MINUTES OF THE
ASSEMBLY SELECT COMMITTEE ON ELECTION CONTESTS
(Assemblywoman Jan Evans - District No. 30)

Sixty-eighth Session
January 16, 1995

The Assembly Select Committee on Credentials was called to order at 3:10 p.m., on Monday, January 16, 1995, Chairmen Lambert and Spitler presiding in Room 119 of the Legislative Building, Carson City, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster.

COMMITTEE MEMBERS PRESENT:

Mrs. Joan A. Lambert, Chairman
Mr. Larry L. Spitler, Chairman
Mr. Bernie Anderson
Ms. Barbara Buckley
Mr. Jack D. Close
Mr. Lynn C. Hettrick
Mr. Richard D. Perkins
Mr. Bob Price
Mr. Brian Sandoval
Mrs. Sandra J. Tiffany

COMMITTEE MEMBERS ABSENT:

None

GUEST LEGISLATORS PRESENT:

None

STAFF MEMBERS PRESENT:

Ms. Brenda J. Erdoes, Legislative Counsel

OTHERS PRESENT:

Mr. Brendan Trainor, Contestant
Mrs. Jan Evans, Contestee
Mrs. Juanita Cox, Citizen
Mr. James Dan, Citizen

Chairman Lambert informed the committee the chairmanship would be shared by Mr. Spitler and herself. Mrs. Lambert announced she would be presiding for the first one and a half hours. The committee would then take a 15 minute break after which Mr. Spitler would preside for the next one and a half hours.

Chairman Lambert then read the following statement:

"We are here today to consider a very important issue. We are in an open public meeting to hear the contest of election in Assembly District 30 as provided for by State law. Upon conclusion of the review of information by this committee, a vote of the Assembly Committee on Credentials will be conducted to determine the recommendation to be made to the full Assembly. Please allow me to describe to you all of the procedures we will be following to insure an orderly and a thorough review of all pertinent testimony and documentation concerning the contest under review.

"First, it's expected that all persons appearing before a committee of the Nevada Legislature are telling nothing but the truth. However, in a matter of such gravity and importance, it is appropriate that oral statements before us today which purport to establish matters of fact, be made under oath and penalty of perjury. It should be noted that the contest before us today represents only the 12th occasion in Nevada history that the election of a member of the Assembly has been contested since enactment of the original law in 1873.

"We also would ask that the proceedings here today remain orderly and consistent with the deliberations of an elected body in a democratic society. Unsolicited comments, outbursts and disturbances from the audience will not be tolerated. Let me inform all of you that the Nevada Constitution, ever since its original enactment in 1864, permits either house of the legislature to impose a penalty against any non-member who commits an act of quote disrespect to the house by disorderly or contemptuous behavior in its presence unquote.

"Finally, Nevada Revised Statute 293.410 specifies those grounds upon which an election may be contested. These include malfeasance by an election official, the eligibility of a candidate for office, canvassing errors, bribery to procure election and malfunction of a voting device. That law also specifies that an election may be contested on the grounds that quote illegal votes were cast and counted for the defendant which if taken from him will reduce the number of his legal votes below the number necessary to elect him unquote.

"The person bringing the contest, not the person against whom the contest is filed, carries the burden of proving that any irregularities shown were of such a nature as to establish that the actual result of the election was changed.

"Our primary goal here today is to have a fair hearing, and we thank you all for your cooperation."

Lambert: Now the committee needs to adopt rules. They are under the green tab. See Exhibit C. There are two sets: one entitled, -- one is a green tab "Rules of the Assembly Select Committee on Election Challenges." These are similar to the Standing Committee Rules that we adopt at the beginning of every session, and under the magenta tab are "Rules of Procedure for Hearing Contest of Election." Has the committee had an opportunity to look at these rules? And if so, I would entertain a motion for adoption.

Moved by Mr. Perkins. Seconded by Mr. Close that the committee adopt the two sets of rules. All those in favor signify by saying "Aye".

Committee: Aye.

Lambert: All those opposed. Carries unanimously.

(For the purpose of Assembly committee reference, the motion shows as follows:)

MR. PERKINS MOVED TO ADOPT THE RULES OF THE ASSEMBLY SELECT COMMITTEE ON ELECTION CHALLENGES AND THE RULES OF PROCEDURE FOR HEARING CONTEST OF ELECTION.

MR. CLOSE SECONDED THE MOTION.

THE MOTION CARRIED UNANIMOUSLY.

Lambert: Following these rules on the procedure for election, we will have an opening statement by the contestant, Mr. Trainor, followed by an opening statement by the contestee or the counsel for the contestee, Mrs. Evans.

Mr. Trainor, I understand that Mrs. Evans wishes to make an opening statement. Would it be simpler for you to make an opening statement

and then she will make hers and then present the main body of your case?

Trainor: Sure.

Lambert: Well, then, if you will make your opening statement.

Trainor: All right.

Lambert: Excuse me. First, I need to swear you in under oath. Could you raise your right hand? Do you solemnly swear or affirm under the pains and penalties of perjury that the testimony and evidence that you will give in these proceedings will be the truth, the whole truth and nothing but the truth, and that you will answer all questions presented to you to the best of your ability and personal knowledge.

Trainor: I will. I do.

Lambert: Thank you. If you will proceed.

Trainor: Greetings to everyone in the Assembly. I want to thank you for having me here today. My name is Brendan Trainor, and I was a bona fide candidate from the Libertarian Party from Assembly 30 in central Sparks and parts of Reno in the last election, and in the previous election before that. I also ran in '92. This is a contest based on the eligibility section of the N.R.S. It is not alleging any other irregularities as far as fraud which has been the usual contests that have come up in the last few sessions.

I would like to begin by quoting the section of the Constitution that I believe would make the candidate ineligible to hold the office in her present condition and that is the Article III, Section 1 of the Nevada Constitution.

> The power of the government of the State of Nevada shall be divided into three separate departments: the legislative, the executive and the judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions -- any functions -- appertaining to either of the others except in cases herein expressly directed or permitted. --

Meaning expressly directed or permitted in the Constitution itself. This Constitutional provision was considered important enough by the founders that it was accorded in the Constitution a separate section preceding Article 4 delegating the powers of the legislative branch. "The division of powers is probably the most important single principle of government declaring and guaranteeing the liberties of the people." Galloway v. Truesdell, 83 Nevada (1967).

And see also: "The Separation of Powers doctrine is a fundamental principle on which federal, state and local governments are based. The doctrine protects the common interest of the public by requiring that those who make the law be different from those who execute and apply it. To protect against unchecked power, it is necessary not only to have separate branches of power but also to have separate personnel in each branch." And that's from an Arizona Supreme Court case of 1987 called Matter of Walker.

It is because of the importance of the issue that I bring the contest. I did file a similar contest on 12/1/92 with the Secretary of State's office. However, I feel that due process was denied me when I was not notified of the hearing in violation of the election laws and the rules of the Assembly NRS 293.427 (3), which states "The contest must be heard and decided as prescribed by the Standing or Special Rules of the House in which the contest is to be tried." And the rule was assembly rule 45.2 which required a three-day notice of a hearing regarding a contest of election. It was terrible weather at that time. I believe that if there are only 12 challenges, there were about five that year, if I recall right, in the Senate primarily based on allegations of election fraud in Las Vegas, and the L.C.B. claimed that because of the confusion attending it, that I was not notified. So I did come back and expressed my displeasure at not being notified. I picked up a copy of the L.C.B.'s arguments in favor of Jan Evans at that time, and I asked to have the minutes amended that would show that I was not notified. And the minutes were so amended. Then I tried to have the Supreme Court intervene by writ of mandate to have a new hearing, and the Supreme Court refused to do that. I waited until after the session was over. I did not disrupt the session anymore after that, and then I did file a complaint for declaratory judgement in the District Court, Case Number CV94-00183 (EXHIBIT D) asking for clarification and enforcement of the constitutional rule prohibiting persons who have powers in one branch from exercising

any functions in another branch of government. Now this complaint was dismissed there, and it's now in the Nevada Supreme Court as Supreme Court Docket Number 25690.

Is there a time limit on this? Do you have a -- do you want me to --?

Lambert: We want you to have an opportunity to have a fair and full hearing, but if you could make this an opening statement, not your entire case, we would certainly appreciate it.

Mr. Trainor: All right. I would just like to say that the reason why I continue to contest it, despite the opinion of the L.C.B. in this matter, was that after going through the Attorney Generals' of the State of Nevada opinions, they consistently declare that state workers, including employees, not relegated simply to officers or major officers like the Attorney General serving in the legislature, member of the Board of Regents serving in the legislature, but consistently have stated, in fact I couldn't find one that did not so state, that people who are employed in the organic state government may not indeed serve as legislators. And that a leave of absence is not an excuse -- but is not -- they cannot do that upon taking a leave of absence intending to return to their position. But the Attorney Generals of Nevada have consistently held, according to my research, that they must resign their position in the Executive Branch before they may be sat in the legislature.

