REPORT OF THE NEW YORK STATE SENATE SELECT COMMITTEE TO INVESTIGATE THE FACTS AND CIRCUMSTANCES SURROUNDING THE CONVICTION OF HIRAM MONSERRATE ON OCTOBER 15, 2009

TABLE OF CONTENTS

Page

I. PROCEDURAL HISTORY

A. BACKGROUND OF THE INCIDENT AND CRIMINAL PROCEEDINGS

On November 4, 2008, New York City Council Member Hiram Monserrate, then 41 years of age, was elected to represent the 13th District in the New York State Senate. At the time, Senator-elect Monserrate was involved in an intimate relationship with Ms. Karla Giraldo, then 29 years of age.

At approximately 3:00 a.m. on December 19, 2008, an incident occurred at Senator-elect Monserrate's apartment in which Ms. Giraldo sustained serious facial lacerations from a broken drinking glass in addition to other injuries. Senator-elect Monserrate then escorted Ms. Giraldo from the premises. Large portions of this latter event were video-recorded by the apartment building's security system. Thirty-seven minutes after leaving the building, Ms. Giraldo and Senator-elect Monserrate arrived at Long Island Jewish Medical Center, where Ms. Giraldo received treatment for her injuries. Hospital employees notified police of the incident, and Senator-elect Monserrate was arrested at the hospital on suspicion that he had assaulted Ms. Giraldo.

Following his arrest, but prior to being indicted, Senator-elect Monserrate took the oath of office of the New York State Senate on January 7, 2009, a position that he still holds. Senator Monserrate is currently the Chairman of the Consumer Protection Committee and is a member of the Cities, Civil Service, Energy and Telecommunications, Insurance, Rules, and Mental Health Committees.

In March 2009, the Queens County District Attorney presented the matter to the Grand Jury, and on March 23, 2009, the Grand Jury returned a six-count indictment charging Senator Monserrate with three counts of second-degree assault, a Class D felony, and three counts of third-degree assault, a Class A misdemeanor.

On September 18, 2009, Senator Monserrate waived his right to a jury, and on September 21, 2009, his trial began before the Honorable William M. Erlbaum in Supreme Court, Queens County. Senator Monserrate did not testify during the trial. Following the close of the People's case, Justice Erlbaum dismissed two of the charges relating to reckless assault. On October 15, 2009, Justice Erlbaum announced his verdict, finding that the three remaining assault counts requiring a showing of "intent" had not been proven beyond a reasonable doubt. Justice Erlbaum found that Senator Monserrate was guilty of the sixth count of the indictment: misdemeanor reckless assault, a crime carrying a maximum jail sentence of one year.[1]

---

[1] The charge for which Senator Monserrate was convicted, Assault in the Third Degree, is defined as follows: "A person is guilty of assault in the third degree when . . . [h]e recklessly causes physical injury to another person." Penal Law § 120.00(2). "Recklessly" is defined in relevant part as follows: "A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." Penal Law § 15.05(3). Finally, "[p]hysical injury means impairment of physical condition or substantial pain." Penal Law § 10.00(9).

B. FORMATION OF THE SELECT COMMITTEE AND SCOPE OF INVESTIGATION

On November 9, 2009, the New York State Senate adopted Senate Resolution 3409. The resolution established "a Select Committee of the Senate to investigate the facts and circumstances surrounding the conviction of Senator Hiram Monserrate on October 15, 2009." According to the Resolution, the Senate's decision to investigate this particular conviction was based in part on its determination that "[t]he seriousness of these domestic violence charges and the circumstances surrounding them warrant further investigation by the Senate, and may warrant the imposition of sanctions by the Senate."

The Resolution "authorized and directed" the Select Committee to "investigate the facts and circumstances relating to the conviction against Senator Monserrate," granting it the full authority possessed by a committee "constituted under Article 4 of the Legislative Law and Senate Rule VII." Senate Resolution 3409 also mandated that the Select Committee "ensure a full and fair investigation." Finally, the Resolution directed the Select Committee to report its findings, along with a recommendation, to the full Senate.

The Committee's mandate did not include an inquiry into the charges as to which Senator Monserrate was acquitted. Accordingly, the Committee did not make any determination or finding as to whether the actions within Senator Monserrate's apartment that caused severe injury to Ms. Giraldo were intentional or accidental.

Resolution 3409 directed that the Select Committee be comprised of "nine Senators to be appointed by the Temporary President of the Senate," and that "[f]our of such members shall be appointed upon the recommendation of the Minority Leader of the Senate." The Senators appointed to serve on the Committee were as follows:

1. Senator Eric T. Schneiderman (chair)
2. Senator Andrew J. Lanza (ranking minority member)
3. Senator James S. Alesi
4. Senator John J. Flanagan
5. Senator Ruth Hassell-Thompson
6. Senator Diane J. Savino
7. Senator Toby Ann Stavisky
8. Senator Andrea Stewart-Cousins
9. Senator Catharine Young

C. COUNSEL FOR THE SELECT COMMITTEE

The Senate retained the law firm of Kaye Scholer LLP, through Daniel R. Alonso, a partner at the firm, to act as Special Counsel to the Select Committee. David L. Lewis, a Senate lawyer who is employed as Counsel to Conference Services to the Minority, was designated Minority Counsel to the Select Committee.

II. THE SELECT COMMITTEE'S INVESTIGATION

A. LEGAL AUTHORITY TO INVESTIGATE

The Senate possesses broad powers "by inquiry, to ascertain facts which affect public welfare and the affairs of government. Such power of inquiry, with process to enforce it, is an essential auxiliary to the legislative function."[2] It is well-established that "[t]his power may be delegated to a committee" and includes the power to issue subpoenas *duces tecum*.[3] These investigative powers are well-established, as they are incident to a legislative body's ability to govern effectively. As Luther Stearns Cushing explained in his seminal work on legislative assemblies,[4]

> [i]t has always, at least practically, been considered to be the right of legislative assemblies, to call upon and examine all persons within their jurisdiction as witnesses in regard to subjects in reference to which they have power to act and into which they have already instituted or are about to institute an investigation. Hence they are authorized to summon and compel the attendance of all persons within the limits of their constituency as witnesses and to bring with them papers and records in the same manner as is practised by courts of law. When an assembly proceeds by means of a committee in the investigation of any subject the committee may be and usually is authorized by the assembly to send for persons, papers and records.[5]

Moreover, "a common understanding or belief concerning the improper conduct of a member is a sufficient ground for the house to proceed by inquiry concerning the member and even to make an accusation."[6] It is well-established in New York "that either house may institute any investigation having reference to . . . *the conduct or qualifications of its members*."[7]

---

2 *In re Joint Legislative Committee to Investigate Educational System of State of New York*, 285 N.Y. 1, 8 (1941). In this case, the New York Court of Appeals upheld the lower courts' refusal to quash a subpoena *duces tecum* that had been issued by a joint committee to the president of the Teachers Union of the City of New York, compelling his appearance before the committee, as well as the production of documents.

