special Counsel and move for the adoption of due process protections for Governor Bentley.

Respectfully Submitted this, the 30th day of March, 2017,

ROBERT BENTLEY, GOVERNOR  
OF ALABAMA and THE OFFICE OF  
THE GOVERNOR OF THE STATE OF  
ALABAMA,

By: 

Ross H. Garber (*pro hac vice*)  
Susan S. Murphy (*pro hac vice*)  
Shipman & Goodwin LLP  
1875 K. St, NW  
Washington, D.C. 20006  
202-469-7798  
rgarber@goodwin.com  
smurphy2@goodwin.com

-and-

David B. Byrne, Chief Legal Advisor  
William F. Patty, Deputy Legal Advisor  
Jason Paulk, Deputy Legal Advisor  
Office of the Governor  
State Capitol  
Montgomery, Alabama 36130  
David.Byrne@governor.alabama.gov  
William.Patty@governor.alabama.gov  
Jason.Paulk@governor.alabama.gov

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing upon the following persons on this the 30th day of March, 2017:

*Via Email*

Jackson R. Sharman  
Lightfoot, Franklin & White LLC  
400 20<sup>th</sup> Street North  
Birmingham, Alabama 35203

*By Hand Delivery*

Tracy Arnold, Clerk  
Alabama House of Representatives Judiciary Committee  
Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130

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Alabama House of Representatives  
Alabama State House  
11 South Union Street  
Montgomery, Alabama 36130

*By Hand Delivery*

Othni J. Lathram, Director  
Alabama Law Institute  
Alabama State House, Suite 207  
Montgomery, Alabama 36130



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Of Counsel

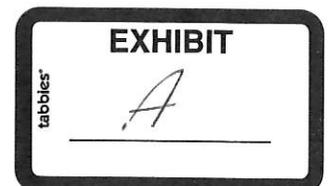
**DUE PROCESS IN IMPEACHMENT  
PROCEEDINGS BEFORE THE ALABAMA HOUSE OF REPRESENTATIVES**

March 2017

Prepared on behalf of the Office of the Governor of Alabama

Ross H. Garber (*pro hac vice*)  
Susan S. Murphy (*pro hac vice*)  
Shipman & Goodwin LLP  
1875 K. St, NW  
Washington, D.C. 20006  
202-469-7798  
rgarber@goodwin.com

David B. Byrne, Chief Legal Advisor  
Jason Paulk, Deputy Legal Advisor  
Office of the Governor  
State Capitol  
Montgomery, Alabama 36130



**DUE PROCESS IN IMPEACHMENT  
PROCEEDINGS BEFORE THE ALABAMA HOUSE OF REPRESENTATIVES**

**March 2017**

**EXECUTIVE SUMMARY**

Questions have arisen about whether the Alabama House of Representatives and the House Judiciary Committee must provide the Governor with due process in connection with its proceedings. It has been suggested that the House need not provide the Governor with due process, and that instead he is entitled to due process only in proceedings before the Senate. Putting aside issues of fundamental fairness, there is simply no legal or historical basis for the House to conduct impeachment proceedings that deprive the Governor of due process.

The full House seemed to recognize as much when it passed Rule 79.1, which authorized the Judiciary Committee to conduct an impeachment inquiry. In this Rule, the House specifically required the Judiciary Committee to “ensure due process.”

There was good reason for this mandate. As this paper explains:

- Well-established principles of constitutional law recognize that because the Judiciary Committee’s role has been designed to be “accusatory” and “adjudicatory,” it must meet strict standards of due process. The role of the full House of Representatives in impeachments is certainly “adjudicatory,” and it plainly must provide the Governor with due process.
- The Alabama Supreme Court has held that officials subject to impeachment must be provided the highest levels of due process. The Supreme Court has said this clearly, repeatedly and recently. To be sure, these holdings have been in the context of impeachment of lower-level state officers pursuant to Section 174 of the Constitution, as opposed to an impeachment of a Governor pursuant to Section 173. But Alabama has never impeached a Governor, and there is no rational basis for believing the Supreme Court would afford the state’s Governor less due process than these other officials. It should be noted that a federal court has ruled that Alabama legislators may not be expelled without due process.
- The elements of due process would not be onerous for the Judiciary Committee to provide the Governor. They include notice of the potential charges against him; a procedure that gives him adequate time and opportunity to prepare a case (for example, by providing him with exhibits and a list of witnesses); disclosure of exculpatory information; the right to hear and cross examine all witnesses; the application of reasonable Rules of Evidence; the presumption of innocence; and, ultimately, the consideration of all of the evidence by the full House of Representatives.

- The courts have jurisdiction to mandate that officials (including the Governor) be afforded due process in impeachment proceedings and to enjoin proceedings that do not comport with constitutional standards.

**I. THE ROLE OF THE ALABAMA HOUSE OF REPRESENTATIVES IN IMPEACHMENT PROCEEDINGS REQUIRES THAT IT AFFORD THE GOVERNOR DUE PROCESS OF LAW**

**A. The Adjudicatory and Accusatory Nature of the Proceedings Before the House Requires Due Process Protections for Governor Bentley.**

Two United States Supreme Court cases established the framework for determining when due process is required - *Hannah v. Larche* and *Jenkins v. McKeithen*.<sup>1</sup> Whether due process is necessary in a particular proceeding depends on whether the proceeding is investigatory or adjudicatory and, if the proceeding is investigatory, whether it is accusatory.<sup>2</sup> Thus, it is necessary at the outset of any consideration of due process to determine both the nature and function of the proceedings that will take place.<sup>3</sup>

*Hannah* establishes that, in determining whether a proceeding is solely investigatory rather than adjudicatory, the Court should consider if its function “is purely investigative and fact-finding.”<sup>4</sup> The relevant question is whether the tribunal can or does “take any affirmative action which will affect an individual’s legal rights.”<sup>5</sup> If so, the proceedings are adjudicatory and must provide due process.<sup>6</sup>

In *Jenkins* the Supreme Court held that even purely investigatory proceedings require due process of law where they are accusatory in nature.<sup>7</sup> A purely investigatory but accusatory proceeding may require due process whether as a result of the tribunal’s rules or as a result of the practical effect of its proceedings.<sup>8</sup> Where a tribunal is “exercising an accusatory function,” where its duty is to find the accused responsible for some violation of law and to advertise that finding or “to serve as part of the process of criminal prosecution, the rigorous protections relevant to criminal prosecutions might well be the starting point for assessing” the procedural protections necessary before that tribunal.<sup>9</sup>

In impeachment proceedings pursuant to Article VII, § 174 of the Alabama Constitution, the House of Representatives’ function is both adjudicatory and accusatory.

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<sup>1</sup> *Hannah v. Larche*, 363 U.S. 420, 442 (1960); *Jenkins v. McKeithen*, 395 U.S. 411 (1969); see also *Hunt v. Anderson*, 794 F. Supp. 1557, 1565 (M.D. Ala.), *aff’d*, 976 F.2d 744 (11th Cir. 1992).

<sup>2</sup> *Hannah*, 363 U.S. at 440; *Jenkins*, 395 U.S. at 427.

<sup>3</sup> *Hannah*, 363 U.S. at 440.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 440-41.

<sup>7</sup> *Jenkins*, 395 U.S. at 427.

<sup>8</sup> *Hunt*, 794 F. Supp. at 1565 (what would otherwise be a purely investigatory matter was violative of due process where, in practice, the proceedings were rendered accusatory by public release of probable cause findings and public statements were made by the executive director providing his opinion of the accused’s guilt) .

<sup>9</sup> *Hannah*, 363 U.S. at 488; *Jenkins*, 395 U.S. at 427; *Hunt*, 794 F. Supp. at 1565.

