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Memo

To: **Patrick H. Lambert**

From: **W. Scott Jones**

Date: **14 July 2017**

Re: **Analysis of impeachment hearing and related proceedings**

Now that we have both had a chance to clear our heads following the impeachment proceedings against you, you have asked me to provide you with this analysis (while it is still fresh) so that in the future we will have a record of what happened in the impeachment process.

I believe it is clear from the evidence that the impeachments proceedings were brought against you because of your efforts to clean up the good old boy/ it's not what you know but who you know/ corrupt system that Tribal members hoped to sweep out of office with your election. (I do not mean to suggest that everyone who was "against you" supported a return to the old cronyism, but I think that was the driving force in the movement against you.)

Almost immediately after you were elected, you hired RGL Forensics to conduct audits of tribal expenditures, and particularly to look for waste and fraud. RGL moved very slowly because they are careful and meticulous. Once we had a draft of the audit of the Executive Office credit card we turned that over to the U.S. Attorney last spring. When you and I met with her, you told her that we believed we had found wrongdoing, but that you knew it was completely up to her whether and how to proceed. Later we hired RGL to conduct additional audits (Qualla Housing, ABC Board), and we also hired a former FBI agent to help with an audit of expenditures on the Tribal Council credit card. Each of the audits ended up showing multiple improper expenditures, i.e., Tribal money being spent for personal benefit. That information is all now in the hands of the U.S. Attorney and the FBI, and it will be up to them how to proceed. It is clear that criminal violations took place; the question is whether the U.S. Attorney will decide to prosecute them.

First, I will lay out the impeachment charges and why none of them show any wrongdoing by you.

Article I charged you with a violation for entering the hotel contract with the TCGE when you were still a private citizen.

Tribal Council and Rob Saunooke made a big deal about the contract being for over 5 million dollars over the life of the contract. They did not recognize that most of that pays for expense and that the profit was only about 10% of that over 5 years.

They also ignored that the deal was sought by Harrah's and was a great financial benefit to the Tribe. You were charging about $20 per room per night less than what Harrah's was paying for other outside rooms.

The purpose of the tribal codes cited is to prevent the use of a tribal official's position of authority for personal gain. You had no position of authority when the contract was negotiated and signed; AND the contract benefited the Tribe.

<u>You broke no law in entering the contract, and, as the witnesses testified, you did not try to use your position to gain any special benefit in negotiations.</u>

Article II charged you with improperly retaining my services before you were sworn in.

This was one of several instances where Tribal Council was "playing gotcha". There was nothing to suggest that my services were anything but to help you be prepared for office, and that was not improper. Furthermore, Rob tried to make a big deal out of what he said were $500,000 in fees (it wasn't that much) over a year and a half. He did not bring up what my firm did for the Tribe during that period of time. On just one project I worked on, the jail 638, the Tribe received almost $2,000,000 and will now receive almost $1,000,000 per year going forward.

<u>Hiring me to perform this work was not illegal, and I actually think the Tribe got very good value for its money.</u>

Article III charges you with violating the Tribal contracting policy, specifically centering around 4 things:

the executive office upfit;
the forensic audit;
the Tribe's long-standing lobbying agreement with Wilson Pipestem; and
the time clocks.

<u>The executive office upfit contract was approved and signed off on by the Business Committee</u>, and the contract eventually came in well under the approved amount. This is just

another game of gotcha because 3 days before the final contract was signed, there was a preliminary contract (that was never acted on) entered into MUNIS.

The Tribe's policies regarding what contracts are supposed to be approved by Business Committee are very confusing. Many, many expenditures over $50,000 are not approved by Business Committee. Historically, most audit contracts have not gone through Business Committee because that has been Finance Department policy. You followed existing finance policy and protocol regarding the audit contract. There should be a clearer set of rules for how to deal with contracts, but to impeach you for following existing policy and custom is ridiculous. The important point about the payments to RGL is that this really is what led to your ouster. The RGL audit made many people uncomfortable.

Wilson Pipestem has long had a contract with the Tribe for lobbying. Long before you came into office the Tribe was paying Pipestem $180,000 per year without a contract approved by Business Committee. Less than a month before you were sworn in, Michele Hicks got a new contract with Pipestem approved by Business Committee, to make it more difficult for you to make changes when you got into office. You then had that contract amended to allow the Tribe to get out early if it wanted to. And the testimony about these types of minor changes to contracts was clear – they happen all the time without Business Committee approval. This is yet another gotcha. Council wanted Pipestem and continues to use him.

The time clocks were purchased with purchase orders, again pursuant to existing Tribal finance policy. The time clocks were a sore spot for some Tribal employees who had become used to coming and going as they pleased, and this was the real issue here.

You violated no laws in these instances, and, in fact, followed Tribal policy.

Article IV charged you with reorganizing the Tribal organizational chart without Council approval.

In fact, you did obtain Council approval when you presented them with a budget. It would be nonsensical for the Chief to have to obtain prospective "approval" before any change in any job position is made. Historically this was done through the budget process, and this is what you did.

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Article V charged you with violating the law by way of your signing statement on the TERO legislation.

Council voted 88-12 in your favor on this charge with only Travis Smith voting against you.

Article VI charged you with taking actions without Executive Committee approval, specifically concerning assigning an interim manager, renaming a position and authorizing pay raises per the advice of the Secretary of Human Resources.

In June 2016, you assigned an employee as an interim manager in the manager's absence for the Remember the Removal Bike Ride. The employee serving as the interim manager was compensated at the manager level for the time he served as the interim manager position. You made this assignment by way of "executive memorandum" which was the procedure the Secretary of Human Resources at that time, Buddy Johnson, told you was the procedure to be followed in such a case. This was no different than a Secretary appointing a "person in charge" if they take leave and at that point in time there was not a Secretary appointed to that Department which required those duties to fall within your Chain of Command as Principal Chief. Further, the Vice Chief testified to taking similar actions when he appointed an interim manager without Executive Committee approval.