3 *Id.* at 8-9.

4 LUTHER STEARNS CUSHING, ELEMENTS OF THE LAW AND PRACTICE OF THE LEGISLATIVE ASSEMBLIES IN THE UNITED STATES (1874) ("CUSHING").

5 *Id.* § 634.

6 MASON'S MANUAL OF LEGISLATURE PROCEDURE § 564.4 (2000) ("MASON'S MANUAL"); *see also Ex Parte D.O. McCarthy*, 29 Cal. 395, 403, 406 (1866), which held that where a "charge affecting the honor, dignity, purity and efficiency" of a legislative body is leveled, "the Senate therefore, under the common parliamentary law, had the power to investigate the charge with the view to the expulsion of the guilty members" because a "legislative assembly, when established, becomes vested with all the powers and privileges which are necessary and incidental to a free and unobstructed exercise of its appropriate functions."

7 *Briggs v MacKellar*, 2 Abb. Pr. 30, 56 (N.Y. Sup. Ct. 1855) (emphasis added).

B. INVESTIGATIVE STEPS

The Select Committee began its investigation following the passage of the Resolution on November 9, 2009 and completed it on January 12, 2010 with the submission of this Report to the full Senate, at which point the Select Committee will cease to exist. During this period, the Select Committee convened on November 9, November 23, December 8, December 14, December 29, 2009, and January 11, 2010. In connection with the investigation, the Select Committee reviewed, among other things, the minutes of Senator Monserrate's criminal trial (attached at Exhibit 2), the People's exhibits admitted at the trial, the grand jury testimony of Karla Giraldo, a notarized statement by Ms. Giraldo dated December 19, 2008 (attached at Exhibit 3), the minutes of Senator Monserrate's sentencing (attached at Exhibit 4), as well as publicly available recordings of Senator Monserrate's interviews with various media outlets during which he discussed the events surrounding his misdemeanor conviction.

On October 26, 2009, counsel for the Select Committee met with representatives from the Queens District Attorney's office. On October 27, 2009, counsel for the Select Committee met with counsel for Senator Monserrate. Counsel for the Select Committee maintained an open dialogue with both the Queens District Attorney's Office and Senator Monserrate's counsel throughout the investigation. However, Senator Monserrate's counsel did not cooperate in the investigation, and refused virtually all of the Select Committee's requests for information and assistance.

For example, Senator Monserrate's counsel was given the minutes of Karla Giraldo's testimony before the grand jury as part of the District Attorney's pre-trial obligations. Indeed, his counsel had strenuously argued that the relevance of such minutes was crucial to his defense. But when the Select Committee asked for a copy, counsel denied the request. Similarly, when Senator Monserrate's counsel was asked to provide copies of exhibits introduced at trial by the defense — which are by law a matter of public record, but which courts entrust to the custody of the lawyers that offer the exhibits — they again declined.

Because, unlike the defense, the District Attorney was prohibited by law from providing grand jury materials without a court order,[8] on November 12, 2009, the Select Committee issued a subpoena to the Queens District Attorney's Office directing it to produce "[a]ll documents relating to the investigation, indictment, and trial of Hiram Monserrate in 2008 and 2009, including but not limited to grand jury minutes and materials obtained by grand jury process." (Attached at Exhibit 5). The District Attorney then filed an "Application to Release Grand Jury Minutes and Other Materials" in New York Supreme Court, Queens County, Criminal Term. When Justice Erlbaum requested an application from the Select Committee, the Committee filed an Order to Show Cause, dated November 20, 2009, with the court, seeking authorization for the District Attorney's Office to release the Grand Jury Materials. The court ordered that the People, Senator Monserrate's counsel, and counsel for the Select Committee appear on December 4, 2009 (also the date of sentencing). (Attached at Exhibit 6).

---

[8] C.P.L. § 190.25(4)(a).

On December 4, 2009, counsel for the Select Committee appeared before Justice Erlbaum and requested authorization to receive the Grand Jury Materials.[9] Justice Erlbaum granted the immediate release of Karla Giraldo's grand jury testimony, together with unspecified additional materials incident to her testimony, and denied the rest of the Select Committee's request without prejudice to a further application. (*See* Exhibit 4). On December 15, 2009, counsel for the Select Committee, in keeping with Justice Erlbaum's directive, filed an Order seeking all materials subpoenaed by the Grand Jury pertaining to the telephone records of Ms. Giraldo and Senator Monserrate on the night of the events that formed the basis of Senator Monserrate's misdemeanor conviction. (Attached at Exhibit 7). On December 21, pursuant to a stipulation between the parties, the Queens District Attorney released Senator Monserrate's and Ms. Giraldo's phone records and cell-site information from the night in question to the Select Committee. (Attached at Exhibit 8).

The Select Committee repeatedly extended an open invitation to Senator Monserrate and his counsel to address the committee, whether in person or by written submission. They declined the opportunity to address the committee.[10] The Select Committee also contacted Karla Giraldo through her legal counsel and invited her to appear before the Committee, or, if she preferred, to be interviewed under oath.[11] Ms. Giraldo's counsel stated that she declined the invitation for an interview. In spite of their public expressions of their intention to cooperate, Senator Monserrate and his counsel refused to provide any of the grand jury materials requested by the Select Committee, defense exhibits from Senator Monserrate's criminal trial, and other materials, including Senator Monserrate's e-mails from the night of the incident.

---

9 The Queens District Attorney's Office did not oppose the Select Committee's request for Grand Jury Materials. Senator Monserrate's counsel did oppose the request.

10 *See* Section IV.C below, regarding Senator Monserrate's refusal to cooperate with the Select Committee's investigation.

11 Letter from Daniel R. Alonso, Esq. to Glenn Marshall, Esq., counsel for Karla Giraldo (Dec. 10, 2009) (Attached at Exhibit 9).

III. FACTS

Part A of this Section provides a summary of the uncontested facts relating to the events of December 18-19, 2008. These facts were not disputed by either the prosecution or the defense at Senator Monserrate's criminal trial, although the inferences to be drawn from many of these facts were hotly contested. Part B provides an overview of the criminal proceedings against Senator Monserrate, including the positions advocated by the prosecution and defense and the evidence presented by both sides in support of their arguments. Part C of this Section reviews the additional evidence that the Select Committee considered as part of the investigation.