**B. The House of Representative and Its Judiciary Committee Function as Adjudicatory Bodies in Impeachment Proceedings under Article VII, § 173 of the Alabama Constitution.**

The Alabama House of Representatives is the governmental body constitutionally authorized to consider and prefer articles of impeachment against a sitting Governor. Pursuant to Article VII, § 173 of the Alabama Constitution:

The governor ... may be removed from office for [certain enumerated causes] by the senate sitting as a court of impeachment, under oath or affirmation, on articles or charges preferred by the house of representatives.... If at any time when the legislature is not in session, a majority of all the members elected to the house of representatives shall certify in writing to the secretary of state their desire to meet to consider the impeachment of the governor ... it shall be the duty of the secretary of state immediately to notify the speaker of the house, who shall, within ten days after receipt of such notice, summon the members of the house, by publication in some newspaper published at the capitol, to assemble at the capitol on a day to be fixed by the speaker, not later than fifteen days after the receipt of the notice to him from the secretary of state, to consider the impeachment of the governor .... If the house of representatives prefer articles of impeachment, the speaker of the house shall forthwith notify the lieutenant-governor ... who shall summon, in the manner herein above provided for, the members of the senate to assemble at the capitol on a day to be named in said summons, not later than ten days after receipt of the notice from the speaker of the house, for the purpose of organizing as a court of impeachment. The senate, when thus organized, shall hear and try such articles of impeachment against the governor, lieutenant-governor, or other officer administering the office of governor, as may be preferred by the house of representatives.

The impeachment of a Governor by the House of Representatives does not simply refer the matter to the Senate for a full trial, however. Article V, § 127 of the Alabama Constitution provides that “[i]n case of the impeachment of the governor, ... the power and authority of the office shall, until the governor is acquitted, ... devolve in the order herein named, upon the lieutenant governor, president pro tem. of the senate, speaker of the house of representatives, attorney-general, state auditor, secretary of state, and state treasurer.” Accordingly, impeachment by the House would itself remove a sitting governor from office. Because the decision of the House of Representatives would “affect an individual’s legal rights,”<sup>10</sup> its function is adjudicatory, not merely investigatory.

The adjudicatory nature of the House proceedings and concomitant need for due process was recognized both by the full House and by the House Judiciary Committee to which the House delegated the role of investigating and rendering a recommendation on impeachment.

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<sup>10</sup> *Hannah*, 363 U.S. at 488.

House Rule 79.1, which was passed in reaction to the first impeachment resolution concerning Governor Robert Bentley, delegated to the House Judiciary Committee the role of investigating and rendering a recommendation concerning the impeachment of Governor Bentley. In delegating those responsibilities to the Committee, the House expressly instructed that the Committee “shall adopt rules to govern the proceedings before it *in order to ensure due process, fundamental fairness*, and a thorough investigation, provided that the rules are not inconsistent with this rule.”<sup>11</sup> In conformance with the dictates of House Rule 79.1, the House Judiciary Committee, in drafting its initial procedural rules, stated:

**While the general thought would be that the House Judiciary Committee’s process would be akin to that of a grand jury, that notion must be modified in light of the adoption of House Rule 79.1’s requirement that the Judiciary Committee process ensure due process. The notion of due process requires that the accused be given an opportunity for confrontation and cross-examination, and for discovery; that a decision be made based on the record, and that a party be allowed to be represented by counsel.** In the criminal setting, while due process is required before depriving a person of life of liberty, it is not required in the grand jury setting standing alone. Because of this key distinction and in light of Rule 79.1, there are elements to these proposed rules that protect the rights of the Governor that go well beyond what would be allowed in [a] grand jury setting.<sup>12</sup>

Thus, both the full House and the Judiciary Committee recognized the adjudicatory nature of the impeachment proceedings before them and the related need for due process. Even in the Committee’s action of hastily adopting amended Rules to further diminish the Governor’s due process rights, the Committee clearly acknowledged the adjudicatory nature of its work. The amended Rules call the Committee’s work “quasi-judicial” in nature and purport to empower the Committee, either itself or through its Chair or Special Counsel, to hold evidentiary hearings at which witnesses and evidence are presented to the Committee, rule on matters of procedure and evidence, issue and enforce subpoenas, compel the attendance of witnesses and the production of documents and permit or deny participation by the Governor in the proceedings and in defending against the recommendations made by the Committee or its Special Counsel.<sup>13</sup> These functions are not purely investigative and fact-finding under the guidelines set forth in *Hannah*.<sup>14</sup> Through those Amended Rules, the Committee empowers itself to adjudicate matters, holds trial-like hearings, determine liability, issue orders and hold individuals in contempt. The House of Representatives and its Judiciary Committee therefore clearly serve an adjudicatory function in considering and preferring articles of impeachment.<sup>15</sup>

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<sup>11</sup> House Rule 79.1(c) (emphasis added).

<sup>12</sup> Background on House Judiciary Impeachment Rules (emphasis added).

<sup>13</sup> Amended Committee Rules of the House Judiciary Committee for the Impeachment Investigation of Governor Robert Bentley.

<sup>14</sup> *Hannah*, 363 U.S. at 440 (relevant factors include whether the tribunal adjudicates, holds trials or determine anyone’s civil or criminal liability, issues orders, indicts, punishes or imposes any legal sanctions, and whether it makes determinations depriving anyone of his life, liberty, or property).

<sup>15</sup> See also *State ex rel. King v. Morton*, 955 So. 2d 1012, 1022 n.12 (Ala. 2006) (See, J., concurring) (“[T]he legislature is a tribunal for impeachment hearings, a judicial function. § 173 Ala. Const. 1901.”).

Accordingly, due process must be afforded to Governor Bentley in the House impeachment proceedings, including those before the Judiciary Committee.

**C. The Impeachment Proceedings Before the House and Its Judiciary Committee are Accusatory in Nature so as to Require That Due Process be Afforded to Governor Bentley.**

In addition to being adjudicatory in nature, it is clear from the Judiciary Committee's Amended Rules, the nature of the proceedings before the House, and the conduct of the members of the House of Representatives that the House impeachment proceedings are accusatory in nature.

Impeachment proceedings before the House concern whether a Governor should be impeached for one of several grounds enumerated in Article VII, § 173 of the Alabama Constitution. Those grounds are:

willful neglect of duty, corruption in office, incompetency, or intemperance in the use of intoxicating liquors or narcotics to such an extent, in view of the dignity of the office and importance of its duties, as unfits the officer for the discharge of such duties, or for any offense involving moral turpitude while in office, or committed under color thereof, or connected therewith ....

It is well settled in Alabama that these charges "all tend, more or less, to reflect upon the dignity of office, to generate disrespect for the law, through the want of worth, moral or intellectual, in the officer, to create dissatisfaction among the people with their government, and to thus seriously cripple the administration of justice in all its departments."<sup>16</sup>

In the case of Governor Bentley, the Articles of Impeachment charge the Governor with willful neglect of duty and corruption in office.<sup>17</sup> The Alabama Supreme Court has made clear that:

[N]eglect of official duties, to be willful, to authorize forfeiture of office, must be characterized by a certain moral or intellectual quality different from that implied in the mere intentional doing, or failing to do, an act. The implication is of a different and more enduring status of the mental or moral faculties. There seems to be required such a determined, perverse, and obstinate neglect of official duty as will authorize and an inference and finding that defendant is so morally or intellectually constituted as to be unfit for the duties of a public office.<sup>18</sup>

Thus, in order for an alleged "willful neglect of duty" to warrant the solemn invocation of impeachment, such willful neglect must be "more than the merely intentional omission of an

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<sup>16</sup> *Nelson v. State*, 182 Ala. 449, 460-61 (1913) (1913); *State ex rel. Brickell v. Martin*, 180 Ala. 458, 471 (1913).

<sup>17</sup> See HR 367.