I could go on and describe these. I don't know if you want to. They are in my contest of election. I don't know if you want me to go and get into the details of these at this point. I know we want a full hearing and everything, but I don't want to drag down the opening statement. I would just like to make another general statement then that there are people in this state, and myself included, who are very concerned about the constitutional process, that the laws be in harmony with the constitution. We believe that a written constitution is not only the direct and basic expression of the sovereign will (the people's will), but it is also the absolute rule of action and decision for all departments of government with respect to all matters covered by it, and must control as it is written until changed by authority which established it which is the real sovereigns, the people of Nevada. (EXHIBIT E). Neither financial difficulties or the political ends of the legislature justify, to use President George Washington's

words in his farewell address, a change to the Constitution by usurpation. President Washington declared although it may be felt that is a good goal to allow -- no, he didn't specifically say this -- but he felt although the goal may seem to be good, such as allowing people from the executive branch of the organic state government the opportunity to run for the legislature, and in this instance it may seem to be an instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit the use can at any time yield.

The Constitution of each state is the fundamental law of the state. There is no law, and certainly no administrative ruling of a legislative commission, enforceable by the courts above or beyond a Constitution. Any governmental act which overrides the restriction declared in the state Constitution is null and void although the Constitution is a living thing and can be interpreted in the light of changing conditions. Evans v. Job, 8 Nevada 1873, State ex rel. Miller v. Lani, 55 Nevada 123. However, there cannot be a departure from the basic principles contained therein. This is emphatically confirmed in King v. Board of Regents 65 Nevada 1948, where the court said, by the late revered Justice Badt, that "Even though we concede the elasticity of the Constitution as a living thing, to be interpreted in the light of new and changing conditions, even though we may not condemn legislation simply because the object or purpose is new, (no matter how astonishing or revolutionary) so long as a constitutional limitation is not violated.

That is the basic reason why I have brought this contest of election to your attention. The other fact, I did hesitate before bringing it, my constituents have been urging me to bring it, all 200 of them, minor party joke there. But, I did hesitate this time because I felt that I may be alone and against the grain as it were. But then I would like to indicate that the controversy surrounding Assemblyman Batten's being told that he must resign from his position on the Gaming Board did give me a little more courage to go ahead and try again to have a hearing on this issue before the Assembly. I could not see in the law that I have read, the Attorney Generals' opinions or the Supreme Court opinions of several other states, including our neighboring states Oregon and Arizona, any distinction between those who might be such as Assemblyman-elect now full Assemblyman, I presume,

Batten, member of the Gaming Control Board as opposed to a university administrator or even teacher. I could not see any distinction between those two in the law.

I did come down and file on Friday, the 18th, which was several days before the deadline which was Tuesday, so I was not party to the controversy that arose over the date of the filings. I had nothing to do with any of that situation about not being reported to the Governor on time or anything of that nature. So I think that I can conclude this part of my opening statement at this time.

Lambert: Thank you, Mr. Trainor. Is there anyone here representing Mrs. Evans, or is Mrs. Evans here to make her opening statement? Mrs. Evans, I might tell you the rules of procedure allow you to defer your opening statement if you wish.

Evans: Madam Chairman, I wish to waive opening statement. Thank you.

Lambert: Mr. Trainor, do you want to present your full statement? You have a choice, I'm sorry I didn't mention it before, of standing at the podium or if you are more comfortable sitting at the table where you are. It's your choice. And I might take this opportunity, if you wish to speak under the public comment portion of this meeting, if you would sign in on the sign-in sheet by the door and so indicate, we would appreciate it.

Trainor: Since this is, as I have said, basically a question of law and organic law and not a question of fact such as allegations of fraud or other facts of that nature, I guess that the best thing to do is to try to give you a little more background on my research into the Attorneys Generals of Nevada. We have AGO 357 in 1954 and AGO 183 in 1952. In AGO 357 Attorney General W. T. Mathews stated that a Mr. Baptista M. Tognoni, employed as a Senior Engineering Aide in the Nevada Highway Department and an elected Assemblyman from Eureka County, and a Mr. Edward C. Leutzinger, employed as a Senior Civil Engineer in the same department, and the elected State Senator from the same Eureka county, had requested leave from their jobs from Mr. Worth McClure, Jr., Personnel Director, Nevada State Personnel Department. Mr. McClure then asked the Attorney General if such leave should be granted. Attorney General Mathews declared,

"We think such practice would ignore if not in fact be violative of the above-quoted constitutional provision, and certainly against the public policy of this state as so expressed therein."

Attorney General Mathews then cited the case that seems to be the ruling case among the Nevada Attorney Generals, State ex rel Black et al., v. Burch, State Auditor from Indiana, I think it's 1948, where the Indiana courts ruled that three Assemblymen and one Senator had violated the separation of powers, and they were merely -- their executive branch employments were as follows: they were employed at the pleasure of those making the appointment for an indefinite period. They resumed the performance of their respective duties without taking any oath of office or being required to furnish any bond. None of them has been requested by his employer to take such oath or furnish any bond. Their jobs are not public offices nor do they in their respective positions perform any official functions in carrying out their duties in these respective jobs. They are acting merely as employees of their respective commissions or boards by whom they were hired. One was described as a Secretary of a Flood Control and Water Resources Commission whose duties were to take and keep minutes and records, basically a secretary. One was an inspector for the Board of Barber Examinations whose job description the court found reduced itself to that of a clerk.

So the Indiana court exhaustively examined the authorities and reasons for the separation-of-powers doctrine, and quoting from the federalist papers concluded that, "In view of the fact it is obvious that the purpose of all these separation-of-powers provisions of Federal and State Constitutions is to rid each of the separate departments of government from any control or influence by either of the departments and that this object can be obtained only if Section 1 of Article 3 of the Indiana Constitution is read exactly as it is written... if persons charged with official duties in one department may be employed to perform duties, official or otherwise, in another department, the door is open to influence and control by the employing department."

Nevada Attorney General Mathews declared he was in accord with the language of the Indiana court. He said that the separation-of-powers doctrine must be read exactly as it is written and that the same rule applies to the Nevada Constitution as applies to the Indiana

Constitution. He said, "It is the opinion of this office that any legislative act empowering any official or person to grant leaves of absence from employment in the executive branch of the state government for the purpose of exercising powers belonging to the legislative branch would be beyond the powers of the legislature to enact. And it is our considered opinion that the Personnel Director has no power to grant such leaves. The resignation of employees -- furthermore, the resignation of employees of the Executive Department for the purpose of serving as members in the Legislative Department with the intent basically of reinstatement thereafter in the Executive Department would be a manifest evasion of such constitutional prohibition, and in brief a subterfuge abating the public policy of the State."

Now, earlier he had also given another opinion in 1952, A. G. Mathews replying to State Senator John Murray, also from Eureka County. And this was concerning whether or not his position as Director of Drivers Licenses under the Motor Vehicle Laws of the state would enable him -- was a violation of the Nevada Constitution. And again Mathews declared, "Executive class includes all persons who have functions in the administration of public affairs, as contra-distinguished from legislative and judicial functions."

Another case that the Nevada Attorney Generals have relied on is Saint, Attorney General v. Allen et al. And Mathews declared that the separation of powers is almost identical to Nevada's as it is in Louisiana. And any exceptions to the rules are purely parliamentary, that is, confined to such instances in the Constitution where the Senate is given executive or administrative power to confirm appointments. Or where the House of Representatives is given judicial power to impeach, or the Senate is given judicial power to try impeachments.

The way that they do this generally, and this -- this is why I think the logic of the law would apply to the University as well as to the Highway Department, is that the courts, when they look at this, they -- they do a process of elimination. Now, the Louisiana Supreme Court looked at the Highway Department and they declared, "It is certain that the Highway Department is not part of the Legislative Department. It is equally certain it is not a part of the Judicial Department, and hence as there are not four but only three general

departments of government, the Highway Department must be classified as belonging to the Executive Department." And, again, they reiterated, "It is not necessary to constitute a violation of the article that a person should hold office in two departments of the government. It is sufficient if he is an officer in one department at the same time he is employed to perform duties or exercise power, belonging to another department. But the words 'exercise power', speaking officially, means perform duties or functions."

Now, "Does this separation of powers apply to education?" might be the question to bring up next.

In Oregon we had Monaghan, a Supreme Court case, Monaghan v. School District No. 1, Clackamas County, where the Oregon Supreme Court was asked for declaratory judgement without suit to determine whether Thomas Monaghan, a member of the Oregon House of Representatives, could also be employed as a teacher in a local school district public school, and the Oregon Supreme Court held he could not, affirming a lower court decision. In so doing, they described an excellent standard for interpreting constitutional law, and described -- established two definitions of the word "function" which are currently listed in the legal reference, "Words and Phrases," which is the standard reference. It's not the most sophisticated, but it's the standard reference for legal terminology.

So, in Monaghan the Court held:

1. In construing the Organic Law, the presumption and legal intendment are that every word, clause and sentence therein have been inserted for some useful purpose.