A. UNCONTESTED FACTS RELATING TO THE EVENTS OF DECEMBER 18-19, 2008

On December 18, 2008, Karla Giraldo attended a holiday party hosted by Jesus Peña, an attorney, at the World's Fair Marina in Flushing, New York. Jasmina Rojas, Ms. Giraldo's cousin, and Rojas' son, Javier Icaza, picked up Ms. Giraldo from her apartment at approximately 9:00–9:30 p.m. to transport her to the party. Senator Monserrate did not attend the party. At the party, Ms. Giraldo consumed at least two alcoholic beverages. At approximately 12:00–12:30 a.m. on the morning of December 19, 2008, Ms. Giraldo left the party and Ms. Rojas and her son drove Ms. Giraldo to Senator Monserrate's apartment located at 37-20 83rd Street, Jackson Heights, New York. Ms. Rojas accompanied Ms. Giraldo into Senator Monserrate's apartment, located on the second floor of the building. Ms. Rojas greeted the Senator, used the bathroom in his apartment, and then left. Senator Monserrate's apartment building has a surveillance video system with video cameras located at various points both outside and inside the building, including the vestibule and the first and second floor hallways.

Sometime after Ms. Giraldo arrived at the apartment, Senator Monserrate opened her purse in order to place a Patrolmen's Benevolent Association ("PBA") card in her wallet. At that time, Senator Monserrate discovered that Ms. Giraldo had another PBA card in her wallet that was given to her by a male acquaintance, and removed that card. As captured by video surveillance, at approximately 12:54 a.m., Senator Monserrate left his apartment and went into the second floor hallway, opened a trash chute in the middle of the hallway, placed a white trash bag down the chute, then reached into his pocket, pulled out an object, and displayed it in the direction of his apartment. He then threw the object down the chute, and began walking back to the apartment. The object was recovered by the NYPD from the trash chute and was identified as the PBA card that had been removed from Ms. Giraldo's wallet by Senator Monserrate. On the video recording, as Senator Monserrate threw the card down the chute, Ms. Giraldo left the apartment, came into contact with Senator Monserrate (who moved to the side and continued into the apartment), opened the trash chute, looked down it for a moment, and then returned with some haste into the apartment.

Approximately two hours later, Ms. Giraldo's face was lacerated when it came into contact with one of Senator Monserrate's water glasses. Carolyn Loudon, tenant of the apartment directly below Senator Monserrate's, testified that she heard a body hit the floor above her, a woman's scream, and then a man's voice state, in English, "listen to me." At approximately 2:50 a.m., the building's video surveillance showed Ms. Giraldo leaving Senator Monserrate's apartment while holding a white towel to the left side of her face with her left hand. Senator Monserrate then exited the apartment a few paces behind her. The video next captured Ms. Giraldo walking down the stairs until she stepped toward the door of the apartment located at the bottom of the stairs and began ringing the doorbell. Ms. Loudon, the resident of that apartment, testified that she heard her doorbell ring, but did not answer the door. As Ms. Giraldo was ringing Ms. Loudon's doorbell,

Senator Monserrate reached for her arm and proceeded to pull her by her right arm through the first floor hallway, into the vestibule, and out the front door of the apartment building. Ms. Giraldo appeared visibly upset and resistant to Senator Monserrate's actions, grabbing a banister in the hallway (losing the white towel she was holding to her face in the process), and then holding on to the interior doorframe in the vestibule. After pulling Ms. Giraldo out of the apartment building, Senator Monserrate led her to his car.

At approximately 3:27 a.m., 37 minutes after leaving Senator Monserrate's apartment, Senator Monserrate and Ms. Giraldo entered the North Shore Long Island Jewish Medical Center ("LIJ"), located at 270-05 76th Avenue, New Hyde Park, New York, as depicted on surveillance video recovered from LIJ. Senator Monserrate and Ms. Giraldo did not enter the hospital at the emergency room entrance, but used the main entrance of the hospital. A hospital surveillance video shows a security guard leading Senator Monserrate and Ms. Giraldo through the hallways of the hospital for several minutes until they arrived at the emergency room. From approximately 3:50 a.m. to 4:54 a.m., LIJ video surveillance recorded Senator Monserrate sitting in the emergency room waiting area, making telephone calls, and talking to one of Ms. Giraldo's treating physicians. Throughout this period, Ms. Giraldo received treatment. LIJ personnel contacted the NYPD, who subsequently placed Senator Monserrate under arrest.

Ms. Giraldo suffered lacerations to her face, described by Dr. Homayoun N. Sasson, her treating plastic surgeon. The first was "an approximately 1.5 centimeter crushed and deep laceration that extended through the underlying muscle tissue, with no underlying bone injuries noted." Dr. Sasson described the shape of the laceration as "a straight line laceration which was horizontal, but it had crushed tissue edges, which are irregular tissue edges." He described the depth of the laceration as "through the whole thickness of the skin until the skull bone reached . . . that's where the injury stopped." Dr. Sasson described another laceration, on the corner of Ms. Giraldo's left eye, which was a "multidirectional" wound and equally as deep as the larger laceration. Finally, Dr. Sasson testified to other smaller injuries on Ms. Giraldo's face, including "multiple small lacerations below the left eye, in the lower left eyelid region, and in the left check areas." Additionally, Ms. Giraldo's medical records also note that she had brownish, circular bruising (ecchymosis) to her left forearm and a skin tear on her left inner forearm.

Sometime after Senator Monserrate's arrest at LIJ, the NYPD searched his apartment and took photos of the scene, and retrieved the building's surveillance video. The police also collected physical evidence, including, among other things, the PBA card found in the trash chute, a number of white towels stained with blood found in the bathroom and bedroom, a green t-shirt found in the bathroom sink, an unstained, but torn, men's white sleeveless undershirt found in an unlined garbage can, and pieces of a broken water glass found in the bedroom. At the request of the prosecution, the pieces of the broken glass were tested to determine how the glass was broken (*i.e.*, whether an opinion could be reached as to whether the glass was broken intentionally or accidentally), but the tests were inconclusive.

B. CRIMINAL PROCEEDINGS AGAINST SENATOR MONSERRATE

On March 23, 2009, Senator Monserrate was indicted in State Supreme Court in Queens on three felony and three misdemeanor assault counts. Counts 1-5 of the indictment related to the events that took place within Senator Monserrate's apartment that led to the lacerations on Ms. Giraldo's face. Count 6 related to events in the apartment hallways and vestibule as depicted on the surveillance video.