<sup>18</sup> *Nelson*, 182 Ala. at 461.

act of public duty; that, to justify removal from office, it must appear that the incumbent is morally or mentally unfit ....”<sup>19</sup>

The Supreme Court of Alabama has also very recently undertaken to define the term “corruption in office,” also known as “official misconduct,” as: “[a] public officer’s corrupt violation of assigned duties by malfeasance, misfeasance, or nonfeasance.”<sup>20</sup> That Court previously held that in order to establish “corruption in office” sufficient to meet the constitutional impeachment standard there must be a showing of “corrupt intent or motive.... That is the act must be done with evil motive, in bad faith or not honestly.”<sup>21</sup>

It simply cannot be the case that public hearings at which Special Counsel argues and the House of Representatives, either itself or through its Judiciary Committee, makes findings on or recommendations concerning whether the Governor is “morally or mentally unfit” to continue in office or that he acted with a “corrupt intent or motive” and engaged in “official misconduct” could be anything less than accusatory.<sup>22</sup> The same is true of any report or written recommendation drafted by the Judiciary Committee or its Special Counsel.

Moreover, the conduct of the House members in introducing the impeachment resolutions against the Governor and throughout the impeachment proceedings demonstrates clearly that the proceedings before the House are, at a minimum, accusatory in nature.

The initial impeachment resolution was announced by Representative Ed Henry, who called a press conference to announce his opinion that, among other things, Governor Bentley “betrayed the trust of the people of Alabama through actions and lies that have caused us to have some doubt about his leadership” and that the “only course of action” is to impeach the Governor.<sup>23</sup> Representative Mike Ball made public his opinion that there is a “crisis of confidence” in Governor Bentley,<sup>24</sup> and Representative Farley has made no secret of his opinions concerning the Governor, claiming that “We’ve bottomed out ... now we’ve got a governor who’s using his office for God knows what” and “It’s totally humiliating”; “This man has got to understand that every day he’s in the governor’s office, this circus will go on.”<sup>25</sup> In fact, Representative Farley has stated outright that “Governor Bentley should not be sitting in the governor’s office” and “He’s the state of Alabama’s spokesperson, our

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<sup>19</sup> *Id.* at 462; *Lewis v. State ex rel. Evans*, 387 So. 2d 795, 803 (Ala. 1980).

<sup>20</sup> *State ex rel. Strange v. Clark*, No. 1151021, 2016 WL 4044903, at \*3 (Ala. July 27, 2016).

<sup>21</sup> *State ex rel. Harlow v. Chandler*, 360 So. 2d 957, 960 (Ala. 1978).

<sup>22</sup> *Jenkins*, 395 U.S. at 427; *Hunt*, 794 F. Supp. at 1566 (publicizing of findings of probable cause of violation and statements made by executive director saying he believed accused was guilty of criminal misconduct made otherwise purely investigatory proceedings violative of due process).

<sup>23</sup> See *Lawmakers Start Impeachment Process Against Bentley*, Birmingham Business Journal, available at [www.bizjournals.com](http://www.bizjournals.com) (April 5, 2016).

<sup>24</sup> See *Alabama Governor Refuses to Talk About Sex Scandal, Impeachment*, available at [www.cnn.com](http://www.cnn.com) (April 7, 2016).

<sup>25</sup> *Governor of Alabama, Robert Bentley, Says He Won’t Quit*, The New York Times, available at [www.nytimes.com](http://www.nytimes.com) (March 30, 2016).

representative .... And this is someone I want negotiating on behalf of the state? I don't think so."<sup>26</sup>

More recently, Representative Corey Harbison and Randall Shedd both posted to their Facebook accounts soliciting comments concerning the Governor. Representative Harbison posted:

I am troubled that the Governor would think that it's okay to fly to Washington, D.C. to President Trump's inauguration with the very people that this controversy has been centered around.

I believe that the U.S. Senate appointment made this state look very bad. Luther Strange would have been a good pick in normal circumstances. We are not facing normal circumstances. I don't know the inner workings of this appointment but from the outside looking in, it appears a deal was cut. This brought negative, national attention.

The Governor's attorney did admit that an expenditure was made from the Governor's campaign account for a person other than the Governor's legal fees. Birmingham news reports say that the ethics commission ruled this type expense illegal and a felony.

How do you feel about these things? Do you feel it's in the best interest of the state to let it be or should the legislature step up the process of impeachment?

Representative Shedd stated:

Remember, I have not "bashed" Governor Bentley, and I take no pleasure in his difficulties.

I don't know what happened behind the scenes with the Governor's actions, but at least the appearance of potential problems exist when the Attorney General lets everyone in Alabama know he is investigating Governor Bentley then it looks like he tried to unring the bell and even stopped House impeachment proceedings, and after doing so lands a coveted appointment to the U.S. Senate by the Governor that he stopped impeachment.

If nothing else is wrong, it looks bad.

In all my speeches across my district, I've been saying we have to restore the public's confidence in state government. This action is going in the opposite direction.

Public confidence in state government is at a serious level.<sup>27</sup>

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<sup>26</sup> Alabama Is No Stranger to Sex Scandals. It Just Never Expected One From This Guy, The Washington Post, *available at* [www.washingtonpost.com](http://www.washingtonpost.com) (April 17, 2016).

<sup>27</sup> Shedd, Harbison want to know what you think of Gov. Bentley, *available at* <http://cullmansense.com/articles/2017/02/12/shedd-harbison-want-know-what-you-think-gov-bentley> (February 12, 2017).

A few days later, those Representatives stated in the press that the Governor's appointment of Luther Strange to the United States Senate "looks like quid pro quo" and sought to introduce a third impeachment resolution against the Governor with Representative Harbison stating: "I'm not doing this for me. I don't like the stink," and "The problem is that we have a Judiciary Committee that is on hold due to a request from an attorney general that is no longer in office that was appointed to the United State Senate by the Governor. It just sounds terrible."<sup>28</sup> Representative Harbison went on to opine that:

- "We can't continue on the way we are in this State. We've become a national embarrassment at this point, and we need to do something."
- "I'm not sure we can continue to function as a state under this cloud. No one trusts the Governor on anything."
- "You can't get anything straight from them [the Office of the Governor] and no one trusts them. That's a problem."<sup>29</sup>

The very public criticism of the Governor by House members and public statements concerning members' perception that the Governor is guilty or should be impeached manifestly establish the accusatory nature of the impeachment proceedings before the House.<sup>30</sup>

Because the impeachment proceedings before the House are both adjudicatory and accusatory in nature, due process must be afforded to Governor Bentley in those proceedings.

## **II. ALABAMA SUPREME COURT AUTHORITY REQUIRES DUE PROCESS IN THE IMPEACHMENT PROCEEDINGS BEFORE THE ALABAMA HOUSE OF REPRESENTATIVES**

Clear authority of the Alabama Supreme Court further dictates the need for due process during the impeachment proceedings before the House.

No governor of Alabama has ever been impeached, and the House of Representatives has had no cause to investigate articles of impeachment concerning any governor of Alabama.<sup>31</sup> Prior to 1875, all office holders in Alabama were subject to impeachment under a single constitutional provision, which provided that:

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<sup>28</sup> Some Legislators are considering an alternate route to impeach the Governor, Alabama Political Reporter, *available at* <http://www.alreporter.com/2017/02/15/legislators-considering-alternate-route-impeach-governor/> (February 15, 2017).

<sup>29</sup> House to hear new push for Bentley impeachment, Alabama Political Reporter, *available at*, <http://www.alreporter.com/2017/02/14/house-hear-new-push-bentley-impeachment/> (February 14, 2017).

<sup>30</sup> *Hunt*, 794 F. Supp. at 1566 (otherwise purely investigatory matter rendered accusatory where public comments were made by executive director regarding his belief that the accused was guilty).

<sup>31</sup> The House has only once been called upon to prefer articles of impeachment pursuant to Article VII, § 173, in 1915, relating to charges against the Secretary of State, John Purifoy, for moral turpitude and willful neglect of duty. *See Report of Judiciary Committee of the House to Which Committee Was Referred the Duty of Investigating on the Matter of the Impeachment of John Purifoy, Secretary of State* (August 14, 1915).