The appointment referred to in Article VI, Paragraph 2 was not an added position and did not therefore require a budget amendment. Pursuant to Resolution No. 16 (2009), a budget amendment approved by Tribal Council is only required when a position is created or additional money is expended. You did not add another position, but simply retitled a position that had already been budgeted.

During FY 2016, you authorized, by executive memorandum, that five line-level employees' salaries be raised. This position neither added a position nor added a cost as detailed in Resolution No. 16 (2009). Salaries were increased commensurate to their duties. The process for raises was followed per Secretary of Human Resources, Buddy Johnson.

This was another instance of Tribal Council playing gotcha. This was an article that relied heavily on the Vice Chief's grievances with the way you ran the executive office. You maintained a "Signature Log" detailing documents that needed your signature and then the signature of the Vice Chief, fulfilling the Executive Committee requirements. You are not responsible for the procedure the Vice Chief chose to employ to handle the same documents after they left your office.

Article VII again charged you with improperly retaining my services before you were sworn in, alleging that you materially benefitted yourself with my services.

After you were elected, but before you were sworn in, you asked me to help you with legal issues in preparation for your first day in office. I provided legal work and legal advice and you used the product of my legal work from your very first day in office. Payment of my services was authorized once you were sworn in and it is clear from the face of the bill that the work performed was for your use in your official capacity once you were sworn in. You did not benefit personally from my legal services paid for by the Tribe.

Article VIII accused you of offering bribes to Albert and Bo.

Council voted 56-20 in your favor on this charge, with Albert and Bo abstaining.

First, you did not give or accept anything of value as set forth in Cherokee Code §14-70.30 with the corrupt intent to influence them; therefore, that ordinance does not apply. You did have discussions with both Albert and Bo about one Police Commission appointment and one TERO appointment from their townships and about Resolution #49 (2015). (You often discussed proposed legislation with Council Members and others in your office, just as any other politician discusses proposed legislation with his colleagues.)

This was not a *quid pro quo*, which is obvious from the fact that you made the appointments discussed with Albert and Bo, even though they did not withdraw the resolution.

Article IX charged you with preventing OIA access to documents needed to conduct an audit.

In April, the Office of the Secretary of the Treasury detected a vulnerability in the Tribe's fiscal management system. The Treasury found that many employees had access to confidential information in the system, and that there was virtually no way to track who was accessing the system or when such access was made. The Secretary of the Treasury, Erik Sneed, then put new internal controls in place to protect confidential personal information in the system from unauthorized access. Anyone who needed access to the system was required to reapply for that access.

The Office of Internal Audit was not prevented from accessing the Tribe's financial records. They were just expected to reapply for access after Sneed took steps to protect the Tribe's financial information from unauthorized access. Further, this was not an action directed by you, nor did you direct any Tribal Employee to prohibit the Office of Internal Audit's access to financial records. This was simply an action by the Secretary of Treasury to better protect Tribal financial records.

Article X charged you with preventing Tribal Council functions by directing Budget and Finance not to release a check to Nexsen/Pruett, PLLC, without your signature.

You did direct the Finance Office not to release a check for Mr. Boyce until all legal requirements for issuance of the check had been met.

Contrary to the assertion in the Articles of Impeachment, Tribal Council did not vote to select Boyce as impeachment counsel, or at least Tribal Council did not do so in an open session, allowing comment from the public.

It is known that R. Daniel Boyce has represented the interests of owners of video gambling machines. These interests are in direct conflict with the interests of the Tribe and its gaming enterprises

The Charter and Governing Document provides in §20 that "no money shall be paid out except upon warrant of the Principal Chief." With that responsibility and fully within your authority as Principal Chief, you determined not to authorize payment of money to a lawyer who has previously taken legal positions harmful to the Tribe without Tribal Council properly following the law itself.

Article XI charged you with impeding Council's ability to impeach.

Council voted unanimously in your favor on this charge.

Article XII charged you with personally benefiting from administrative leave and Tribal assets used in connection with Grand Council.

Tribal Council voted 88-12 in your favor on this charge, again with Travis Smith as the only council member voting against you.

As you know, we also tried to get the Cherokee Court to intervene and require fair proceedings. Although Judge Barrett's order raised serious concerns about the fairness of the process, the Court did not intervene because of sovereign immunity. As you know, Rob Saunooke even argued that the Council can do anything it wants to do. As he said:

> You're interfering with the inherent authority of the Tribal Council to do what the charter gives them a right to do. They have all the powers. There is no power reserved to any other body. I want to be very clear, because there's a misconception on our reservation that there's three branches of government. There are not. There is one branch of government and it's the Tribal Council. The chief has no power.

This is one of the reasons that the EBCI needs a Constitution.

You and I also discussed whether to ask Brenda Pipestem to recuse herself from the case because of what you heard about Wilson being involved with the Council's search for an impeachment lawyer. However, because we did not have proof of that and because we did not think it likely that she would recuse herself, we did not make the motion. (She could have recused herself as Kirk Saunoooke recused himself, but she chose not to.)

Finally, I cannot end this memo without at least briefly addressing problems with the legal process. There was no real process, much less *due* process (which Rob Saunooke said you were not entitled to anyway.) When the same folks who are leading the charge are the same ones who get to be the jury, anyone can appreciate that the process is not fair. When the

prosecuting lawyer gets to huddle with the jury, we all know the process is not fair. And as I told the Tribal Council, when the most powerful elected tribal official can be treated this way, without any hint of fairness, then no tribal member can or will expect fair treatment from tribal government.