From September 21 to October 13, 2009, a bench trial was conducted before the Honorable William Erlbaum, Justice of the Supreme Court of the State of New York, Queens County. The Queens District Attorney's Office was represented by Assistant District Attorneys Scott Kessler and Johnette Traill. Joseph Tacopina and Chad Seigel, of Tacopina Seigel & Turano, represented Senator Monserrate.

1. *Key Points Made By The Prosecution*

The prosecution's primary arguments at trial were that (1) Senator Monserrate intentionally assaulted Ms. Giraldo inside the apartment while in a jealous rage after discovering the PBA card in her purse; and (2) after that assault, Senator Monserrate attempted to control the situation (and Ms. Giraldo), which led to a second, reckless assault of Ms. Giraldo as depicted on the surveillance video. As described more fully below, Senator Monserrate's lawyers contended that the incident in the apartment was accidental, and that Senator Monserrate pulled Ms. Giraldo out of the building in an effort to get her medical assistance at a hospital at a time when she was resistant to going.

In support of its contentions regarding the assault within the apartment, the prosecution argued that the video surveillance showing Senator Monserrate disposing of the PBA card demonstrates that he was jealous and that he and Ms. Giraldo were having an argument at approximately 12:54 a.m. on December 19, 2008. The prosecution presented the testimony of Ms. Loudon, the downstairs neighbor, who testified that between midnight and 3:00 a.m. on December 19, 2008 she heard "a lot of commotion going on above" her and characterized it as "a lot of chaos," "just mad energy," and a "high noise level." The prosecution argued that Ms. Loudon's testimony demonstrated that Senator Monserrate and Ms. Giraldo argued continuously from the time Senator Monserrate disposed of the PBA card until Ms. Giraldo's face was cut with the glass.

To support these arguments, the prosecution offered statements Ms. Giraldo allegedly made to emergency room personnel while she received treatment to the effect that her injuries were not the result of an accident. Nurse Susan Cabibbo, who treated Ms. Giraldo in the triage room, wrote in a January 9, 2009 handwritten statement and testified at trial that once Ms. Giraldo was left alone with her she said "he is crazy, he is crazy," referring to Senator Monserrate, and told Nurse Cabibbo that she was involved in an altercation. In the contemporaneous triage notes, Nurse Cabibbo typed that Ms. Giraldo was "involved in altercation" and catalogued her injuries as multiple lacerations to the eye area and bruising and a skin tear to the left forearm.

Dr. Dawne Kort, an emergency room resident who speaks Spanish fluently and who also treated Ms. Giraldo, wrote in a January 6, 2009 statement and testified at trial that she asked a sobbing Ms. Giraldo to explain what happened, to which Ms. Giraldo responded "I can't believe he did this to me. My face, my face, I can't believe my face." Dr. Kort recounted that Ms. Giraldo further stated, "We were fighting. I asked for a glass of water." and Senator Monserrate responded "You want the water? You want the water? Here's the water." According to Dr. Kort's testimony

and written statement, Ms. Giraldo then reenacted what happened for Dr. Kort by holding an imaginary glass in her hand and shoving it towards her face. Then, when Ms. Giraldo was informed that Senator Monserrate told another of Ms. Giraldo's treating doctors, Dr. Dan Frogel, that it had been an accident, Ms. Giraldo became upset and stated, "It wasn't an accident. We were fighting and he cut my face." and "We were fighting, we were fighting and he broke the glass and took a piece and cut my face." Ms. Giraldo did not want the police called to the hospital and, according to Dr. Kort, stated that "You can't call the police he is a Senator and I didn't want to cause any trouble." Dr. Kort also wrote the following statement in the "attending note" on December 19, 2008: "4:00 a.m. 29 year old female with no significant past medical history presents to the ER status post facial trauma. As per, she was involved in an altercation [with] boyfriend. During altercation [patient] struck in face [with] broken glass."

The People called Ms. Giraldo as a witness during its case, but chose for tactical and legal reasons not to ask about the details of the incident in the apartment. Despite that, Ms. Giraldo testified that the incident in the apartment was an accident. The prosecution argued that Ms. Giraldo's trial testimony should not be credited and that her statements to the emergency room personnel were accurate because the emergency room personnel had no reason to make up such detailed statements.

Regarding what took place in the downstairs hallway, the prosecution argued that following the initial assault inside the apartment, Senator Monserrate was more concerned about himself and his political career than getting medical attention for Ms. Giraldo. As a result, he attempted to control Ms. Giraldo in order to avoid unwanted attention, leading to the second, reckless, assault, as recorded by the video surveillance. To support these contentions, the prosecution argued that, first, Senator Monserrate did not call 911 because he knew that would entail both EMS and the police visiting his apartment and later filing of various official forms. In that regard, Ms. Giraldo professed at trial not to recall whether she had asked the Senator to do so. However, when confronted with her grand jury testimony in which she testified that she said to Senator Monserrate after the incident, "If you want, call an ambulance," she agreed that her recollection had been refreshed.

Second, as captured on the video recording, the People argued that Ms. Giraldo sought to escape from Senator Monserrate in order to seek help when she rang the doorbell of Ms. Loudon, the downstairs neighbor whom Ms. Giraldo did not know. In support of this argument, the prosecution impeached Ms. Giraldo — who testified at trial that she did not recall ringing the downstairs neighbor's doorbell — with her grand jury testimony, in which she stated that she knocked on the door because she "thought maybe [the neighbor] could help me get to the hospital." As Ms. Giraldo attempted to seek assistance, Senator Monserrate forcibly dragged her away from Ms. Loudon's apartment, beginning the chain of events that the People asserted caused the injuries to her left forearm.

Third, the District Attorney pointed out that, instead of taking Ms. Giraldo to nearby Elmhurst Hospital, Senator Monserrate drove her to LIJ, traveling approximately 14 miles in 37 minutes at 3:00 a.m. Senator Monserrate bypassed at least eight Queens hospitals closer to his apartment than LIJ before settling on a hospital that was on the border of Nassau County.

Finally, instead of dropping off Ms. Giraldo at the LIJ emergency room, Senator Monserrate parked on the street, approximately 150 yards away from an entrance to LIJ that was itself at the opposite end of the hospital from the emergency room. The prosecution argued that

this was consistent with seeking to go to the hospital while minimizing the chances that Senator Monserrate would be recognized and that uncomfortable questions would be asked.