All State officers may be impeached for any misdemeanor in office, but judgment shall not extend further than removal from office, and disqualification to hold office, under the authority of this State. The party impeached, whether convicted or not, shall be liable to indictment, trial and judgment, according to law.<sup>32</sup>

Under that framework, all impeachment proceedings were initiated in the House of Representatives. Section 24 of the Alabama Constitution of 1868 provided that:

The House of Representatives shall have the sole power of preferring impeachment. All impeachments shall be tried by the Senate; the Senators, when sitting for that purpose, shall be on oath or affirmation; and no person shall be convicted under an impeachment without the concurrence of two-thirds of the Senators present.<sup>33</sup>

In 1875, the legislature altered this framework to adopt a procedure materially identical to the procedure that applies today, whereby certain enumerated office holders are tried by the Alabama Supreme Court or the Circuit Court while others, including the Governor, are tried by the Senate following impeachment by the House.<sup>34</sup> As a result of this amendment, the Alabama Supreme Court has had before it numerous impeachments of officers of Alabama and, accordingly, has had cause to issue numerous opinions concerning impeachments in Alabama.

In addressing those impeachments, which arose under Article IV, § 174, the Supreme Court has made it patently clear that “[d]ue process of law is essential to impeachment.”<sup>35</sup> It is well settled in Alabama that “impeachment under our Constitution is a criminal prosecution.”<sup>36</sup> Accordingly, impeachments are “governed by rules of law applicable to criminal prosecutions.”<sup>37</sup> “The defendant in such cases is entitled to certain constitutional and statutory protections accorded to defendants in exclusively criminal cases.”<sup>38</sup> Moreover, “[c]onstitutional and statutory provisions in such cases are to receive strict construction in favor of the accused.”<sup>39</sup> The fact that these decisions were issued in connection with impeachments under § 174 does not, perforce, render them inapplicable to impeachment proceedings under § 173.<sup>40</sup> To the contrary, the rationale behind those cases establishes, irrefutably, that the Governor is entitled to due process in any impeachment proceedings before the House.

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<sup>32</sup> Art. IV, § 23, Ala. Const. of 1868.

<sup>33</sup> Art. IV, § 24, Ala. Const. of 1868.

<sup>34</sup> See Art. VII, §§ 1-4, Ala. Const. of 1875; Art. VII, § § 173-176, Ala. Const. of 1901.

<sup>35</sup> *State v. Blake*, 225 Ala. 124, 126 (1932).

<sup>36</sup> *State v. Buckley*, 54 Ala. 599, 620 (1875); see also *Clark*, 2016 WL 4044903, at \*3; *Evans*, 387 So.2d at 800.

<sup>37</sup> *State v. Hasty*, 184 Ala. 121, 124 (1913).

<sup>38</sup> *Evans*, 387 So.2d at 801.

<sup>39</sup> *Parker v. State*, 333 So.2d 806, 808 (Ala. 1976).

<sup>40</sup> See, e.g., *Opinion of the Justices*, 359 So.2d 1155 (1978) (applying *Blake*, 225 Ala. at 124, which concerned impeachments under § 174, and *Stone v. State ex rel. Freeland*, 213 Ala. 130 (1925), which concerned impeachment under § 175, to a question involving impeachments under § 173).

The first Supreme Court case to consider impeachment procedure under the revised constitutional provisions of 1875, *State v. Buckley*, concerned the changes to that procedure and adoption of procedural rules to govern impeachment before the Supreme and Circuit Courts.<sup>41</sup> The *Buckley* Court noted that, regardless of the new distinction in the forums for deciding an impeachment for various office holders “[u]nder . . . article 7, section 4 [of the 1875 Constitution] penalties in cases of impeachment ‘shall not extend beyond removal from office, and disqualification from holding office . . .’” That provision was equally applicable to each of the three impeachment provisions in the 1875 Constitution, whether calling for a trial before the Circuit Court, Supreme Court, or as in the case of an impeachment of a governor, the Senate. Examining federal and English authorities on impeachment, the *Buckley* Court concluded that “[t]he authorities above hold that *removal from office, and disqualification to hold office, are criminal punishment*. But the doctrine has been carried much further.”<sup>42</sup> Examining authority from other states, the Court concluded that because an impeachment results in removal “[w]e feel constrained to hold that impeachment under our Constitution, is a criminal prosecution.”<sup>43</sup> As such, the Court concluded that certain due process rights are guaranteed in an impeachment (such as the right to confrontation) and the regulations adopted concerning the new classes of impeachment were for that reason unconstitutional.<sup>44</sup> Thus, the determinative factor in the *Buckley* Court’s decision that impeachments were criminal in nature and thus deserving of due process protections for the accused was the fact that the impeachment would result in removal -- a result that would adhere today regardless of whether the official was impeached under § 173 or § 174. Removal is the result that the Governor would face in the event that the House of Representatives voted to impeach.

Similarly, the concurrence in *State ex rel. Brickell v. Martin* made no distinction between impeachment proceedings in the legislature and court impeachment proceedings in discussing the need for “a definitely understood, well-defined charge” for impeachment.<sup>45</sup> Judge McClellan concluded that “the Constitution establishes definite, particular causes, for which only those officers may be impeached. There may be a measure of difficulty in arriving at a sound interpretation or construction of what these causes comprehend; but, notwithstanding, this furnishes no basis warrant for an assumption that any one of the causes for impeachment laid down in the Constitution is complete or may be supplemented or modified by recourse to individual judicial judgment, whether in the Senate sitting as a court of impeachment or in the Supreme Court sitting as a court of impeachment. The highest officers of the state, including the executive and members of the Supreme Court, are made, by section 173, subject to removal from office for the causes there set down.”<sup>46</sup>

Relying on *State v. Buckley*, the Supreme Court in *Nelson v. State* reiterated that “Impeachment proceedings are highly penal in their nature, and are governed by the rules of law applicable to criminal causes. Constitutional and statutory provisions on the subject of the

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<sup>41</sup> *Buckley*, 54 Ala. at 599.

<sup>42</sup> *Id.* at 619 (emphasis added).

<sup>43</sup> *Id.* at 620.

<sup>44</sup> *Id.* at 620-21.

<sup>45</sup> *Martin*, 180 Ala. at 460 (McClellan J., concurring).

<sup>46</sup> *Id.* at 460-61.

procedure in such cases are to receive strict construction in favor of the accused.”<sup>47</sup> That Court made no distinction between impeachments under § 173 and those under § 174. Again, it is the ultimate result of the proceedings -- removal of the office holder -- that dictates the need for due process of law.

In *State ex rel. Attorney General v. Hasty*, the Court discussed impeachments generally as follows:

While ours is a popular form of government, under which nearly all officials are elected by the people, yet public office has been ever regarded as a public trust, and our lawmakers, while not contemplating or requiring infallibility, have expected a faithful and intelligent discharge of duty by those who are selected to fill positions of trust and responsibility. This expectation has been emphasized, not only by statutes covering nearly all derelictions and providing a punishment for same, but by our organic law, which provides for the impeachment and removal from office of nearly all public officials for any of the causes therein enumerated, but which said impeachment does not exclude the right of the state to indict and is in its nature cumulative and is intended to relieve the public of an unfit official until the people have another chance to pass upon his qualification. While this extraordinary remedy by impeachment does not prevent an indictment and conviction thereunder, and does not extend beyond removal from office and a disqualification to hold office under the state, during the term for which the officer was elected or appointed, it is, in its nature, highly penal and is governed by rules of law applicable to criminal prosecutions.<sup>48</sup>

Again, the conclusion that an impeachment is penal in nature was based wholly upon the fact that an impeachment results in the removal of a public officer from office, which is true of impeachments under either § 173 and § 174 and is true upon the impeachment of a Governor by the House of Representatives.<sup>49</sup>

Again relying on the result of the impeachment, the Court, in *State v. Blake*, stated, without reference to any distinction between impeachments under § 173 and § 174 that “[i]mpeachment proceedings are for the removal of public officers for malfeasance while lawfully holding the office upon grounds prescribed by section 173 of the Constitution. *Due process of law is essential to impeachment.*”<sup>50</sup>

The Supreme Court, in *Parker v. State* was asked to decide “whether an office holder may be impeached for an offense involving moral turpitude which occurred prior to his assumption of office.”<sup>51</sup> While the petitioner before the Court was the Treasurer of Jefferson County, subject to impeachment under § 174 of the Constitution, the Court drew no distinction

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<sup>47</sup> *Nelson v. State*, 182 Ala. 449 (1913).