2. The intent of the people adopting it is to be found in the words themselves.

3. It is to be presumed that the words themselves are sufficiently precise to convey intent to framers, and

4. The meaning apparent on its face is the meaning intended to be conveyed, and

5. Where one meaning is plainly declared in a state Constitution, the

courts are not at liberty to search elsewhere for possible or even probable meanings.

According to the Oregon Supreme Court, the word "functions" means "that which one is bound or which it is one's duty to do; and under the provision, one who exercises the function of another department may be either an official or an employee."

So we see the Oregon Court granted no special dispensation to educators, and held that when education mandated by the Constitution is definitely an obligation and sovereign power of the state, cannot be bartered away. But, they took the opinion that public school teachers are employees exercising one of the functions of the Executive Department of the state government within the meaning of the constitutional provision that no person charged with official duties under one of the separate departments of government shall exercise the functions of another department.

Some people have declared that the word "functions" is identical in meaning to official duties or powers such as used in the Nevada Constitution and was merely inserted to avoid redundancy, but the court rejected this. The court accepted the Burch doctrine that our Nevada Attorney Generals have also accepted, that "functions" has a distinct meaning, it's broader in scope than "powers" or "official duties" and it gives greater force to the concepts of separation by barring any official in one department of government of the opportunity to serve any other department even as an employee.

And there's other Oregon cases. I would like to clarify this that -- a little bit in that apparently after the Monaghan case, the legislature asked for a constitutional amendment to allow public school teachers to serve in the legislature, and is -- to my knowledge, in another case that I brought up, it was mentioned that the people of Oregon did amend the Constitution to allow public school teachers in there. But the process there was that when they had a problem, they went and amended the Constitution. They didn't go behind the scenes sort of and have a commission rule that Monaghan could be in.

Now what of a state university? Is it effectively included within Article III, Section 1, Separation of Powers doctrine? First of all, the L.C.B. concedes that the University of Nevada is part of the Executive

Branch of the organic state government created in Article II, Section 4 of the Constitution...

Lambert: Excuse me, Mr. Trainor. You use the term "organic state government" fairly often. Could you define that for the committee, please.

Trainor: As opposed to local government, organic state government is the government that is expressly created in the Constitution. However, then the organic state government turns around and creates local government. So that is not organic. It's a creature of the state.

There was a -- something that bothered me from the first time I came in that there was a hierarchy chart available for people describing the branches of government -- if I can find it. I'm sure it's here. I've seen it here. At any rate, the hierarchy chart had the judicial, the executive and the legislative branch, but then it had two departments in which the supervisors -- not supervisors, but the boards are elected, that is the Board of Regents and the Board of Education; and it had them off to the side as a fourth branch of government. And in my first letter to the Secretary of State when we first started looking into this, we asked the Secretary of State if -- concerning this, and the Attorney General at that time, I think, was the one who told her and then she related it to us in a return letter, but she said that some people doubt whether the University is part of the organic government but the courts -- is completely a branch. But the courts did not say that you can be half in and half out. You can't be -- you're either pregnant or you're not pregnant. You're either part of the executive branch or you're not part of the executive branch, and the fact that the Board of Regents is elected, or whatever, by the process of elimination that I've described, the court would say, "All right, you've got the -- the school is not judicial - it doesn't decide what is the law; and it's not legislative - it doesn't create the law. Therefore, it has to be executive, because it implements the law. So -- ."

Also in Monaghan, the Court quoted Federalist 51, "It is equally evident that in reference to each other, neither of them ought to possess, directly or indirectly," (again the words 'directly or indirectly'), "an overruling influence in the administration of their respective powers. It will not be denied that power is of an

encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it."

Okay -- I'm not going to mention her name, but a well-respected activist in Nevada (deals in tax issues basically) in 1992 was the one who told me about State Ex Rel Spire v. Conway. And this was in Nebraska where the Nebraska State Senator Gerald Conway after his election was contested, the Nebraska Legislature sat Mr. Conway. However, in this instant the state attorney generals (I don't know whether it was in a different party or not, the case doesn't mention), -- but the state attorney general took a quo warranto action.

Now, again, I understand that you have the power to seat Mrs. Evans, and there is nothing I can say or do. According to the statutes, you have the exclusive right and power to do that. But in instances, and there have been several, where contested people on this issue have been sat, the remedy has been open to have them removed from their executive position jobs. In other words, once they are in the legislature, you can't -- the courts cannot take anybody out of the legislature. However, people that have felt that either the state in a quo warranto or the school district in Oregon or myself, hopefully here, -- I wouldn't want to do that -- but the way to get relief then would be Constitutional relief or to have the law clarified or enforced, would be to have the person removed from the executive branch job. And this is what happened in Nebraska in 1992. According to this case, Mr. Conway's position at the college would have been secure if the Doctrine of Degrees that was originally put forth by the Legislative Counsel Bureau in 1992 had been the ruling opinion of law. He only had a subordinate position. He was not involved in setting public policy. He did not take an oath of office. His only power lay in his immediate classroom related duties under established college procedures. He received unpaid leave of absence during the times the legislature was in session.

The Nebraska Supreme Court, recognizing that "courts must apply and enforce the constitution as it is written," concluded "As a consequence, Article II prohibits one who exercises the power of one branch - that is, an officer in the broader sense of the word - from being a member - that is, either an officer or employee - of another branch. Article II is not limited in its application to officers, constitutional or otherwise, but extends to employees as well."

So, again, I guess I'll just review briefly Nevada Attorney Generals' opinions.

A. G. Mathews held that an office -- the office of Director of Drivers License in the executive branch was not compatible with the legislature. He forbade two employees of the State Highway Department from taking unpaid leaves of absence to serve in the 1955 legislature.

Attorney General Harvey Dickerson ruled that a member of the Nevada Assembly could not be a local government employee who was only an inspector and maintenance man for the Hawthorne Elementary School District Number 7 for remuneration while the Assembly was even not in session. Attorney Dickerson said that an Assemblyman was not only an Assemblyman during the legislative session, but also during his entire elective term of office. He is charged during that term with the exercise of powers properly belonging to the legislative branch of our state government. "He is subject to special session duty during his term of office and may and oftentimes does serve on interim committee or commission activity all during his two year term. The school districts are political subdivisions of the state government and part of the executive branch. An employee of the school district is exercising a function appertaining to the executive branch. If that employee is at the same time an Assemblyman, the activity is in conflict with the above quoted constitutional provision.

In that same year, Attorney General Dickerson confirmed that if the Assemblyman decided to resign from the Assembly, he could -- there was no prohibition on taking the job and vice versa. And it is interesting that in this Attorney General's opinion whether the -- the question arose whether the position of maintenance engineer and inspector was a public office. Attorney General Dickerson determined it was a mere employment, not an office, but the separation-of-powers prohibition still held. In 1958 the Attorney General ruled office of mayor and assemblyman. That's a little more up-front. You can understand being an elected -- being a mayor and being elected to the legislature, I think that's pretty apparent on its face.

Now, at this time we begin to see exceptions based on local government people in the Attorney General's opinions. That is, in

1967 a ruling was made that a Fire Chief in the City of Sparks -- Sparks could -- could in fact serve as State Senator, and the explicit rationale was that the Fire Chief was entirely subordinate to the Mayor and City Council, could do nothing in the legislature that would impact his local government position. And the Attorney General wrote, "Historically the requirement of the separation of powers was never applied to local government organizations. The closeness of local authorities to popular control affords an adequate sanction and protection.

I don't -- I haven't seen any brief from the L.C.B. at this time, but in 1992 they relied on a case whose judgement was about local government. Someone who was elected Police Chief of San Francisco who then appointed himself Police Judge to judge on the qualifications of the policeman. And somebody challenged that and the Supreme Court of California in the 1860's said that local government partakes of all three of the branches of government. County Commissioners, for example, sometimes do executive jobs, functions, sometimes perform judicial functions, sometimes perform legislative functions; and the separation of powers does not hold when you are talking about local government.

Since I don't know if the legislative -- I haven't seen anything in this hearing if they are continuing to estab -- stick to their same arguments, I can skip that for the time being.

People v. Provines was the name of the case they brought up in 92. And Elliott v. Van Delinder had a reference to Provines, but in that instance, I point -- I had to go and point out that the person whom they were talking about was an employee in one branch and an officer in the other and that the court did not rule -- or did not give any indication that they regarded that as the hierarchy, that the L.C.B. suggested that separation-of-powers should only be confined to officers in 1992. And so I questioned their case Elliott on the issue that although there was a reference to Provines, the Elliott case talks about someone who was an employee and an officer, and the Elliott case didn't decide one way or the other which weight they gave to that.

So -- now, in the Federal Constitution, the word "officers" is used in both instances. It says -- I don't have the exact quote, but it does

say "officers in one branch cannot be officers in another." So it's also interesting that in Saint, Attorney General, a Louisiana case that our Attorney Generals in Nevada have also cited, they did a lot of research and found that the separation-of-powers in state constitutions was originally written by Thomas Jefferson for Kentucky, and that he remarked when he wrote the separation-of-powers for the State of Kentucky that he thought the state Constitution should be even stricter than the federal Constitution. He was afraid that the federal Constitution was not strict enough.