2. *Key Points Made By The Defense*

The defense's main arguments at trial were that: (1) the incident in the apartment was an accident, and (2) Senator Monserrate used appropriate force — which the defense termed "force, not violence" — to take Ms. Giraldo to the hospital at a time when she was resistant to going. To support the argument of an accident, the defense relied on the sworn trial testimony of Ms. Giraldo, who maintained continually that her injuries were the result of an accident and that she did not want the police involved, and Ms. Giraldo's aesthetician, Neife Toro, who testified that when Ms. Giraldo telephoned her at approximately 3:00 a.m. on the morning of the incident (before arriving at the hospital), she told her that her face had been cut in an accident. The defense further relied on a stipulation regarding the testimony of Dr. Frogel, who the parties agreed would have testified that Senator Monserrate told him that "he went to get her [Ms. Giraldo] something to drink. As he was handing her the glass he tripped (slipped) and consequently the glass shattered" and that the glass cut Senator Monserrate on the palm as well.

The defense criticized the prosecution's reliance on "secondhand" accounts from the emergency room personnel regarding events that only two people, Senator Monserrate and Ms. Giraldo, truly knew about. The defense also argued that the statements attributed to Ms. Giraldo at the hospital were not reliable because: (1) Ms. Giraldo was intoxicated and the incident occurred in a dark room, which impacted her ability to provide accurate statements as to what happened;[12] (2) Ms. Giraldo was upset due to the potential impact of her cuts on her appearance; and (3) Ms. Giraldo's statements regarding what happened were inconsistent.

The defense attacked the accuracy of what the emergency room personnel, specifically Dr. Kort and Nurse Cabibbo, reported to be statements of Ms. Giraldo on the grounds that there was a language barrier between them, because Ms. Giraldo, who is from Ecuador, primarily speaks Spanish, and has a limited understanding of English. In support of this argument, the defense offered Nurse Cabibbo's triage notes and Dr. Frogel's stipulation that there was a "language barrier" between them and Ms. Giraldo. Regarding Dr. Kort, who is fluent in Spanish, the defense established that Spanish was not Dr. Kort's first language and that although she had lived in Spain and had Spanish-speaking parents, she had never studied Ecuadorian Spanish. The defense further offered Ms. Giraldo's testimony that she and Dr. Kort had problems understanding one another. Additionally, the defense questioned the accuracy of the LIJ personnel's statements in light of the fact that Dr. Kort and Nurse Cabibbo did not memorialize their conversations with Ms. Giraldo until at least two weeks after the incident.

The defense further criticized statements from the emergency room personnel by claiming that they were predisposed to rush to judgment because they were trained to be especially sensitive to potential domestic violence situations, referring specifically to Dr. Kort. The defense

---

[12] The defense argued that the lights in Senator Monserrate's bedroom were off at the time of the incident. This argument was based on the testimony of a member of the NYPD that when he entered the apartment, the bedroom lights were on and there was a blood stain on the light switch, leading to the inference that either Senator Monserrate or Ms. Giraldo turned the bedroom lights on after Ms. Giraldo's face was cut.

pointed to the stipulation that Dr. Frogel had told Dr. Kort "that a potential violence case came into the hospital" before Dr. Kort treated Ms. Giraldo. The defense also highlighted a difference between Dr. Kort's handwritten statement dated January 6, 2009 and a typed version of the same statement, also dated January 6, 2009. In the handwritten statement, Dr. Kort had crossed out her initial phrase that she had "threatened the patient" with respect to Ms. Giraldo's inconsistent stories about the incident. In both the handwritten and typed versions of the statement, the full sentence reads: "I was then honest with the patient that the stories were inconsistent and unless I knew the truth was going to call the police." The defense argued that Dr. Kort threatened to call the police after Ms. Giraldo provided inconsistent explanations for her injuries as a way to pressure Ms. Giraldo to conform to Dr. Kort's preconceived notion about how Ms. Giraldo was injured (*i.e.*, as the result of domestic abuse).[13] Finally, the defense argued that both Dr. Kort and Nurse Cabibbo failed to comply with LIJ's Domestic Violence Policy, which provides that hospital personnel should "quote the information/patient as much as possible" when creating a record about a potential domestic violence victim. Neither of them included the substance of the alleged statements made by Ms. Giraldo in the medical records, and only quoted Ms. Giraldo in their written statements created approximately two weeks after the incident.

Regarding the prosecution's contention that there was a lengthy argument between Senator Monserrate and Ms. Giraldo, the defense argued that even if there was an argument, it had not continued during the approximately two-hour gap between the time Senator Monserrate discarded the PBA card and when Ms. Giraldo's face was cut. The defense referred to Ms. Loudon's trial testimony that in the hours before she heard a body hit the floor above her, she had not heard screaming and that she continues to have trouble with the amount of noise coming from Senator Monserrate's apartment because he does not have carpet on his floors. With respect to evidence relating to the broken glass, the defense pointed out that the prosecution's glass expert could not determine if the glass was broken intentionally or as the result of an accident. Moreover, Dr. Sasson, Ms. Giraldo's plastic surgeon, testified that he could not determine whether Ms. Giraldo's injuries were the result of an intentional act or an accident.

During its opening statement, which is not considered evidence under the law, the defense emphasized what it termed Senator Monserrate's exemplary life, including his lack of a prior criminal record or history of domestic violence, his graduation with honors from the City University of New York, Queens College with a degree in political science, his 12 years of service with the NYPD, his work as a founding member of the Latino Officers Association of the NYPD, the fact that he was the first and only police officer in New York City history to serve on the board of directors of the New York Civil Liberties Union, and the fact that he was the first Hispanic ever elected to government office in Queens. The Select Committee has considered these facts as if they were evidence before it.

Regarding the incident in the hallway, the defense argued that, as depicted on the video surveillance, Senator Monserrate was not violent with Ms. Giraldo, but simply used force in order to bring her to the hospital for the salutary purpose of getting her the treatment she needed. The defense specifically highlighted a frame of the video in which Senator Monserrate placed his arm around Ms. Giraldo's shoulders as they walked outside the apartment building to his car. The

---

[13] Dr. Kort testified that she did not recall threatening the patient and was not sure why she wrote and crossed out a sentence to that effect.

defense also relied on Ms. Giraldo's testimony that she panicked after the incident because she was afraid of needles and afraid to receive stitches, but that Senator Monserrate insisted on taking her to the hospital for her own good. In response to the prosecution's argument that Senator Monserrate should have brought Ms. Giraldo to a nearer hospital, the defense offered evidence that Senator Monserrate had been treated at LIJ on a previous occasion and that the prosecution had not accounted for the quality of nearby hospitals.