<sup>48</sup> *Hasty*, 184 Ala. at 121.

<sup>49</sup> Art. V, § 127, Ala. Const. of 1901; *Hasty*, 184 Ala. at 124-25 (discussing consequence of impeachment under § 176 of Article VII, applicable to either § 173 or § 174).

<sup>50</sup> *Blake*, 225 Ala. at 126 (emphasis added).

<sup>51</sup> *Parker*, 333 So.2d at 806.

between proceedings under that section or section 173. Relying on *State v. Buckley*, the Court found that “[a]n impeachment proceeding under our Constitution is a criminal prosecution.”<sup>52</sup> That court went on to recognize that “[c]onstitutional and statutory provisions in such cases are to receive strict construction.”<sup>53</sup>

The Court in *State ex rel. Mullis v. Matthews* stated that “[a]n impeachment under section 174 of the Constitution is a criminal prosecution.”<sup>54</sup> That court did not, however, say that proceedings under § 173 are not criminal in nature,<sup>55</sup> nor could it, given its reliance on *State v. Buckley*. Similarly, the Court in *State ex rel. Strange v. Clark* noted that “Alabama caselaw is well settled that a proceeding brought pursuant to Art. VII, § 174, Ala. Const. 1901, is criminal in nature.”<sup>56</sup> While the Court did not explicitly address proceedings under § 173,<sup>57</sup> it expressly relied on *State v. Buckley*.<sup>58</sup>

As is clear from the foregoing, the Alabama Supreme Court has determined that impeachment proceedings in Alabama are criminal in nature *because they result in removal of a public official from office*. This occurs whether as a result of a proceeding in the Circuit Court pursuant to § 175 of the Constitution, as a result of a proceeding in the Supreme Court pursuant to § 174 of the Constitution, as a result of a proceeding in the Senate pursuant to § 173 of the Constitution, or as a result of a proceeding in the House of Representatives pursuant to §§ 173 and 127 of the Constitution. The penalty suffered by the accused determines the accused’s rights. And the penalty of removal mandates due process protections. Accordingly, the impeachment proceedings before the House must be conducted in accordance with due process.

### **III. A GOVERNOR FACING IMPEACHMENT IS ENTITLED TO NO LESS DUE PROCESS THAN A STATE LEGISLATOR FACING EXPULSION FROM OFFICE**

Consistent with the authority concerning impeachments discussed above, the Alabama Supreme Court has concluded that the authority to remove a state senator is constrained by due process. In considering the legislature’s power “to expel a member by a two-thirds vote,” the Alabama Supreme Court concluded that the legislature’s power was “seemingly unrestricted,” but nevertheless recognized that “the legislature must afford a member the minimum procedural due process requirements of the federal constitution.”<sup>59</sup> Tellingly, that Court further

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (concluding, in reliance on *State v. Hasty*, that the law does not provide for impeachment for “acts which occurred prior to the commencement of [an officer’s] term and prior to the actual assumption of his duties.”).

<sup>54</sup> *State ex rel. Mullis v. Matthews*, 259 Ala. 125 (1953)

<sup>55</sup> *Id.*

<sup>56</sup> *Clark*, 2016 WL 4044903, at \*3.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *State ex rel. James v. Reed*, 364 So.2d 303, 307 & n.3 (Ala. 1978).

recognized that “[t]he power of the Legislature to remove one of its members for criminal misconduct is analogous to the power of impeachment.”<sup>60</sup>

Similarly, in *McCarley v. Sanders*,<sup>61</sup> the United States District Court for the Middle District of Alabama concluded that “a person may not be discharged or expelled from a state public office upon a ground involving criminal guilt, infamy, disgrace or other grave injury to the individual until after such notice and hearing as is requisite to due process of law.”<sup>62</sup> That Court concluded that “[w]henver a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law.”<sup>63</sup> Thus, in *McCarley*, the expulsion of a Senator from office by vote of the Senate was held to violate due process where, among other things, that vote was based on the recommendation of a Senate investigation committee without a hearing before the full Senate and “without according [the expelled senator] an opportunity to defend himself and without themselves [the full Senate] hearing any evidence.”<sup>64</sup>

Here, the House of Representatives is considering whether to impeach the Governor on the basis of the charges of willful neglect of duty and corruption in office against the Governor. As discussed previously, those charges require a finding that the Governor is “morally or mentally unfit” to continue in office or acted with a “corrupt intent or motive” and engaged in “official misconduct.”<sup>65</sup> The grounds without question “involve[e] criminal guilt, infamy, disgrace or other grave injury to the individual.”<sup>66</sup> Moreover, a vote in favor of impeaching the Governor by the House of Representatives would, pursuant to § 127 of the Constitution, result in the removal of the Governor from office. Thus, the due process clauses of both the Alabama Constitution and the United States Constitution require that the Governor be afforded due process protections in the impeachment proceedings before the Alabama House of Representatives.

#### **IV. DUE PROCESS REQUIRES A FAIR HEARING BEFORE THE ALABAMA HOUSE OF REPRESENTATIVES**

Having established that the Governor is entitled to due process of law in impeachment proceedings before the House of Representatives, the question then becomes what process is due to the Governor in such proceedings. “The phrase ‘due process of law,’ although incapable of a precise definition, in its most basic sense encompasses the observation of that degree of

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<sup>60</sup> *Id.* at 308.

<sup>61</sup> *McCarley v. Sanders*, 309 F. Supp. 8 (M.D. Ala. 1970).

<sup>62</sup> *Id.* at 11.

<sup>63</sup> *Id.* (quotation marks omitted).

<sup>64</sup> *Id.* at 11-12.

<sup>65</sup> *Nelson*, 182 Ala. at 461; *Evans*, 387 So. 2d at 803; *Clark*, 2016 WL 4044903, at \*3; *Chandler*, 360 So. 2d at 960.

<sup>66</sup> *McCarley*, 309 F. Supp. at 11-12.

fundamental fairness that is essential to our concept of justice.”<sup>67</sup> The “goal of fundamental fairness ... is the essence of due process.”<sup>68</sup> In particular:

Procedural due process in this respect requires at a minimum an orderly proceeding appropriate to the case or adapted to its nature, just to the parties affected, and adapted to the ends to be attained; one in which a person has an opportunity to be heard, and to defend, enforce, and protect his rights before a competent and impartial tribunal legally constituted to determine the right involved; representation by counsel; procedure at the hearing consistent with the essentials of a fair trial according to established rules which do not violate fundamental rights, and in conformity to statutes and rules, conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed; revelation of the evidence on which a disputed order is based and opportunity to explore that evidence, and a conclusion based on the evidence and reason.<sup>69</sup>

Thus, “[d]ue process requires that the accused shall be advised of the charges, and have a reasonable opportunity to meet them. This includes the assistance of counsel if requested, the right to call witnesses, to give testimony, relevant either to the issues of complete exculpation or extenuation of the offense and in mitigation of the penalty imposed.”<sup>70</sup> “Under Article 1, Section 6 [of the Alabama Constitution], the right of the accused to demand the nature and cause of the accusation is a fundamental component of the right to due process; the defendant must fully and intelligently understand the charge to adequately prepare a defense.”<sup>71</sup> The right to notice of the specific charge is “the first and most universally recognized requirement of due process.”<sup>72</sup> It is a “fundamental” right that is “essential” to due process.<sup>73</sup>

Also among the fundamental elements of due process that must be afforded a governor in impeachment proceedings is that the full House of Representatives act as the tribunal in evaluating whether to adopt articles of impeachment. Due process requires that *all* of the members of a tribunal *equally* consider the evidence without preconception or bias.<sup>74</sup> The

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<sup>67</sup> See *Ex parte Fountain*, 842 So. 2d 726, 730 (Ala. 2001) (“Both the Alabama and United States Constitutions protect a citizen of this state from being deprived of life or liberty without ‘due process of law.’”).