And most of the constitutions in the country use the same wording that the Nevada Constitution which says, "Any functions appertaining to." It does not say "offices." And I think that if the legislature wants it to say "officers", that they should bring the issue to the people in the form of a constitutional amendment although without a brief, I'm not sure if that's the position that the Legislative Counsel Bureau is taking at this time.

Maybe I'll just close this since it is a question of law and not of facts but Judge McCarren in State v. Cole wrote, "Aside from the expressions set forth in these and numerous other decisions wherein thought and consideration of the courts generally have been expressed by judicial utterances - aside from all this, the question is, in my judgement, not one of extreme intricacy, but is one of easy answer and solution. We have a policy and a purpose and an inhibitory declaration, created by an organic law, not narrow but broad, not rigid but flexible, not harsh but wholesome. No 'kindly light' by way of judicial expression is required to lead the way, for there is, in fact, no 'encircling gloom'. The words used in this section are so plain and self-explanatory, the policy established is so manifest and the result is so wholesome, that these features in themselves light the way to comprehension and application. The highest duty of the courts is to be an affirmative force in putting into execution the properly expressed will of the people, and to this end it is the ever-attendant duty of the courts to see to it that a properly declared rule prescribed by a constitutional or legislative body is not deprived of its lifeblood by some strained construction to such an extent as to destroy its power of effective operation.

"It will suffice to say that, in my judgement, the petition in this case holds the position which by Constitutional law he is prohibited from

occupying and from which by constitutional provision he is prohibited from receiving the emoluments, and the petition therefore," (when this case was denied because I think he was asking for money from both jobs) "not only for want of jurisdiction, but by reason of the constitutional inhibition."

Kind of operating in a vacuum here. But that may be all that is necessary for me to say at this time.

Lambert: Thank you. Are there any questions from the committee of Mr. Trainor? Thank you, Mr. Trainor.

Mrs. Evans, would you care to present your case at this time? Mrs. Evans, because of Rule 45, the Assembly, I have to swear you in before you testify. If you could raise your right hand. Do you solemnly swear or affirm under the pains and penalties of perjury that the testimony and evidence that you will give in these proceedings will be the truth, the whole truth and nothing but the truth, and that you will answer all questions presented to you to the best of your ability and personal knowledge.

Evans: I will.

Lambert: Thank you. Will you state your name, address and occupation.

Evans: My name is Jan Evans. I reside at 3250 Wilma Drive in Sparks, Nevada. My current position is Director of Development for the University of Nevada School of Medicine, and I was elected to Assembly District 30 in Washoe County.

My statement, Madam Chairman, Members of the Committee, is simply that I will rely upon the document that has been presented to you by the Legislative Counsel, and I also rely on prior court history on this matter. I have no further statement to make at this time.

Lambert: Are there any questions of Mrs. Evans? Thank you, Mrs. Evans.

Evans: Thank you, Madam Chairman.

Lambert: Brenda, does the committee have an opinion from the L.C.B.?

Erdoes: Yes. It is under the red tag. You have it. (Exhibit C)

Lambert: What's the pleasure of the committee since Mrs. Evans has mentioned this. Have you had an opportunity to read it or would you like Mrs. Erdoes to recap this? I mean to make it clear that Mrs. Erdoes as an employee of the Legislative Counsel Bureau is not representing Mrs. Evans and cannot. She is representing this committee only, and acting as our legal advisor.

It appears to be the pleasure of the committee that she summarize this. Could you, Mrs. Erdoes?

Erdoes: Yes. To make this a little simpler, I will tell you that the Legislative Counsel Bureau has not changed its opinion in this case. Mr. Trainor's contest of election is based upon the argument that Mrs. Evans is ineligible to be seated in the Assembly because she is employed by the University and Community College System of Nevada. (Exhibit F). Mr. Trainor argues that seating Mrs. Evans would violate Section 1 of Article 3 of the Constitution of the State of Nevada, the separation of powers clause, which prohibits a person from exercising the powers of one branch of the government from exercising any functions appertaining to the other two branches.

In 1993, Mr. Trainor presented the identical legal argument, based upon the same citations of legal authority, to the Assembly Select Committee on Credentials of the 67th Session. His argument was rejected, and Mrs. Evans was seated. When Mr. Trainor petitioned the Supreme Court of Nevada for a writ of mandamus ordering the Speaker to hold a new hearing, the Supreme Court of Nevada reviewed the legal authorities and legal argument presented by Mr. Trainor and concluded that his contest of election lacked merit as a matter of law. The Supreme Court of Nevada has not issued any other decision, either before or after its opinion on Mr. Trainor's 1993 contest of election, that contradicts or otherwise addresses the issue of whether it could be considered a violation of the separation of powers doctrine for an employee of the University of Nevada to serve in Nevada's citizen legislature.

In addition to the opinion issued by the Supreme Court of Nevada on Mr. Trainor's previous contest, relevant legal authority from California supports the conclusion that Mrs. Evans' legislative service in

conjunction with her employment at the University does not violate Nevada's separation of powers clause. California's interpretation of its separation of powers clause is especially important because Nevada's Constitution, including Nevada's separation of powers clause, is patterned after California's Constitution. In an early case before the Supreme Court of California, the court concluded that a person may be employed by two branches of government without violating the separation of powers if the person does not take part in managing the affairs of more than one of the branches.

The principles established in the decision of the Supreme Court of California were reaffirmed and broadly interpreted in a later case before the Court of Appeals of California. Elliot v. Van Delinder, 247 P. 523 (Cal. Ct. App. 1926). In discussing the meaning of separation of powers clause in California's Constitution, the court explained that the constitutional prohibition of the separation of powers clause "means that no person shall hold offices under different departments of the government at the same time ...." Thus, even if section 1 of Article 3 of the Constitution of the State of Nevada were interpreted to include all persons who hold a public office, Mrs. Evans' position at the University would still not be included within the constitutional prohibition because her position at the University is not a public office. Mr. Trainor has also conceded in his contest of election that Mrs. Evans' position at the University is not a public office. Therefore, it follows that Mrs. Evans does not, under the California courts' interpretation of the separation of powers clause, exercise any functions appertaining to the executive branch.

Exercising the functions of the executive branch of government entails much more than mere employment in that branch. To ascertain whether a legislator's employment in the executive branch is a violation of the separation of powers clause, it must be determined whether the legislator's duties, responsibilities and authority within the executive department rise to the level of constituting an impermissible exercise of the functions of the executive branch. Mrs. Evans' position as Assistant Director of Development at the University of Nevada School of Medicine is not created by statute, nor are her duties prescribed by statute. Mrs. Evans is wholly subordinate and responsible to the Director of Development, the Dean of the School of Medicine, various Vice Presidents and the President of the University, and ultimately, the

Board of Regents. She does not establish policy for the executive branch of government, and she does not further any course of action selected by the executive branch regarding political matters. Consideration of the questions listed above and the circumstances of Mrs. Evans' employment reveals that Mrs. Evans does not exercise any functions appertaining to the executive branch of government.

In summary, Section 1 of Article 3 of the Constitution of the State of Nevada prohibits persons charged with the exercise of the powers of one of the departments (such as a Legislator) from exercising the functions of either of the other departments. It is the opinion of this office that exercising the functions of another department requires more than mere employment within that department. The Supreme Court of Nevada has already reviewed the identical legal argument and legal authorities cited by Mr. Trainor in his 1993 contest of election and concluded that the contest lacked merit. It is the opinion of this office that the position held by Mrs. Evans is not the type of position to which the constitutional prohibition of the separation-of-powers clause applies, and that Mrs. Evans therefore is not required to resign that position to serve as a Legislator.

Finally, the ultimate determination of Mrs. Evans' right to be seated rests with the members of the Assembly. Section 6 of Article 4 of the Constitution of the State of Nevada provides that "each house shall judge the qualifications, elections and returns of its own members ...." It is well-settled that when a legislative house makes a decision upon the qualifications or election of one of its members, that decision is conclusive and may not be reviewed by any court, including the state's highest court. Thus, the decision of whether Mrs. Evans may be seated may only be made by the Assembly itself.

Lambert: Thank you, Mrs. Erdoes. Are there any questions of Mrs. Erdoes?

Sandoval: Mrs. Erdoes, I just want to make something clear in my mind. The writ of Mandamus that was filed in 1991, did that -- in the decision by the Supreme Court, did that address the merits of whether Mr. Trainor was entitled to have another hearing? Or did it address the merits of his contest election?

Erdoes: I think the best thing I could tell you is exactly what it said. I have the quote. Just a second.

Sandoval: Do you have the full text of the opinion?

Erdoes: Yes, I do. I could supply that to you if you like. I think it was one page. It said, "Having reviewed petitioner's contest of election, we conclude that it lacks merit as a matter of law."

Sandoval: If possible, I'd like to see the whole text, please.

Lambert: Mr. Close.