3. *Verdict*

On October 15, 2009, Justice Erlbaum announced the verdict[14] and, although not required to, provided substantive explanations of his findings. With regard to the remaining counts against Senator Monserrate relating to the events in the apartment (specifically, counts one, two, and four of the indictment), Justice Erlbaum concluded that those charges were "not proven" beyond a reasonable doubt and acquitted Senator Monserrate. The factors supporting an acquittal included the following: (1) both Ms. Giraldo and Senator Monserrate, who were the only eyewitnesses to the events in the apartment, stated either in testimony or through hearsay that was put in evidence that the facial lacerations were accidental; (2) Ms. Toro's (aesthetician) testimony that Ms. Giraldo told her that the facial lacerations were accidental; (3) Ms. Loudon's (downstairs neighbor) equivocal testimony regarding an argument; (4) Dr. Sasson's (plastic surgeon) inability to rule out whether the lacerations were caused by an accident; (5) the prosecution's glass expert's inability to rule out whether the glass was broken by an accident; (6) Senator Monserrate's lack of a history of domestic violence; and (7) the statements from the emergency room personnel were entitled to less weight because: (a) none of them had personal knowledge of events at the apartment building; (b) Ms. Giraldo's statements were not under oath and were made while she was under the stress of her injury; (c) Dr. Kort's and Nurse Cabibbo's statements were reconstructions made more than two weeks later; (d) Ms. Giraldo had consumed alcohol; and (e) Ms. Giraldo refused police assistance and sought to speak to and protect Senator Monserrate.

Senator Monserrate was convicted of count six, assault in the third degree (a misdemeanor), which charged that "[t]he defendant, on or about December 19, 2008, in the county of Queens, recklessly caused injury to Karla Giraldo by forcibly dragging her by her arm." Justice Erlbaum provided the following rationale for the court's guilty verdict on count six:

> Count six reads, quote, the grand jury of the county of Queens by this indictment accuses the defendant of the crime of assault in the third degree committed as follows: "The defendant, on or about December 19, 2008, in the county of Queens, recklessly caused injury to Karla Giraldo by forcibly dragging her by her arm," end quote. That's the accusation.

---

[14] After the prosecution rested its case, the court dismissed counts three and five, which presented a theory that Senator Monserrate recklessly assaulted Ms. Giraldo with the glass (i.e., engaged in conduct which created a substantial and unjustifiable risk that injury would occur). The Court determined that the while the prosecution had established a prima facie case of *intentional* assault, counts three and five would be dismissed "for want of a prima facie case under the theory of recklessness concerning events in the apartment."

Karla Giraldo was called as a witness by the state. And I have complimented both lawyers, both sets of lawyers, for the very able way they presented the case, very effective and zealous advocates. I adhere to that. I especially want to make reference to the fact that the District Attorney Brown, I thought, took the high ground by calling Ms. Giraldo as a witness. And I found her testimony very helpful. For example, she testified that when she got to the premises that night, that is to the defendant's apartment, she was not physically injured. She had no physical injuries. It appears, although this is not dispositive, that after she suffered injuries in the apartment, not proven to be assaultive beyond a reasonable doubt, but suffered injuries nonetheless, very serious ones, that she wanted to go by ambulance. And she exceeded [sic] to the defendant's decision that, no, I'll take you to a hospital.

I also note that the defendant took her to a very remote location, one abutting a different county, Nassau County, at the very outer limits of Queens County. The injuries here, due to that in my view, the state has clearly proven the defendant's guilt beyond a reasonable doubt as to the sixth count that the defendant did indeed cause reckless injury to Karla Giraldo.

I examined the law very carefully and I think the elements are clearly made out and beyond a reasonable doubt. Having come to the apartment without physical injury, the surveillance tape indicates not a friendly nonviolent interaction, but a violent and very forceful dragging of the complainant — of the, I'll call her the injured person, Karla Giraldo. Pulling her, pushing her, she is fighting to stay in the premises. And she is a woman of slight frame compared to that of the defendant. And forcefully taking her from the premises where 911 could have readily been called.

Elmhurst hospital was just down the block and on Baxter, a few blocks further. One could have walked there in seven or eight minutes. An ambulance could have been there in a minute or two and she could have been given care right away.

In my view she was very — she was indeed injured, palpably so. She is screaming, apparently in pain and crying and fighting to stay in the premises and that one can physically see from the surveillance tape. As one can see from the video surveillance that she is forcefully being pulled and pushed. She is injured. There is bruising, there is discoloration, black and blue marks. It seems to be substantial pain. There is skin tearing. She is already in a weakened state due to severe facial injuries right up in the area of the eye, a horizontal injury and a vertical injury and a lot of blood. One can see the bloody towels and other blood areas in the apartment itself, a lot of bleeding. As she is leaving on the surveillance tape she is holding a towel to her head. She is dragged, and so forcefully that the towel

> flies from her hand as her leg flies upward and ends up in that hallway that she is using to try to stanch the blood. She is emotionally fragile at the time. She is vulnerable. She is panicky. She is scared for her looks. She is scared for her well-being. And indeed, she is taken quite a distance over several minutes to the vehicle, and over quite a distance from the apartment. She is pulled away from a neighbor's apartment. And she rang a bell several times apparently seeking help. All of the signs are that she wished to — that she wished to remain at the premises and not to accompany the defendant.
>
> She was also — injury was further inflicted by an exacerbation of what had happened earlier because bleeding for a 37 minute trip to a hospital abutting another county in a very sensitive area of the head where perhaps sight was at risk, whether she could know that or not, she is not a medical person, it was right by the eye with lots and lots of bleeding. And signs of the bleeding, that could have been stanched within just a few minutes, for 37 minutes continued while she is taken to a hospital abutting Nassau County.
>
> And accordingly, the defendant is found guilty under count six.[15]

After announcing the guilty verdict, Justice Erlbaum noted that while Senator Monserrate may have been concerned about Ms. Giraldo and her injuries, his actions indicated a concern for his political career as well: "it would certainly appear not unreasonable that there was another concern, and that is to get her away from the house and to get her away from a neighborhood where the defendant had roots and was likely well known in that community, having served as a public official in that community and where the event at Elmhurst would have been hotter than a pistol and to get her to a place of low visibility and enter in a manner of low visibility from someplace outside of the hospital, not even pulling into the emergency area, so as to keep the things under the radar."[16]

4. *Sentencing*

On December 4, 2009, Justice Erlbaum sentenced Senator Monserrate to three years probation, 250 hours of community service, one year of domestic abuse counseling, and a $1,000 fine plus mandatory surcharges. Justice Erlbaum also entered a five-year order of protection ordering Senator Monserrate to refrain from any contact with Ms. Giraldo. The order of protection was entered without prejudice to a subsequent motion to modify or vacate the order.