<sup>68</sup> *Id.*; *Pike v. S. Bell Tel. & Tel. Co.*, 263 Ala. 59, 71 (1955) (“Procedural due process, broadly speaking, contemplates the rudimentary requirements of fair play ....”) (quotation marks omitted).

<sup>69</sup> *Med. Servs. Admin. v. Duke*, 378 So. 2d 685, 686 (Ala. 1979) (quotation marks omitted) (emphasis added).

<sup>70</sup> *Ex parte Seymore*, 264 Ala. 689, 692 (1956); *Hunter v. State*, 251 Ala. 11, 14 (1948) (same).

<sup>71</sup> *Newberry v. State*, 493 So.2d 995, 997 (Ala. 1986); *Gayden v. State*, 262 Ala. 468, 469 (1955); *Nelson*, 50 Ala. App. at 288 (same); *Young v. State*, 348 So.2d 544, 546 (Ala. Crim. App. 1977).

<sup>72</sup> *Young*, 348 So.2d at 546 (quotation marks omitted); *Gayden*, 262 Ala. at 469.

<sup>73</sup> *Nelson*, 50 Ala. App. at 287; *Ex parte Seymore*, 264 Ala. at 692; *Martin*, 180 Ala. at 458 (stating, with regard to one who is subject to impeachment, “[h]is guilt or innocence cannot be adjudged without a definite judicial conception of what acts or omissions or official fitness or qualifications these charges expressed the fundamental law comprehend -- what is requisite to constitute willful neglect of duty or incompetency. Weight cannot be taken nor measure made without a standard therefor. So guilt or innocence cannot be pronounced without a definitely understood, well-defined charge--to which the judicial mind may apply the evidence to determine guilt or innocence.”).

<sup>74</sup> See, e.g., *Med. Servs. Admin.*, 378 So. 2d at 686.

Alabama Supreme Court has concluded that “[a]n unbiased and impartial decision-maker is one of the most, if not the most, fundamental of requirements of fairness and due process.”<sup>75</sup> This requirement is violated where there is an “intolerably high risk of bias.”<sup>76</sup> Such an “intolerably high risk” exists, for example, where it is demonstrated that the decision maker had made up his or her mind before the petitioner had an opportunity to be heard or where the same person serves as both accuser and adjudicator in a case.<sup>77</sup>

In addition, due process requires that the Governor be afforded with a presumption of innocence and that the Houses’ findings on the ultimate issue of impeachment be made under the standard of beyond a reasonable doubt.<sup>78</sup>

Due process also requires that any procedural rules adopted by the House must provide for the production to the Governor of, at a minimum, all exculpatory evidence discovered by the House of Representatives pursuant to the Fifth and Sixth Amendments to the United States Constitution as well as *Brady v. Maryland* and its progeny.<sup>79</sup>

Due process affords the Governor the constitutional right “to be heard by himself and counsel, or either...”<sup>80</sup> Due process also requires that the Governor be afforded notice and a hearing prior to the tribunal’s ruling, the ability to confront the witnesses against him, the ability to present a defense to the full House, the right to have compulsory process for obtaining witnesses in his favor, and the right to testify on his own behalf, if he elects to do so.<sup>81</sup> An “accused has a constitutional right of confrontation and cross-examination which is an essential and fundamental requirement of a fair trial. The right to confront one’s accusers is also guaranteed by our state constitution. The right to confront one’s accusers as prescribed by the sixth amendment guarantees the right to “face-to-face encounter[s] between witness and accused.”<sup>82</sup>

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<sup>75</sup> *State Tenure Comm’n v. Page*, 777 So.2d 126, 131 (Ala. Civ. App. 2000) (quoting *Stallworth v. City of Evergreen*, 680 So.2d 229, 233 (Ala. 1996) (quotation marks omitted)); *Buck v. C.H. Highland, LLC*, No. 2150220, 2016 WL 3221095, at \*6 (Ala. Civ. App. June 10, 2016) (same).

<sup>76</sup> *Buck*, 2016 WL 3221095, at \*6; *Page*, 777 So.2d at 131.

<sup>77</sup> *Buck*, 2016 WL 3221095, at \*6; *Page*, 777 So.2d at 131; *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1905-06 (2016); see also *In re Murchison*, 349 U.S. 133, 134, 137 (1955) (judge may not act as “one-man judge-grand jury” and “Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of the accused.”).

<sup>78</sup> Ala. Const. Art. I, § 6; *Thomas*, 283 Ala. at 227 (“This impeachment proceeding is in the nature of a criminal prosecution, hence the defendant came into this Court with a presumption of innocence. The burden was upon the prosecution to adduce evidence sufficient to establish the defendant’s guilt beyond a reasonable doubt and to a moral certainty.”); see also *Clark*, 2016 WL 4044903, at \*3 (“The State must prove the charges on which the proceeding is based beyond a reasonable doubt.”); *State v. Lovejoy*, 135 Ala. 64, 65 (1902); *Hasty*, 184 Ala. at 129.

<sup>79</sup> *Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Agurs*, 427 U.S. 97 (1976); *United States v. Bagley*, 473 U.S. 667 (1985); and *Kyle v. Whitley*, 514 U.S. 419 (1995).

<sup>80</sup> Ala. Const. Art. I, § 6; *Med. Servs. Admin.*, 378 So. 2d at 686 (due process requires “an orderly proceeding ... in which a person has an opportunity to be heard ....”).

<sup>81</sup> Ala. Const. Art. I, § 6.

<sup>82</sup> *Williams v. State*, 627 So. 2d 985, 989-90 (Ala. Crim. App. 1991), *aff’d sub nom. Ex parte Williams*, 627 So. 2d 999 (Ala. 1993); *Holman v. Washington*, 364 F.2d 618, 623-24 (5th Cir. 1966) (“The constitutional

## V. THE COURTS HAVE JURISDICTION OVER ANY VIOLATION OF THE GOVERNOR'S DUE PROCESS RIGHTS BY THE ALABAMA HOUSE OF REPRESENTATIVES

The Supreme Court of Alabama has concluded that, where an office holder cannot be removed except through impeachment, the “courts of equity will protect by injunctive process the incumbent of an office, who shows a prima facie right to continue in office, from the intrusion of adverse claimants who are without right or title to the office.”<sup>83</sup> This principle that a court may protect the constitutional rights of an official subject to impeachment has been applied to the impeachment of a governor.

In *Office of the Governor v. Select Committee of Inquiry*,<sup>84</sup> the Connecticut Supreme Court, in considering whether to quash a subpoena to a sitting Governor in connection with an impeachment proceeding before the House of Representative of Connecticut, found the dispute justiciable. In taking jurisdiction over the dispute between the Governor and a committee of the House of Representatives, the Court found particularly compelling the fact that, under the Connecticut Constitution (as is also the case in Alabama), the governor is treated uniquely in that he or she is removed from office “upon presentment of articles of impeachment by the House of Representatives.”<sup>85</sup> That Court stated:

Under our constitutional scheme, the governor is the only official removed, albeit temporarily, upon the presentment of articles of impeachment by the House of Representatives and during the pendency of the Senate trial. For all other officials, removal from office takes place only after a trial in the Senate and conviction by that body. This distinction means that the initial impairment of the capacity to execute the duties of the office of governor take place in the impeachment process one critical step *before* the point at which all other executive and judicial officials are impaired in the performance of their duties by means of removal from office, namely, at the point of formal *accusation* by the House, as opposed to the point of conviction by the Senate.<sup>86</sup>

Although impairment does remain contingent upon presentment of articles of impeachment by the House of Representatives, the proximity and severity of this harm as compared to the potential impairment for all other executive and judicial officials suggests that, in order to be afforded a meaningful opportunity to challenge legislative conduct related to gubernatorial impeachment proceedings, the office of a sitting governor should be allowed to raise its constitutional challenges under a somewhat more lenient standard than might apply to other officers who are subject to

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right of confrontation and cross-examination to the extent guaranteed by the Sixth and Fourteenth Amendments cannot be sidestepped because it happens to be convenient for one of the parties. The importance of this right is emphatically demonstrated by the existence of the numerous safeguards designed for its protection. In addition to the Sixth Amendment of the United States Constitution, the right is also guaranteed by the Constitution of the State of Alabama, Article \*624 I, Section 6, Constitution of Alabama, 1901.”); Ala. Const. Art. I, § 6.