Close: Thank you, Madam Chairman. Brenda, could you help me a little bit in reference to terminology Mr. Trainor used on Page 13 of his text where he relates the "doctrine of degree", and nowhere in your summary did you use those same terms. Could you help me understand?

Trainor: The arguments that the LCB brings forth, I call myself the "doctrine of degree."

Lambert: Excuse me, Mr. Trainor, I believe the question was to Mrs. Erdoes. You will have an opportunity for rebuttal at another time.

Trainor: I'm sorry. I thought you were addressing me.

Close: No. To Mrs. Erdoes. The question I have is Mr. Trainor used that in his documentation and I didn't see it described anywhere in your testimony. Could you help me understand from your perspective or his or whatever what the "doctrine of degree" means?

Erdoes: It is a term that, I believe, was coined by Mr. Trainor. But I believe that what he is describing there is what we have said, that it's a matter of degree as to whether or not you could serve in both branches. It depends on how much policy-making power you have, if any, what kind of -- whether you actually exercise a function in the second branch and that's the matter of degree that we have described although we did not call it that.

Sandoval: Mrs. Erdoes, this is a follow-up to my prior question. I'm just trying to get this clear in my mind. At the conclusion of your presentation, you stated that the legislature has exclusive jurisdiction to determine the outcome of a challenge, but you are relying upon the Supreme

Court's decision that says that contest of election lacks merit as a matter of law. Could you explain that for me, please?

Erdoes: I think just as a matter of course, we rely upon the Supreme Court's determinations in terms of what provisions of the state Constitution mean. And I believe that ultimately it may be writ of quo warranto would lie and that it might go to the Supreme Court, but we are just using the Supreme Court's interpretation of the law as one of the best ways to give you a definition of what it means.

Sandoval: Would you agree that there's somewhat of a conflict that the Supreme Court is saying that it finds that the contest of election is without merit but at the same time there's another opinion that states that the legislature has exclusive jurisdiction over this issue?

Erdoes: I had assumed that the Supreme Court of Nevada was looking at it in terms of a constitutional -- another constitutional issue, and maybe those could be read together. But it is still our premise that the Assembly is the sole judge of the election of its -- and qualification of its members.

Lambert: Mr. Price. Are there any other questions? Ms. Buckley.

Buckley: Mrs. Erdoes, how would you reconcile the decision made on Assemblyman Batten with the case of Assemblywoman Evans?

Erdoes: To my knowledge, there was not an opinion issued in that case. If there was, at least we didn't ever have -- we were never made privy to that. If I had to draw a distinction, I would say that you would look at whether ones function in being a regulatory officer would be a little bit different. However, I do not have the facts of the Batten case before me to really comment on that honestly. And, also, I think the difference -- that one big difference there is that's the Attorney General, I believe, was the one that is being cited as having decided something there as opposed to the Supreme Court or this body.

Lambert: Are there any other questions? Thank you. Well, now we've reached the part of our procedure for rebuttal. First, Mr. Trainor if he has any rebuttal. Or you can go directly to a closing statement if you don't. We could ask if Mrs. Evans has rebuttal prior to the closing statement.

Trainor: I do have somewhat of a rebuttal.

Lambert: Excuse me. The rebuttal may only be on facts that have already been mentioned.

Trainor: Right.

Lambert: Thank you.

Trainor: Okay. When the Supreme Court denied my petition for a new hearing, and they did put that sentence in there, they did not quote any law. They issued an opinion, but they did not say what they relied on that opinion. And also, there is a body of law in this area that says that title to office cannot be determined collaterally and in the Legislative Counsel Bureau's own -- collaterally means as far as I can see that -- I was asking the Supreme Court to have Mr. Dini, who was Assembly Speaker at the time, grant me a new hearing. I was not asking the Supreme Court directly whether or not they agreed with my opinion. I wanted the hearing, not an opinion from them on the law.

They did not do that, and they did put in this sentence, that they thought it lacked merit as a matter of law, but they did not give me any law to rely on. They did not tell me why they thought that. And considering all the Attorney Generals' opinions and all the other case law and what I consider to be not strong opinions from the Legislative Counsel Bureau, I waited until after the session was over, and after all the business -- the main business of the legislature was done, and then refiled to ask for declaratory judgement to find out what they thought.

Now I would like to point out that the Legislative Counsel Bureau -- it was dismissed on the local level and the judge, Judge Steinheimer on the local level also relied on this Writ of Mandamus and said it was a judgement by inference. But I don't know what a judgement by inference really is when you are not given any law to determine what the judgement says.

So I took it back up to the Supremes and asked them to clarify what they meant by this. It was ambiguous to me, too. Did it mean that once the Assembly seats someone they weren't going to interfere

with it. Or did it actually mean that they thought my case lacked -- you know, that I was completely off the wall and I shouldn't even have a hearing. And everything like that. So I don't think a one sentence in this Writ of Mandamus can be an estoppel to that issue. And I would also like to point out that the Legislative Counsel Bureau requested the Supreme Court in the springtime when I refiled for a quick decision, and they haven't rendered it yet. They've been sitting on it.

As a minor party candidate, someone who is unknown in the political process to a certain degree, I did feel like I was being given the "bum's rush" and that perhaps because I was not a major party candidate that whatever I said did not have equal weight with -- if I had been a major party candidate so that was also a motivating reason for why I did this.

The -- as I have said before, relying on an 1860 decision in Provines, which is -- the judgement is only on local government. It's a fundamental principle of law, and I think especially constitutional law because it goes back to Marbury v. Madison and McCullough v. Marilyn, the very first constitutional questions that were brought up in our Supreme Court under Justice Marshall that dicta could be respected. Now that -- dicta means that when a court judges, it judges on a specific issue and there is judgement in Provines, which is the California case that they rely on, was about local government. It was about someone elected to be the Chief of Police who was also a Police Judge, appointed himself Police Judge, and somebody whom he didn't want to be a policeman objected to that on separation-of-powers.

That was -- now in the back of the case there is some dicta, and the Supreme Court said maybe we shouldn't enforce the separation of powers too strictly because one of our brethren on the court is also trustee for the library system, and if we looked at this too strictly, we might say that he couldn't be a trustee and also be a Supreme Court Judge. But that was merely dicta, it didn't have anything to do with the case itself. And when you look at the law, dicta is given respect, but it -- it's not supposed to be used as -- to determine an outcome in a situation that is materially different as this situation is.

And then in the -- like I said before, as far as the second case that

they brought up, Elliott v. Van Delinder, -- Elliott v. Van Delinder contains a reference to Provines, just a reference. It says, "The truth that this section deals with the titles to office permeates the opinion of the Supreme Court in the leading case of People v. Provines." It's merely a reference in the beginning of the body of the case. Then it goes on to say, I would go on to say, "The Elliott court did not decide the legal definition of 'offices' in relation to 'functions', 'employments' or 'powers' or any other words used in this body of law, because it did not even discuss this issue. It's a little two-page decision. It uses 'office' and 'employment' without regard to any hierarchy of meaning. On Page 524 it states, "It's contended that the office of Justice of the Peace, held by respondent, is incompatible with the employment exercised by him under the Engineering Department of the state, and, therefore, he cannot hold the office. An alleged incompatibility of offices raises the question of title" so you see, if the L.C.B. wants to say that you have to be in office, that's fine. But in the case that they cite, the Elliott case, it uses 'office' and 'employment'; it doesn't give them any hierarchy of meaning; it doesn't define them one to the other; it merely mentions them.

The Elliott case was judged on the fact that the court refused to make a judgement saying that the question of title under incompatibility of offices cannot be tried in this proceeding which is a petition for writ of mandate which is also this proceeding from the Nevada Supremes. So here we have a case (I hope I'm not getting too complicated here), but here we have a case where the L.C.B. is relying on a situation in which the judgement is that you can't rely on a writ of mandate to decide title offices so that actually, in my opinion, reflecting back and contradicting themselves here.

And the second thing that the court held was that they weren't sure whether it was -- if the individual -- the facts of the case did not state whether the individual had assumed the office before or after he assumed his employment and so they didn't know whether to -- how to judge it because they didn't know whether the employment came before or after his acquisition of the office. So they decided nothing. They didn't decide anything. They didn't define anything. All they basically did in the Provines case was mention -- in the Elliott case -- was mention the Provines case. So I don't see how the L.C.B. can accept Elliott and declare that it reaffirms and broadly interprets

Provines. It merely outlines Provines in a cursory fashion in order to render its immediate judgement that issues of the incompatibility of offices may not be settled by a writ of mandate. It repeatedly uses the words, "office" and "employment", without defining them or showing a relation or distinction between them. The Elliott court's use of "office" and "employment" even so far as to explicitly state that the incompatibility of the employment as engineer with the office of Justice of the Peace had to be settled by Quo Warranto indicates that the court took a very broad view of the definition of office when it mentioned Provines, perhaps similar to Bouvier's law dictionary, "right to exercise a public function or employment."

