June 18, 1987

M E M O R A N D U M

TO: Robert I. Kelly
FROM: Craig Hudgins
SUBJECT: Processes for removal of state officers by the legislature

The purpose of this memorandum is to describe generally the processes available to the legislature for the removal of state officers. This memorandum does not discuss removal of a governor's appointees by that governor with consent of the senate, removal of judges by the supreme court or the State Judicial Qualifications Commission, expulsion by a house of the legislature of members of that body, or de facto removal of a governor's appointees by failure of the senate to confirm the appointments.

Article XV of the Texas Constitution provides two processes for the legislative removal of state officers. These processes, of impeachment and of address, originated in English law, have long and deep roots in Anglo-American jurisprudence, and have antecedents in every Texas constitution since the republic.

IMPEACHMENT

I. Introduction

Technically, impeachment is a process of accusation that, to result in removal, must be followed by a trial and conviction. The term is customarily used, however, to describe both the accusatory and trial stages of the process.

Article XV, Sections 1 through 5, of the Texas Constitution and Articles 5961 through 5963, Revised Statutes, provide the authority for the impeachment process. (A future reference in this memorandum to a section, unless otherwise noted, is a reference to a section of Article XV of the constitution.) Section 1 vests the power of impeachment in the house of representatives, and Article
5961 provides that several named officers and "all other State officers and heads of State departments or institutions of any kind, and all members, regents, trustees, [or] commissioners having control or management of any State institution or enterprise" are subject to impeachment.

In the leading Texas case on impeachment, Ferguson v. Maddox, 263 S.W. 888 (Tex. 1924), the supreme court characterized the power of impeachment as a judicial power granted to the legislature. As such, it is not subject to constitutional restrictions on the exercise of legislative powers.

II. House Consideration of Impeachment

Article 5962 authorizes the house at its option at a regular or called legislative session to consider articles of impeachment or make an investigation pertaining to a possible impeachment. The Ferguson case established that consideration of impeachment at a called session is not dependent on the inclusion of the subject by the governor in the agenda for the session. Article 5962 further authorizes the house to continue to meet on an impeachment issue after a regular or called session has expired or adjourned for legislative purposes and permits the house to adjourn during consideration of an impeachment issue to any date the house specifies.

If the house is not in session, under Article 5962 the house may be convened for the purpose of impeachment by one of three methods:

(1) by proclamation of the governor;

(2) by proclamation of the speaker on submission of a written petition signed by at least 50 members of the house; or

(3) by a proclamation signed by at least a majority of the members of the house.

The proclamation must state in general terms the cause for and time of convening of the house. Article 5962 provides methods for publishing the proclamation and furnishing a copy to each house member.
III. Procedure in House

By prescribing very few procedural details, Article 5962 permits the house a great deal of latitude in the formulation of appropriate procedures for impeachment. Article 5962 does state that on convening for impeachment, two-thirds of the membership constitutes a quorum, but that a smaller number may adjourn daily and compel the attendance of absent members. The article also states that the house and its committees have the same power as a district court to obtain evidence, compel testimony, and punish contempt. The article concludes with a broad pronouncement that a house committee in an impeachment matter has any power conferred on it by the house.

In the 1975 impeachment of O. P. Carrillo (the most recent such action), house proceedings began with the filing of a simple resolution calling for the impeachment of Carrillo. After the resolution was filed, the speaker referred it to a select committee of 11 members that had been created by a simple resolution. The resolution also could have been referred to a standing committee.

The house's power has been likened to that of a grand jury. In previous impeachments, the committee to which a resolution has been referred has heard evidence and then framed one or more articles of impeachment alleging the charges against the officer. The committee then has usually voted one or more of the articles to the full house for its consideration and action. (In the Carrillo case, the articles of impeachment were presented to the house in the form of a committee substitute for the original simple resolution that had initiated the action.)

Neither the constitution nor the statutes require an extraordinary majority vote for the house to adopt articles of impeachment, so presumably a majority vote of the members present and voting would be effective, assuming the presence of a quorum.

IV. Consideration by Senate

Article 5963 requires the senate to sit as a court of impeachment if the house adopts articles of impeachment. The article prescribes methods for delivering adopted articles of
impeachment to the senate or, if the senate is not in session, to the governor, lieutenant governor, and each member of the senate.

The senate, like the house, is exempt when sitting as a court of impeachment from constitutional restrictions on the length or time of legislative sessions. If the senate is not in session when articles of impeachment are delivered by the house, the senate may be convened by one of four methods:

(1) by proclamation of the governor; or

(2) if the governor fails to issue the proclamation within 10 days after the date the articles are adopted, by proclamation of the lieutenant governor; or

(3) if the lieutenant governor fails to issue the proclamation within 15 days after the date the articles are adopted, by proclamation of the president pro tempore of the senate; or

(4) if the senate president pro tempore fails to issue the proclamation within 20 days after the date the articles are adopted, by proclamation signed by a majority of the members of the senate.