Before sentencing, Senator Monserrate's counsel moved to set aside the verdict on the basis that the evidence at trial was legally insufficient to establish the requisite elements of physical injury. Counsel argued that the evidence was insufficient because mere bruising is insufficient to sustain "physical injury" as that term has been interpreted by the courts, and the surveillance video only showed that Senator Monserrate held onto Ms. Giraldo's right arm, while the

---

15 Record 1289:15-1293:4.

16 Record 1293:14-25.

injuries she sustained were to her left arm. The District Attorney responded that while it is true that the video shows the defendant "dragging the victim by her right arm," the video also clearly shows her left arm "banging on the banister, [and] being caught in the door," leaving little doubt that Senator Monserrate's actions in the hallway caused the injury to her arm.[17] Justice Erlbaum rejected defendant's argument, stating that:

> The woman wanted 911. She was actively bleeding in a region very close to the eye. She is trying to stanch the continuous flow of blood with a towel to her head. She is screaming in pain in the hallways. It's taken 37 minutes to reach a hospital, maybe doesn't get to that hospital for the better part of an hour, still bleeding in the hospital, still in pain from the earlier episode where a very heavy glass broke against her eye under circumstances that were disputed at the trial. You put that all together, plus the Court's observations of your client's demeanor and her demeanor on the tape, this is not going to be based on a single nanosecond of an episode that lasted almost an hour.
>
> Impairment of physical condition, substantial pain, they are palpably present. One has to stop bleeding. 911, EMS people, could have done that in minutes; could have come there and comforted her; could have seen whether or not there would be some complication of the eye, very close to the eye. Putting it all together, in my view, the requirement of physical injury was clearly met. Your motion to set aside the verdict is denied.[18]

Ms. Giraldo testified at the sentencing and requested that the court lift the order of protection that had been in effect since the initial court appearance on the case. Justice Erlbaum questioned Ms. Giraldo's independence and whether Senator Monserrate controlled her. He stated that "many people have suggested by words or implication that you are not your own person, that you act at the bidding of Mr. Monserrate, and that your professed wishes shouldn't be called at face value because of a certain domination over you" and asked Ms. Giraldo to respond. Ms. Giraldo answered that Senator Monserrate does not control or dominate her life and that they are in a relationship together. Justice Erlbaum upheld the order of protection and stated to Senator Monserrate and Ms. Giraldo that "you must accept the fact, sir, that she is not on a leash, and she does not need your permission for everything, and curb your anger, curb your anger, and you should have zero tolerance toward abusive behavior, Miss Giraldo, which trenches into your zone of autonomy."[19]

Senator Monserrate spoke briefly on the record at the sentencing. He stated, among other things, that "I don't think I'm here because of a politically motivated prosecution. I'm here because of my own actions, and I take full responsibility for those actions. I cannot stress enough to

---

17 Sentencing 46:21-24.

18 Sentencing 47:13-48:15.

19 Sentencing 143:22-144:2.

you, your Honor, how sorry I am. I am so sorry for the harm that Karla endured and has suffered. I love her very much, and knowing that she has endured what she has, really, really is something that I will have to live with for the rest of my life."[20]

5. *Appeal*

Counsel for Senator Monserrate has filed a notice of appeal. His lawyers have indicated that they will advance on appeal the same argument made in support of Senator Monserrate's motion to set aside the verdict, that Ms. Giraldo did not suffer physical injury sufficient to sustain a misdemeanor conviction. They also have the ability to challenge other aspects of the conviction at the time they perfect Senator Monserrate's appeal.

C. ADDITIONAL EVIDENCE REVIEWED BY THE SELECT COMMITTEE

In addition to the trial record, the Select Committee has reviewed numerous additional pieces of evidence, summarized below.

1. *Grand Jury Testimony of Karla Giraldo*

On March 12, 2009, Ms. Giraldo testified before the Grand Jury that was investigating Senator Monserrate's actions with respect to the events of December 19, 2008. The District Attorney, without mentioning the surveillance video to Ms. Giraldo, began simply by asking Ms. Giraldo about some of the events that occurred on that night. After questioning her at some length, the District Attorney played the surveillance video for Ms. Giraldo and then asked her to clarify a number of her previous answers, some of which did not comport with what could be seen in the video.

Regarding the incident with the PBA card, Ms. Giraldo initially testified that she had consumed two glasses of wine at the party on the night of December 18, 2008 and that that was the extent of the drinks she had that evening. She also testified that she was not upset that Senator Monserrate had thrown the PBA card away and that she did *not* follow him into the hallway. After watching the video, which clearly shows Ms. Giraldo following Senator Monserrate into the hallway, Ms. Giraldo acknowledged that she had been a "little sad" that Senator Monserrate had thrown the card away and that there had, in fact, been an argument, although she characterized the argument as "normal, without any fighting." Ms. Giraldo also acknowledged that she had exited the apartment and gone to the trash chute in the hallway, but stated that she had not remembered that fact when asked about it earlier in the grand jury session.

Regarding the incident with the glass, Ms. Giraldo testified that Senator Monserrate had been bringing a glass of water to her in bed when he bumped into something in the narrow passageway between the bed and a wall. As a result, Senator Monserrate spilled water onto her, leading her to sit up and collide with him and the glass, leading to her lacerations. After she was cut with the glass, Ms. Giraldo testified that Senator Monserrate told her that they should go to the hospital. Ms. Giraldo responded that she did not wish to go because she was afraid of needles, but when Senator Monserrate told her that they should go and it was for her own good, Ms. Giraldo agreed. Ms. Giraldo told Senator Monserrate that if he wanted, he could call an ambulance, to which Senator Monserrate responded that he wanted to drive her to the hospital. Ms. Giraldo

---

[20] Sentencing 130:17-131:2.

testified that although the closest hospital to Senator Monserrate's apartment was Elmhurst Hospital, she did not want to be taken there and she told Senator Monserrate to "bring me to Long Island to see a surgeon." She stated that although she had never been to LIJ, some members of Senator Monserrate's family had been there, and asserted that she was the person who first mentioned LIJ.

Regarding the events that occurred in the hallway, before viewing the surveillance video, Ms. Giraldo testified that she had been crying at the time that she and Senator Monserrate exited the apartment, explaining that while she knew that she should go to hospital, she did not want to go because she was nervous. She testified that Senator Monserrate tried to calm her down at that time by grabbing her by the arms and telling her that they were going to the hospital for her own good. Ms. Giraldo testified that she then calmed down and went with him willingly. She repeatedly stated that no struggle of any kind occurred in the hallway after Senator Monserrate told her to calm down. Ms. Giraldo also initially testified that she knocked on the neighbor's door because "I thought maybe he could help me to get to the hospital," but she later explained that she did not know why she wanted to see someone else and that she was nervous at that time. After watching the video, which clearly showed evidence of a struggle in the hallway, Ms. Giraldo testified that she did not remember what she said when she reached the bottom of the stairs in the apartment building, but also testified that she was very nervous at the time, and maintained that she went with Senator Monserrate willingly.