You see, "office" is defined in our N.R.S. in the way that it is, after this case. And I have a Nevada case that is contemporaneous with this case called State v. Cole in which they say, "It may seem to be an easy matter to define what an office is . While it may appear to be a simple matter to determine whether a position is an office or not, the courts have experienced a good deal of trouble in doing so." And they went on to give several different -- and one of the definitions of the world "office" embraces what we would now call -- in light of the -- after, post-N.R.S., a mere employment. Such as in Bouvier's dictionary where it says, "An employment on behalf of the government" -- where it says, "A right to exercise a public function or employment." So even though the Elliott case mentions office, there is no guarantee in the Elliott case that it means the same thing that we mean today because nowadays we have a modern definition in the N.R.S. of what an office is.

Lambert: Thank you, Mr. Trainor. Is that the conclusion of your rebuttal on that point?

Trainor: Yes.

Lambert: Thank you. Mrs. Evans, do you have any rebuttal? Then, do you have a question?

Anderson: Madam Chair, is Mr. Trainor planning on providing all the additional documentation that he has presented for our review? I noticed he had several citations there. Other than those that he has in his parent statement which I believe most of them are in there, but a few of those last I don't recall picking out, Mr. Trainor. Is all of that in here?

Trainor: I don't think it's all in the contest and I didn't want to write a thirty page treatise in the contest.

Lambert: Could you supply the document that you have there to the committee? So we can have a complete record of what has been discussed?

Trainor: I would be glad to.

Anderson: Thank you, Madam Chair.

Lambert: Thank you, Mr. Anderson. Mr. Perkins, do you have a question?

Perkins: Mr. Trainor, referring back to one of the statements that you made in regard to the Supreme Court saying, "Having reviewed petitions, contest of election, we conclude it lacks merit as a matter of law," and your statement that that referenced no other laws for a basis. Are you aware of any laws, rules or procedures that mandate that the Supreme Court reference laws when they make a decision?

Trainor: I would have to refer to -- I know on the federal level, Rule 52A, the Federal Rules of Civil Procedure say whenever an order is granted or denied that the court should list the law. In other words, that they should tell you what they base their decision on so you can base your actions in the future on a foundation that you understand. And I found myself confused here, and, perhaps if I was better -- I am not an attorney, and perhaps if I had been better equipped to a procedure, I might have thought of a way to challenge that. But then again, you know, you're not told of a meeting, you're a minor party candidate, and it just felt like you are getting the bum's rush, and maybe I'd just sit quiet and, you know, just leave it alone. But it didn't leave me alone -- the issue didn't leave me alone. Other people kept bringing it up. You keep seeing letters to the editor in different papers from time to time complaining about state employees in the legislature.

Perkins: Yes, sir. I understand all of that. But the question being, I am not aware of any procedural rule or law that binds the Supreme Court to provide a reference for a decision that they make. I am not an attorney either. This is a learning process for me. But, you know, when they issue a ruling, we have a ruling, and I don't know that

there are any other rules for them -- that bind them to do anything other than that. And that was my question. Thank you.

Trainor: Okay.

Lambert: Are there any other questions of Mr. Trainor? Well, thank you, Mr. Trainor. The opportunity now is for closing statements from both sides. Would you like to make a closing statement or was your rebuttal your closing statement?

Trainor: Well, okay, here we go again, -- I --there is going to be comment from the audience, isn't there?

Lambert: I have one person signed up, and we will check the sheet to see if there are any more.

Trainor: All right. I would like to point out that I have pretty much one strike against me, and that is the one sentence in the writ of mandate which, by the L.C.B.'s own contention cannot decide -- by one of their own cases, -- cannot decide title to office in a writ of mandate especially when it's collaterally applied to -- something -- somebody else. And whoever, I would like to point out that the L.C.B. has not countered any of my arguments with a single Attorney General's opinion in the State of Nevada. They have relied on a 100 year old court case. An addictive from that case, not really the judgement, and a mentioning of that case, and another case from the 1920's. And I have presented Supreme Court decisions from Oregon, Arizona, Nebraska, Louisiana and approximately a half dozen Attorney Generals' opinions which are not written in the same way as the opinion of the Legislative Counsel Bureau. They take an entirely different tact on the issue, and they declare that Article III, Section 1 does not only apply to officers, that it also applies to -- employees, mere employees; that any functions appertaining to embraces employment, and that -- the rule is that one branch of government should not be open to any influence, "direct or indirect," is another phrase they like to use consistently from the other branch.

There have been editorials written on this especially in 1992 when we first started (people like myself and a couple of other candidates started mentioning it), and there have been letters to the editor sprinkled throughout. I am not sure of the history of allowing

university people in the legislature. I am not sure how far back it goes. I did read in one article that there was an Ethics Commission ruling in 1989. But once again I would like to point out that an ethics commission ruling, I don't believe, would have the weight of an Attorney General's opinion and much less a Supreme Court opinion that actually clearly defines the law that shows research and that shows that case history and that shows that the law is, as I said, that Article III, Section 1, the separation of powers should be consistently applied; that the founding fathers wanted it to be stricter on the state level than the federal level and that -- so I know that this is a question of law rather than facts, and I have tried to present my case as best I can for myself and for the people of my district that have from time to time expressed their concern over this issue. Thank you very much.

Lambert: Thank you, Mr. Trainor. Mr. Price.

Price: Thank you, Madam Chairman. Mr. Trainor, may I ask did you prepare this yourself or was this prepared by an attorney, your brief?

Trainor: I did it myself.

Price: I would like to congratulate you. It's well done. I do not agree with all of your conclusions, but it certainly is well done, and you are to be commended.

Trainor: Thank you.

Price: I also happen to be one of those folks you were talking about that believes that the University is, in fact, a fourth branch, but I'm not sure that that would play on this anyhow because the argument could be made between belonging to both branches. But I would like to comment at least for the record, and there may be some folk who are not aware, the Attorney General is not the legal body for the legislature. The opinions that (and I'm not saying that they should be discounted) but the legal opinion for the legislative branch of government, as you are, I'm sure, well aware, is in fact the Legislative Counsel Bureau. And the Attorney General furnishes opinions for the executive branch and -- I'm not sure -- I guess for the courts also. In both cases, those are exactly what they are called, "opinions." They are on occasion wrong, and most of the time right,

but they are in fact opinions for the policy makers to use as consideration in their deliberations, and I just wanted to put that in because -- and especially for our new folk who may put a little more weight in an Attorney General's opinion. When I started we in fact used to occasionally ask for an opinion which was done as a courtesy, but that stopped a long time ago as well it should have. Thank you.

Lambert: Thank you, Mr. Price. Mr. Trainor, are you -- do you have any more closing remarks?

Trainor: No, I think that I will rest here. I can't think of any right now. I've been up all night. Most of the night. A little exhausted.

Lambert: Thank you. You have a remarkable grasp of the subject. You would have me fooled if you said you were an attorney. Mrs. Evans? No closing statement? Mr. Hettrick?

Hettrick: Thank you, Madam Chairman. I'd like to ask a question of Brenda (Erdoes). Why did the L.C.B. choose to use the older opinions?

Erdoes: Because what we did was analyze all the law in the area and what we believe is that the California case is the closest because the constitution is the closest to the State of Nevada. The Nebraska case, for example, is on the Nebraska Constitution which is different than the Nevada Constitution and so, therefore, to us, in our analysis of the whole picture, we believe that that was the correct law to use to base it on. Does that answer your question?

Hettrick: Yes, I think to that degree. Would you agree with Mr. Trainor's comment that it was local government and not a state level government? Do you agree that that has any merit or bearing?

Erdoes: No, because the holding of the case was actually defining what their -- the California three branches of government provision, which is the same as ours, says. And what that says is -- and what that case held was that it means "office", and I think that applies whether it's local, government or state.

Hettrick: One more question.

Lambert: Mr. Hettrick.

Hettrick: Typically would you weight 1860's opinions equal to or higher or lower on a scale of relative value to later opinions or, in other words, I'm not an attorney so I'm trying to come up with some way to weight these opinions. How should we look at these various opinions? Are the later ones more on point, less on point?

Erdoes: If the opinions were construing identical provisions or were on point, then I think you would give more weight to a later opinion, but the problem here that we are describing is that we believe that the California opinions were closer on point than the other opinions, and that's why we gave them greater weight. I don't think there is a doctrine that I know of that says these cases go out of -- just because they're old. Sincerely, very many of the very basic legal principles that we rely on are older cases.

Lambert: Mr. Sandoval.

Sandoval: Ms. Erdoes, without addressing the weight of an Attorney General's opinion, in Mr. Trainor's contest he cites a number of Attorney Generals' opinions that he has read to us. In your opinion, do you not distinguish any of those Attorney Generals' opinions, is it -- are you opine or is it your opinion that the Supreme Court's decision supersedes those Attorney Generals' opinions?

Erdoes: No. I think what we would say is that because our analysis was the same before the Supreme Court opinion came in, what we were looking at is basically the relevance of the California law in construing that provision and also looking at setting up what the -- how much -- what you do in your branch of government in that sort of a sliding scale. The A.G.'s opinions, none of them addressed the University professional in a position such as Mrs. Evans' position, and I think that's why we didn't distinguish them.