<sup>83</sup> *Day v. Andrews*, 279 Ala. 563 (1966).

<sup>84</sup> *Office of the Governor v. Select Committee of Inquiry*, 271 Conn. 540 (2004).

<sup>85</sup> *Id.* at 554-55.

<sup>86</sup> *Id.* at 556.

impeachment. Affording the office of a sitting governor the opportunity to bring a meaningful challenge to impeachment proceedings is especially critical because the presentment of articles of impeachment to the Senate has the immediate, and irreparable effect of removing a duly elected official from office and depriving the people of the state, for a time, of the services of the governor whom they chose to fill that high office in the previous election. These consequences demonstrate the necessity that the plaintiff be afforded a reasonable opportunity to raise a meaningful constitutional challenge while the matter is before the defendant, whose task is vital to the ultimate decision as to whether articles of impeachment will be presented.<sup>87</sup>

The Court further noted that “the appropriate standard by which to determine whether judicial review of the legislative exercise of the impeachment authority in connection with a sitting governor is warranted is whether the plaintiff has asserted, in good faith, a colorable claim of a constitutional violation.”<sup>88</sup>

The *Select Committee of Inquiry* Court also found that the speech or debate clause of the Connecticut Constitution did not bar judicial review of a claim that the legislature had violated the constitution. The Court reaffirmed its prior holding (which involved a due process challenge) that “[i]f the legislature [should] attempt to encroach upon constitutional restrictions, it will become the solemn duty of the court to declare such an attempt illegal and the act void.”<sup>89</sup> Because a claim of constitutional violation by the legislature is a claim that the legislature’s conduct was “not within the sphere of legitimate legislative activity,” the Speech or Debate clause did not immunize the legislature from suit and did not “categorically bar the plaintiff’s action, nor [did] that clause preclude [the Court’s] consideration of the plaintiff’s claims on the merits.”<sup>90</sup>

Finally, the *Select Committee of Inquiry* Court rejected the claim that the constitutional challenge to the legislature’s conduct in the gubernatorial impeachment proceedings was a non-justiciable political question.<sup>91</sup> In so deciding, the Court first found that “[a]lthough the text of our state constitution confers impeachment authority on the legislature, that authority is not unbounded and legislative encroachment upon other constitutional principles may, in an appropriate case, be subject to judicial review. Accordingly, there has been no constitutional commitment of the impeachment authority to the legislature such that judicial review of the plaintiff’s challenge is rendered inappropriate.”<sup>92</sup> The Court further concluded that there “are discoverable and manageable judicial standards for determining the merits of the plaintiff’s

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<sup>87</sup> *Id.* at 556.

<sup>88</sup> *Id.* at 558.

<sup>89</sup> *Id.* at 565 (quotation marks omitted) (alteration in original). Indeed, the illegality of the act of a House of Representatives in infringing a chief executive’s constitutional rights and exceeding the scope of its authority granted to it under the impeachment provisions of the state constitution raises significant separation of powers concerns.

<sup>90</sup> *Id.* at 568.

<sup>91</sup> *Id.* at 573-577. In so deciding, the Connecticut Supreme Court applied the same factors as would be considered by the Alabama Supreme Court. *See Reed*, 364 So.2d at 305.

<sup>92</sup> *Select Committee of Inquiry*, 271 Conn. at 574.

claim.”<sup>93</sup> Third, the Court found that “in deciding the merits of the plaintiff’s constitutional claim, we would not be reviewing a policy determination of a clearly nonjudicial, discretionary nature.”<sup>94</sup> Fourth, the Court found that “consideration of the merits of the plaintiff’s claim would not convey a lack of due respect to a coequal branch of government.”<sup>95</sup> Fifth, the Court found that “this matter does not present an unusual need for unquestioning adherence to a preexisting political decision.”<sup>96</sup> Lastly, the Court found that “there is no potential embarrassment resulting from multifarious pronouncements by various governmental departments on one question.”<sup>97</sup>

Based on the foregoing, it is clear that a claim by the Governor that the House of Representatives has violated his due process rights would present a justiciable question appropriate for consideration by a court in Alabama *prior to* his removal from office by virtue of impeachment by the House of Representatives.<sup>98</sup>

### CONCLUSION

Because impeachment proceedings before the Alabama House of Representatives is both an adjudicatory and accusatory proceeding, because impeachment by the House of Representatives would result in removal of the Governor duly elected by the people of Alabama and, therefore, that proceeding is criminal in nature pursuant to clear Supreme Court authority, and because removal of a sitting governor on grounds such as those advanced here requires it, the House of Representative must afford the Governor with due process of law in its proceedings such that the requirements of fundamental fairness are met. Any violation of the Governor’s due process rights would be in derogation of the constitutional mandate of the House of Representatives and subject to judicial review.

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 575.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 576.

<sup>97</sup> *Id.*

<sup>98</sup> Such a claim would also raise significant separation of powers concerns that would be justiciable under the rubric of the *Select Committee of Inquiry* case.



## ALABAMA HOUSE OF REPRESENTATIVES

### JUDICIARY COMMITTEE

**JACK SHARMAN**  
SPECIAL COUNSEL  
LIGHTFOOT, FRANKLIN & WHITE LLC  
400 20TH STREET NORTH  
BIRMINGHAM, ALABAMA 35203

March 23, 2017

*Via Electronic Mail*

Ross H. Garber, Esq.  
Shipman & Goodwin LLP  
1875 K Street NW, Suite 600  
Washington, DC 20006-1251  
[rgarber@goodwin.com](mailto:rgarber@goodwin.com)

David Byrne, Esq.  
Chief Legal Advisor  
Office of the Governor of Alabama  
State Capitol  
600 Dexter Avenue  
Montgomery, Alabama 36130  
[dbyrne@alabama.gov](mailto:dbyrne@alabama.gov)

**Re: Impeachment Investigation of Governor Robert Bentley**

Gentlemen:

For your convenience, and to aid in everyone's planning, the House Judiciary Committee (the "Committee") has asked me to convey a tentative schedule, set out below, concerning potential impeachment proceedings regarding Governor Robert Bentley. I copy Bill Athanas and Ellen Brooks.

I emphasize the word "tentative." There are a number of variables, internal and external, that could have an impact on this schedule. In addition, you have indicated that the Office of the Governor, Governor Bentley personally, or both, may file a lawsuit. Obviously, litigation could change any schedule.



DATE	EVENT	NOTE
April 7	Report of Investigation	Special Counsel's written report of investigation will be provided to the Committee and to Counsel for the Governor by 5:00 p.m. It will be made available to the public.
April 10	Committee Hearing Day One	Presentation by the Committee's Special Counsel and offer of witnesses, if any. [House Rule 79.1 (d); Amended Committee Rule 2(i) and Rule 13(b)]
April 11	Committee Hearing Day Two	Presentation by counsel for the Office of the Governor and for the Governor and offer of witnesses, if any. [House Rule 79.1 (d); Amended Committee Rule 2(i)(2)-(3)]
April 12	Committee Hearing Day Three	Special Counsel response. [House Rule 79.1 (d); Amended Committee Rule 2(i) and Rule 13(b) ]
April 13	Committee Hearing Day Four or Recess	Conclusion (or recess if concluded on April 12)
April 14	Committee Meeting	<p>Summation by counsel for the Office of the Governor; by counsel for the Governor; and by Special Counsel. [House Rule 79.1 (d); Amended Committee Rule 2(i)(2)-(3); Amended Committee Rule 2(i) and Rule 13(b)]</p> <p>Motion(s)</p> <p>Debate</p> <p>Vote on motion(s) and charge to Special Counsel as to preparation of Committee Report (including any revised Articles)</p>