The proclamation must state the purpose and time for convening of the senate, which may not be later than 20 days after the date of the proclamation. Article 5963 provides the methods for publishing the proclamation and delivering a copy to the lieutenant governor and each member of the senate.

V. Procedure in Senate

Article 5963 prescribes few requirements for a senate impeachment trial. The article does state that two-thirds of the membership constitutes a quorum, but that a smaller number may adjourn daily and compel the attendance of absent members. Daily attendance is made an express duty of each senator, and the senate has express authority to recess or adjourn at will.

Article 5963 authorizes the senate to adopt rules of procedure, obtain evidence, compel testimony, punish contempt, meet
in closed sessions, and exercise all other necessary powers. The senate also may empower its officers, committees, and agents as it desires.

Section 3 requires senators sitting in impeachment to be on oath or affirmation to try the matter impartially. Conviction on an article of impeachment requires a vote of two-thirds of the senators present. Under Texas historical precedents, members of the house authorized by that body present the case in the senate as prosecutors customarily called "managers."

Section 5 provides that officers against whom an impeachment trial is pending in the senate are suspended from exercising their official duties. The governor is authorized to make provisional appointments to vacancies so created.

Finally, Section 4 provides that conviction on an article of impeachment extends to removal from office and disqualification from holding any office of honor, trust, or profit under the state. A person convicted on impeachment also is subject to indictment, trial, and punishment under criminal law.

ADDRESS

Section 8 provides for the removal of judges of the supreme court, "Court of Appeals," and district courts by the governor on the address of two-thirds of each house for specified causes or "other reasonable cause which shall not be sufficient ground for impeachment." The constitutional provision affords the person sought to be removed notice and a hearing and requires each cause for removal to be stated in the address and entered in the legislative journals. Article 5964 clarifies the obsolete constitutional reference to the court of appeals by specifying the court of criminal appeals and courts of appeals, expressly includes criminal district courts, and adds the agriculture, banking, and insurance commissioners to the list of persons subject to the process.

There is very little law in Texas on the process of removal by address, and there is even less precedent. The process was used to remove several judges immediately following Reconstruction, and proceedings were instituted in 1877 (the house voted for removal of
a district judge, but the senate voted against it) and 1977 (the justice resigned before presentation of evidence). The process is considerably more streamlined than impeachment, apparently requiring only a hearing followed by the requisite votes. The attorney general issued an opinion in 1977 stating that, because the process is at least quasi-judicial in nature, address, like impeachment, is not subject to constitutional restrictions on the length or subjects of legislative sessions. Op. Tex. Att'y Gen. No. H-1023 (1977). There are, however, no statutory provisions authorizing the legislature to convene for the purpose of address.

Although the address process begun in 1977 on the issue of removal of Donald B. Yarbrough from the supreme court was terminated early because of the justice's resignation, the plan devised for the legislature's action provides an example for consideration by the legislature in the future. In that instance, concurrent resolutions providing for removal by address were filed in each house. A subsequent concurrent resolution adopted by the legislature called for the houses to sit as separate committees of the whole at a joint meeting held for the purpose of conducting the hearing required by the constitution. Under the resolution, the lieutenant governor and speaker were authorized to appoint members of the legislature to act as counsel for the legislature, and the speaker was authorized to designate the chief counsel from among them. The chairman of the senate committee of the whole was authorized to preside at the joint meeting and given final authority on evidentiary questions. Members of the committees were authorized to present questions of witnesses in writing to the presiding officer for posing after examination and cross-examination, or to counsel for posing at counsel's discretion. At the conclusion of the joint meeting, each house was to retire to its chamber to consider the address resolutions.

Two provisions of Section 8 and Article 5964 could possibly cause problems in an address proceeding. The vote requirement is stated as "two-thirds of each House." This represents a change from the Reconstruction constitutional requirement of "two-thirds of the members elected to each House" (Article V, Section 10, and Article XII, Section 41). The 1887 address proceeding, under the current constitution, was approved by a vote of 67 of 106 house members, four short of two-thirds of the membership. The senate overruled an objection to that vote. Therefore, a strong case can
be made that Section 8 requires only two-thirds of the members present and voting in each house, but the issue is not without some doubt.

The second question is whether the phraseology of Section 8 limits address to instances in which the charges are not sufficient grounds for impeachment. The subject of grounds is outside the scope of this memorandum, but the existence of the issue should be noted.

Historically, removal by address does not include disqualification from holding future office, although there are no direct Texas precedents.