Sandoval: So in other words, you feel that the California decisions are more relevant than the Attorney Generals' opinions?

Erdoes: To this specific case.

Sandoval: Thank you.

Lambert: Thank you. Mr. Trainor, we omitted at the beginning of your testimony to have you state your address and your occupation. If you could do that for the record now.

Trainor: I reside in Assembly District 30 at 840 Thirteenth Street, and I'm employed at the Reno Hilton Hotel in food and beverage.

Lambert: Thank you. And thank you for appearing before the committee. Now, I have two people signed up for public comment. The first is Juanita Cox. Mrs. Cox, you have the choice of sitting there or coming to the podium whichever you are more comfortable doing. And because of Rule 45, the Assembly, I am going to have to swear you in before you testify. Could you raise your right hand?

Do you solemnly swear or affirm under the pains and penalties of perjury that the testimony and evidence that you will give in these proceedings will be the truth, the whole truth, and nothing but the truth and that you will answer all questions presented to you to the best of your ability and personal knowledge?

Cox: I do.

Lambert: Thank you. Could you state your name, your address and your occupation, please?

Cox: For the record, my name is Juanita Cox. My mailing address is 164 Hubbard Way, Suite C, Reno, Nevada 89502. I am a housewife and a full-time citizen lobbyist.

I'm here today to inform you of another Independent American party former Senatorial candidate, Niki Hannevig. She ran for Clark Senate Seat number 8 and -- that is currently held by Senator James of Las Vegas. I spoke with Miss Hannevig this afternoon. I was informed of her position about noon, I guess. And so I called her, and I hope this will convey her story correctly. Ms. Hannevig worked in the Nevada Bureau of vocational rehab when she filed for State Senate Seat number 8 in Clark. She was informed she had two choices.

Lambert: Excuse me, Mrs. Cox. What has this got to do with the contest in District 30?

Cox: Well, it's a similar state kind of a position, and it just adds, I thought, to some of the information that you might not know.

Lambert: For your information, there are bills in the legislature to be heard this session, or there are B.D.R.'s that will become bills, on the whole issue of contest of election so there will be other public hearings on this subject. But if you feel this is relevant, go ahead.

Cox: I feel it's relevant. She had two choices: one, to resign or two, to withdraw from the Senatorial race. They cited Title V, U.S.C. Section 1501 and 1508 specifically V U.S.C. 1502 (a). They said specifically N.R.S. 615.300 (2) that no such offices can get campaign dollars or materials sent out -- campaign materials -- and that required the bureau to terminate her. They also cited Nevada Admin Code 284.770 (1) and (2) and N.R.S. 281.481 (2).

Deputy Attorney General John Albretc was involved as was Libby Jones, her supervisor; Steven Shaw, Administrator of the Department of Employment and Training; Al Frenzel, Bureau Chief; Marlyn Yesek, Department of Employment and Training Personnel Director. Also Donna McIntire of the State Personnel, Chief. Ms. Niki Hannevig chose to resign her position with this state, and she did run as the Independent American Senatorial candidate.

I hope this information has some bearing on this case. And I thank you.

Lambert: Thank you. I would suspect that the agency got some federal money. You're citing federal law. Probably the Hatch Act?

Cox: And the N.R.S. and Administrative Code, I presume, but I am not sure.

Lambert: Thank you for your input.

Cox: Are there any other questions?

Lambert: Are there any questions from the committee? Seeing none, thank you.

Cox: Thank you.

Lambert: The next person is James Dan. Good afternoon, Mr. Dan. Because of Assembly Rule 45, I am going to have to swear you in before you testify.

Dan: Okay.

Lambert: If you could raise your right hand. Do you solemnly swear or affirm under the pains and penalties of perjury that the testimony and evidence that you will give in these proceedings will be the truth, the whole truth, and nothing but the truth and that you will answer all questions presented to you to the best of your ability and personal knowledge?

Dan: Yes.

Lambert: Thank you. If you could state your name, your address and your occupation.

Dan: My name is James Dan. I live in Sparks. 3051 South Cottage Lane. I'm a free-lance computer programmer and lecturer.

Lambert: Thank you.

Dan: Also full-time troublemaker. I would like to point out again that this body, the Assembly, sits as sole judge, jury and executioner on matters of seating members of the Assembly in contested elections. We've presented a number of Attorney Generals' opinions and they may or may not be relevant as far as their authority goes because of the authority of the Assembly to do whatever it wants in these cases. We've also seen opinions from the L.C.B. We've seen other opinions based on what other people have done in similar cases such as the Thomas Batten case and such as the Niki Hannevig case. In the Thomas Batten case, the gentleman was forced to resign from his state job in order to accept his Assembly seat, and I see that as perhaps a case of the opinions of the executive branch employer as to how strongly they feel about the separation of powers clause, and how closely they want to enforce the matter on their own.

In the case of the Nevada State University, it appears that the administrators or the heads of the University are very lax in forcing their employees out of the Assembly or forcing them to resign.

Perhaps they see an advantage to the university system to have their employees sit in the legislature so that they are not as serious about enforcing the separation of clause -- separation of powers clause as perhaps the Gaming Commission.

Now, what I would like the members of this body to do is to simply look at the logic that's been presented by the Attorney General's opinion, notwithstanding the authority of the Attorney General in coercing a decision. But simply to look at the logic and to look at the logic of the Constitution and based on your acceptance of the Nevada State Constitution and the doctrine of separation of powers, to judge the issue accordingly.

Now, in past sessions of the legislature, I might suggest that partisan politics might have a bearing on the decision. But judging from the way the Assembly is split in this case, and also the fact that the issue covers not only Democrats but also Republicans, I can cite the few members who might have the same problems as Mrs. Evans who are in the Republican side of the House. We see that the issue becomes one that is more pervasive than partisan politics, and I would hope that you would keep that in mind in making your decision.

Quite often, simply as a citizen, I look at the goings-on in the state of Nevada and see that conflict of interest and sometimes even constitutional matters are not taken as seriously as perhaps they should, and as they are in other places in the United States, and I would simply urge this body to perhaps take this issue far more seriously and examine it on constitutional grounds and set aside any issues of partisan politics in reaching a conclusion. Thank you.

Lambert: Thank you, Mr. Dan. Are there any questions? Mr. Price.

Price: Thank you. This is a little aside, but I want to make sure -- Jim, are you a city councilman or a former city councilman?

Dan: No. I have never held public office.

Price: Okay. I -- you've been very eloquent in your appearances before our committee and for some reason I thought that you had been. But, thank you.

Lambert: Are there any other questions of Mr. Dan? Mr. Hettrick.

Hettrick: Not of Mr. Dan. Thank you, Mr. Dan. No, I had one other if I may.

Lambert: Thank you, Mr. Dan. You wish to direct it to?

Hettrick: To Mr. Trainor. Thank you, Madam Chairman. I would just ask if you would agree that you have been properly noticed this time for this meeting.

Trainor: Yes.

Hettrick: Thank you.

Lambert: We've reached our hour and a half so it's time to have a 15 minute break and then Mr. Spitler will preside when we come back into a work session. We thank you all for your attendance and you can stand up and stretch your feet for a few minutes now.

At 4:40 p.m., Chairman Lambert called for a 15-minute recess of committee.

The Assembly Select Committee on Credentials reconvened at 5:00 p.m. on Monday, January 16, 1995, and was called to order by Chairman Spitler presiding in Room 119 of the Legislative Building, Carson City, Nevada.

Spitler: Mr. Anderson is in the building and will be returning. One of the things, you know, is we rotate the chairs and do an hour and a half at a time and do a 15 minute break. It's awfully dangerous, I think, to give legislators breaks but I do think it's real important that we put them in so we will have to watch our time a little bit more closely as we continue with the hearing.

At this time, we'll open the workshop and points of discussion, questions for clarification, or the pleasures of the committee. Mr. Price.

Price: As I indicated in talking to Mr. Trainor, I believe his presentation was certainly put together well, but from the considerations that we've had, of course, in my case this is the second time through, and the cases that have -- and opinions of our own Legislative Counsel, if it's not too early to make a motion, I would make a motion if it's in order,

and then we could discuss, or would you rather hold?

Spitler: Let's hold just to see if there's other discussion -- see if there's other discussion before we take a motion. Is there other comment? Mrs. Tiffany.

Tiffany: Thank you, Mr. Chairman. Is Mr. Trainor even here? Oh, there he is back there. This is really directing more comments towards us than it is Mr. Trainor, but I would like him to hear this too. And I really appreciated the fact that he came here today. He spent his time. He put together, I think, a really well-done document even though I don't necessarily agree with the contents of it. And I also appreciate the fact that he is exercising his constitutional rights. But I have to tell you what I'm hearing from this gentleman is appeal, appeal and appeal. And that -- I feel like some of his motivation is being fueled by the fact that he is a third party candidate, and he even used the term that he has been getting the "bum's rush," and I really question that motivation sometimes.