<b>April 21</b>	Committee Report	To be provided to the Committee and to counsel of the Office of the Governor and counsel for the Governor by 5:00 p.m. [Amended Committee Rule 14]
<b>April 28</b>	Governor Bentley Written Response	To be provided to the Committee and to Special Counsel by 5:00 p.m. [Amended Committee Rule 14]
<b>May 1</b>	Committee Meeting	Motion(s), debate and vote on proposed Committee Report and Articles (if any).
<b>May 4</b>	Report to the House	Transmission of Committee Report and Minority Report (if any) to the Clerk for consideration by the full House. [House Rule 79.1(a)(2), (f)].
<b>May 9</b>	House Consideration of Committee Report	[House Rule 79.1 (g)]

### Questions to Witnesses and Notice of Rights

The Committee is sensitive to the fact that there are multiple investigations involving Governor Bentley. I share that sensitivity. Neither I nor the Committee, of course, is privy to whether the Governor intends to be a witness at any impeachment hearings. He will be welcome to be a witness. Like all witnesses appearing before the Committee, the Governor may submit a sworn written statement to the Committee pursuant to Amended Committee Rule 5(c). Note, however, that like all witnesses appearing before the Committee he will be subject to questions from the Members and from Special Counsel. (See Amended Rule 2(g)).

As in any situation of potential liability on multiple fronts, the Chairman, the Committee and I want to make sure that we have discharged our duties with regard to any witness appearing before the Committee.

For that reason, I attach an exemplar notice-of-rights form. The notice contains language that will likely be familiar to you from other engagements.

David, Ross and Bill: if the Governor intends to testify, the Committee will ask him to execute the notice and return it by email to me. Should he decline to do so, the Chairman will make the same inquiry of him orally before he testifies.

**Evidence That The Governor or Other Witnesses Have Refused to Provide to the Committee Pursuant to Its Investigation**

The presentation by the Governor is guided by Amended Committee Rule 2(i)(2)-(3). Please note that no party or witness (including the Governor) will be allowed to offer evidence that the Committee or its Special Counsel has sought by informal request, formal subpoena or otherwise and that has not been produced pursuant to those requests. In addition, where the Committee or its Special Counsel has sought an informal interview or a formal transcribed interview under oath and the witness has refused to cooperate, that witness will not be allowed to testify.

The Governor is an exception to the immediately foregoing note concerning testimony. He has declined to submit to an interview under oath but, in light of the fact that he is the subject of the hearing, he can certainly testify.

**Exhibits**

All exhibits and must be submitted to the Committee Reporter, and then to the Committee Clerk, no later than the close of the hearing. The Reporter and Clerk prefer that exhibits be pre-marked.

With best wishes, I am

Sincerely yours,



Jack Sharman

cc: The Honorable Mike Jones, Chairman, Alabama House Judiciary Committee  
William C. Athanas, Esq.  
Ellen Brooks, Esq.

[COMMITTEE LETTERHEAD]

## NOTICE TO WITNESSES

Testimony and other information you give to the Committee may be used against you in any federal or state administrative, civil or criminal proceeding. It may be that there are such proceedings ongoing or contemplated related to the subject matter of the Committee's hearing and to the subject matter of your testimony before the Committee. You may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment to the Constitution of the United States and Section 6 of the Alabama Constitution, to give any information that may tend to incriminate you. You also have the right to have an attorney with you during your testimony, at your own expense, and you may consult with your attorney at any time during your appearance before the Committee.

Further, pursuant to Rule 5(b) of the Amended Committee Rules of the House Judiciary Committee for the Impeachment Investigation of Governor Robert Bentley (the "Amended Rules"), a copy of which has been provided you, "[a]ll testimony given at a hearing shall be under oath administered by the Chair along with instruction that if a witness fails to tell the truth, the recording of his or her testimony shall be referred to the appropriate law enforcement entity for investigation and possible prosecution and advise the witness that he or she is subject to the penalties of perjury."

By signing below, you and your counsel acknowledge your understanding of the contents of this notice and that you have conferred with counsel about this notice.

\_\_\_\_\_  
(Signature of witness)

\_\_\_\_\_  
(Printed name)

\_\_\_\_\_, 2017

\_\_\_\_\_  
(Signature of counsel)

\_\_\_\_\_  
(Printed name)

\_\_\_\_\_, 2017

OFFICE OF THE GOVERNOR

ROBERT BENTLEY  
GOVERNOR



STATE CAPITOL  
MONTGOMERY, ALABAMA 36130

(334) 242-7100  
FAX: (334) 242-3282

## STATE OF ALABAMA

April 4, 2017

Chairman Mike Jones  
Members of the House Judiciary Committee

Re: Proposed Schedule

Dear Chairman Jones and Members of the Judiciary Committee,

In connection with the Emergency Motion to Afford Due Process Protections filed by Governor Bentley and the Office of the Governor on March 30, 2017, please find attached a proposed scheduling order for proceedings before the Judiciary Committee. We believe that the attached schedule and procedure provides a way for the Committee to promptly address this matter while still providing for the due process protections required by the Constitution and House Rule 79.1.

We look forward to a response.

A handwritten signature in black ink, appearing to read "Ross H. Garber", written over a horizontal line.

Ross H. Garber

A handwritten signature in blue ink, appearing to read "David B. Byrne, Jr.", written over a horizontal line.

David B. Byrne, Jr.

cc: Jack Sharman, Special Counsel  
Mac McCutcheon, Speaker of the House

**COMMITTEE  
EXHIBIT**

7-Q

## [PROPOSED] SCHEDULING ORDER

On **April 7, 2017**, Special Counsel shall notify the House Judiciary Committee in a written submission whether he believes he has found substantial, credible, and admissible evidence that Governor Bentley has committed one or more offenses that are impeachable under the Alabama Constitution (hereinafter "Notice").

- If Special Counsel has concluded that he has not found such evidence, he shall accompany his Notice with a summary of his findings. The Committee shall then meet to consider and determine whether to accept Special Counsel's findings and conclusions and to adopt a recommendation to the full House of Representatives.
- If Special Counsel has concluded that he has found such evidence with respect to one or more impeachable offenses, he shall include in his Notice a detailed description of each impeachable offense and identify the Constitutional impeachment provision potentially implicated by that alleged conduct. Special Counsel shall on that same date also provide counsel for the Governor and the Office of the Governor with: (1) a list and copies of all exhibits he will introduce at public hearings of the Committee; (2) a list of the witnesses he will call; (3) all exculpatory information developed in the course of Special Counsel's investigation; and (4) any record of statements by those on Special Counsel's witness list.

On or before **April 13, 2017**, counsel for the Governor and the Office of the Governor shall provide to Special Counsel a list

and copies of exhibits they may introduce at public hearings before the Committee and a list of any witnesses they may call.

**On or before April 13, 2017**, Special Counsel and counsel for the Governor and the Office of the Governor shall address the Judiciary Committee and may file briefs with respect to (i) the standard of impeachable conduct and burden of proof to be applied by the Committee and (ii) proposed Rules of Procedure and Evidence applicable during proceedings before the Committee.

Beginning on **April 20, 2017**, the Judiciary Committee shall convene to hear arguments and evidence. At the conclusion of these proceedings, the Committee will deliberate, and votes shall be taken with respect to each potentially impeachable offense identified in the Notice of Special Counsel.

If the Committee determines by majority vote to recommend impeachment as to any charge, the Committee shall instruct Special Counsel to prepare a report summarizing the evidence of such charge(s) and attaching supporting exhibits and testimony. Within 7 days of the submission by counsel of this report, any member(s) of the Committee who voted in opposition to recommending impeachment as to any charge may submit a Minority Report, and counsel for the Governor and the Office of the Governor may submit an Opposition memorandum. Within 2 business days thereafter, the clerk of the Judiciary Committee shall forward a full record of the proceedings before the Judiciary Committee, including all exhibits and a recording of all testimony, along with Special Counsel's report, any Minority Report, and Opposition, to the clerk of the House.