Also, I really didn't hear any new arguments. I didn't hear any new facts or new information that was presented to the Legislative Counsel Bureau. And I would sure hope that we as the Assembly would really take a look at elections when we call our committees back to order and particularly for a situation like this where it's been multiple opinions and to the Supreme Court and a lot of homework done, but I really consider this to be a frivolous suit, and I think we're going to have to take into consideration a means test in this kind of a situation where it's going on and on and on and there's no new facts in here. So I would just like to make a suggestion that will be a little more directed to Mr. Trainor is that -- and I appreciate the fact of what you've done. I think you're well informed. I think that you've spent a lot of time on this issue and you're well read and you're educated. But I also recommend that you really seriously listen to the outcome of what the next two opinions would be, whether the Supreme Court or us, and maybe get on along with your life now. Thank you very much.

Mr. Spitler: Mr. Anderson.

Anderson: I appreciated Ms. Tiffany's remarks. I think they are well founded in terms of the means test. And I point both in agreement with the

means test for this particular issue, but I would remind all of us, in terms of the -- particularly for the Assembly, the importance of having access and public access to those things that need to be addressed. It may be the proper avenue was to not come and address the particular election of an elected candidate but rather to a standing committee of the Assembly with the proper bill that needed to be introduced relative to that kind of a challenge. And we will take those kind of questions up so maybe the forum is what we need to give direction to, not to the free access of an individual to the election process and to the Assembly itself because clearly we want to make sure that stands that we are always open and willing to take whether he comes from a third party or if he had gained access to the election via the petition route by -- I don't think that that should have any standing, doesn't have any standing in my view, whether he comes from one of the organized political parties or not. And I again want to join in your statement that we -- to uphold -- to delay the start of the body is I think detrimental to the public good and for that I'm concerned, and I also want Mr. Trainor and others to know that we still stand willing to listen to those kind of concerns. And I commend him also for his brief in trying to bring it to our attention.

Spitler: Mrs. Buckley.

Buckley: Thank you, Mr. Chairman. I concur with some of the remarks of both Assemblymen Anderson and Tiffany. I think that we need to strike a proper balance between individuals being able to seek redress in these types of situations, and I think where the balance can be struck is to allow individuals to continue to present contest, but to change the result of it, and that is, the mere filing of a challenge is not enough to deprive someone of taking the official oath especially in situations where the evidence has already been heard by a body and rejected and to rebut the presumption that you are presumed guilty instead of being presumed innocent before any charges are substantiated.

Leaving that aside for a minute because I am sure we'll debate that in Elections and Procedures and on the Floor, in looking at the arguments presented, I find that the California authorities are more persuasive since the California constitution is similar to ours. I also find that the A.G. opinions are distinguishable in that they are not situations where a University in a separate system of -- of kind of a

buffer between a state agency and an individual is set up. I also think it is persuasive that we are a citizen legislature and looking at a University situation. And in light of those, I find that those are most persuasive in finding that Mrs. Evans can be seated.

With regard to the Supreme Court opinion, I'm troubled by that. And Assemblyman Sandoval and I discussed it a little bit between ourselves during the testimony. The decision indicates that having reviewed the petitioner's contest of election, we conclude that it lacks merit as a matter of law. However, the relief sought was a hearing, not the exact issue of the validity of the separation of powers argument. That is a little disturbing and for that reason, I'm not giving this as great precedential weight as I would if I thought they squarely considered the separation-of-powers issue. But, based on the California constitutional provision and the decision of our Legislative Counsel Bureau, that's my opinion. Thank you.

Spitler: Any other comments? Mr. Perkins.

Perkins: Thank you, Mr. Chairman. During Mr. Trainor's arguments that he put forth, we heard some basis, some of the premise that he founded his argument on was based upon the United States Constitution and some of the arguments made in the federalist papers and, of course, our Nevada Constitution. And I think in light of the fact that all three of those documents, or that the papers themselves being several documents, being many, many, many years old, I don't think that any of the people that participated in the creation of those documents ever envisioned the society that we have today. Or perhaps maybe they did. And they left them in a very general form for us to operate for many years and they stood the test of time, but I think that rather than take them so specifically, I think they did make them general so that we could have an evolution in our society, and so that we could have a citizen legislature and so that these things could take place.

And I don't think that my interpretation of those documents would preclude -- cause the preclusion that we are talking about today. And I think that we should give -- you know -- some weight to the fact that we need to have some flexibility. We need to have the evolution so that when changes occur in society that those documents could prevail. And that's all I've got to say.

Spitler: Thank you. Any other comments? Yes, Mr. Close.

Close: As a Co-Chair of the upcoming Elections and Procedures Committee, we appreciate the testimony that has been provided today. At least, I do, because I think it will help us to give us some direction and possibly this is the time for us not to remain silent on this issue but to come forth with a proactive statement so we don't have to continue to look towards our southern brothers and sisters to make decisions, but let Nevada make its own rule.

Spitler: Thank you. Mr. Sandoval.

Sandoval: I'd first like to compliment Mr. Trainor. I think that he did an excellent job on his brief and his articulation of his issues. My comments will echo Mr. Perkins'. I think this is a broad versus a strict interpretation of constitutional provisions, and I, too, agree that you need a broad interpretation in order to allow what we have here in Nevada which is a citizen's legislature. And I think that to interpret it as strictly as was presented by Mr. Trainor, would make things in the future unworkable. But at the same time, I, too, echo Mr. Close's comments that this issue should be addressed in the Elections and Procedures Committee. Thank you.

Spitler: Thank you. Other comments from the committee? I would remind the committee of the rule that we adopted today on the floor, Item 3 of the Procedure for Election Contest for 1995. I'll just read briefly here because as we begin to entertain a motion, what that motion should be. "Our task is to report to the Assembly our findings on whether the contestant has met the burden of proving that any irregularities shown were of such a nature as to establish that a result of the election was changed thereby." That, of course, was not upon us in this particular hearing. "The committee shall then report to the Assembly its recommendation on which person should be declared elected or report that we have no recommendation." (Exhibit H)

With that in mind, the chair would entertain a motion. Mr. Price.

ASSEMBLYMAN PRICE MOVED THAT THE SELECT COMMITTEE ON ELECTION CHALLENGES RECOMMEND TO THE BODY THE SEATING OF MRS. EVANS.

ASSEMBLYMAN TIFFANY SECONDED THE MOTION.

Chairman Spitler asked for discussion on the motion. There was none.

THE MOTION CARRIED UNANIMOUSLY.

Spitler: At this time, we are going to recess to report to the Assembly. Our meeting then will reconvene tomorrow morning at 8 a.m. to hear the challenge of District Number 9.

Buckley: With regard to the hearing tomorrow, at this point I believe it was requested that we have a list of witnesses and the anticipated time that they would take to testify and any written documentation so that it could be read by tomorrow so that the day could be planned better and so that we would have an opportunity to read anything and be prepared when we commence tomorrow at 8 a.m. Could you give us a status as to those requests?

Spitler: Mrs. Erdoes. The question was, you know we made attempt to find out how many witnesses and timing and everything. Did anyone get back to you regarding that?

Erdoes: Yes, I'm sorry, I missed that. Mr. Foley --

Spitler: Please continue.

Erdoes: Mr. Foley indicated on behalf of Ms. Von Toble that he would take between two and four hours to give his basic case to you, and then would discuss with you questions of whether you wanted him to go further at that point. I believe the other, Kathleen England, for Ms. Giunchigliani, indicated that she was really not sure, depending on what evidence came up and what was raised in the other case. But she indicated two to four hours as well.

Spitler: Excuse me one moment. I would remind the audience that we are in a meeting, and I would respectfully request that if you are going to have conversation that you have them outside the room. Please continue.

Buckley: To follow up, do we have copies of any written evidence so that we may review it prior to the hearing?

Erdoes: The evidence -- First I should tell you that when I advised both parties that -- what I advised them of is that they could give you something, but they were not required to. I think that was your direction. And the choice was made. Mr. Foley said that what he was going to present was nothing that you would need to read through first. It was something that he wanted to explain. They were basically forms and things. He showed them to me -- that he wanted to explain as he went along and he has them in a notebook tab. I believe that on your desk I gave you what Mrs. England would like for you to have. It's a motion and then a case. That was all that was submitted and you have that in front of you.

Spitler: Does everyone have the packet that she's talking about? Okay. Show us the packet. I want to make sure everyone's got it.

Anderson: I don't believe I have that particular packet.

Erdoes: I'll be glad to make you a copy. The secretary has one.

Spitler: I think I understand what happened to Mr. Anderson. His documents were in my stack or vice versa.

Since there was no further business to come before the committee, the meeting was recessed at 5:20 p.m. until Tuesday, January 17, at 8:00 a.m.

RESPECTFULLY SUBMITTED:

Bobbie Mikesell

Bobbie Mikesell,
Committee Secretary

APPROVED BY:

Joan A Lambert

Assemblyman Joan A. Lambert, Chairman

Larry L. Spitler

Assemblyman Larry L. Spitler, Chairman