Regarding the events that occurred at LIJ, Ms. Giraldo testified that she told the emergency room personnel that she had an accident, but "when they realized that he's a politician then this nightmare began." Ms. Giraldo stated that the hospital personnel "did not clean the blood from my face" when they realized who she was and that they "started to gossip and to make problems by calling the police."

2. *The Notarized Statement of Karla Giraldo*

On January 3, 2009, Mark A. Panzavecchia of the law firm Panzavecchia & Associates PLLC, which at that time represented Senator Monserrate, faxed to the Queen's District Attorney's Office a notarized three-page statement by Ms. Giraldo, dated December 19, 2008 (the "notarized statement"). The notarized statement is handwritten and in English. It was notarized by Michael D. Nieves, who at the time acted as a spokesperson for then-Councilmember Monserrate. At the time that the notarized statement was faxed to the District Attorney, Senator Monserrate had not yet been indicted and the District Attorney was still considering what to do with the case.

In the notarized statement, Ms. Giraldo attested that "I, Karla Giraldo, duly sworn, depose and say that I was never assaulted or hit in any way by Hiram Monserrate. What occurred on Dec[ember] 19, 2008 was an accident. I do not want to press charges against Hiram. I do not want an order of protection." Regarding the incident in the apartment, Ms. Giraldo attested that "Hiram was instrumental in getting me to the hospital after I was accidentally cut by a glass containing water after we argued in the bedroom" and "[t]hat evening I was very upset and moving around frantically and therefore careless around the glass." Regarding the decision to go to the hospital and the hallway incident, Ms. Giraldo swore that "[a]t first, I refused to go to the hospital, but Hiram insisted that I go as the accidental injury was in need of medical treatment" and "[a]s I walked down the hallway of the apartment building with Hiram, I refused to go to the hospital but Hiram insisted that I go for my own good, and thankfully forced me to go for my own good." Regarding the decision to go to LIJ, the affidavit stated that "I refused to go to Elmhurst Hospital

and I asked Hiram to take me to Long Island Jewish Hospital because I felt that Elmhurst was not a good hospital for the treatment I needed."[21]

3. *Routes to LIJ*

The Court gave substantial weight to the fact that it took 37 minutes for Senator Monserrate and Ms. Giraldo to travel 14 miles from his apartment in Jackson Heights to LIJ in the middle of the night. Because the parties offered no evidence at trial of the precise route that Senator Monserrate and Ms. Giraldo took to arrive at LIJ, the Select Committee determined that it would be useful to the Investigation to assess the approximate distance and time involved with several different routes from Senator Monserrate's apartment to LIJ. Using the Internet application Google Maps, we have calculated five separate routes to LIJ, each using a different major roadway or highway to travel the majority of the distance to LIJ. Each of the routes is presented below, including the approximate distance and time involved in each route:[22]

- Cross Island Parkway: approximately 14.8 miles
  approximately 19 minutes (40 minutes in traffic)
- Northern Boulevard: approximately 11.3 miles
  approximately 26 minutes
- Long Island Expressway: approximately 12.9 miles
  approximately 18 minutes (30 minutes in traffic)
- Grand Central Parkway: approximately 14.2 miles
  approximately 19 minutes (45 minutes in traffic)
- Union Turnpike: approximately 11.6 miles
  approximately 34 minutes

---

[21] Members of the Select Committee raised concerns about the legitimacy of the notarized statement, including the fact that some of the language used appears to be inconsistent with Ms. Giraldo's testimony regarding her limited English language proficiency. Because Ms. Giraldo declined to appear before the Select Committee, it was denied an opportunity to directly address these concerns. However, through counsel, the Select Committee interviewed Michael D. Nieves, a spokesperson and political consultant for Senator Monserrate and Luis E. Castro, a long-time friend of Senator Monserrate, both of whom were present when the statement was drafted, notarized, and signed. Mr. Nieves and Mr. Castro confirmed that Edward Irizzary, an attorney who is not a native Spanish speaker, and not Ms. Giraldo, hand-wrote the notarized statement in English. Moreover, Mr. Nieves explicitly acknowledged that the statement was not in Ms. Giraldo's words but were "lawyer words" supplied by Mr. Irizzary. The information provided by Mr. Nieves and Mr. Castro indicates a possibility that Ms. Giraldo's actual intended statements may have been "lost in translation" during the process of creating the notarized statement.

[22] *See* Maps of Possible Routes to LIJ. (Attached at Exhibit 10)

4. *Telephone Records*

As described above, the Select Committee sought, by subpoena and application to Justice Erlbaum, the telephone calling records for Senator Monserrate's and Ms. Giraldo's mobile telephones, for the period between 12:00 a.m. and 7:00 a.m. on December 19, 2008, which were collected by the Grand Jury during its investigation. Despite the initial opposition of Senator Monserrate's counsel to the Select Committee obtaining any information outside the trial record, on December 21, 2009, pursuant to a stipulation agreed to by the District Attorney, counsel for Senator Monserrate, and the Select Committee, Justice Erlbaum agreed to allow the District Attorney to release phone records pertaining to the two mobile phones. The phone records are summarized below. All times provided are based on those records.

The records for Senator Monserrate's mobile phone show that he made or received only five calls on that phone during the period between 12:00 a.m. and 7:00 a.m. on December 19, 2008. All five calls were placed or received before 12:50 a.m., when the surveillance video recorded Senator Monserrate disposing of the PBA card. Three of the calls were made to or received from Ms. Giraldo's mobile phone. The other two were with telephone numbers whose owners are not identified by the records. However, because the LIJ hospital surveillance shows Senator Monserrate using a mobile phone on several occasions, the Senator plainly had access to and used a different mobile phone, presumably Ms. Giraldo's. Additionally, the hospital surveillance showed that Senator Monserrate used both a hospital courtesy phone and a pay phone between 3:46 a.m. and 4:14 a.m. The Select Committee did not have access to the records of those telephones.

Ms. Giraldo's mobile phone was far more active during the period between 12:00 a.m. and 7:00 a.m. than Senator Monserrate's, even though she was receiving treatment at LIJ for her injuries during part of this time. The records for Ms. Giraldo's phone also show three calls between her phone and Senator Monserrate's phone, all of which took place before 12:50 a.m. At 2:08 a.m., presumably after the incident with the PBA card, but before Ms. Giraldo was injured, a call was placed from Ms. Giraldo's phone to the phone of her ex-husband, John Giraldo. The call lasted less than a minute. At 2:48 a.m., a call was placed from Ms. Giraldo's phone to a mobile phone owned by Javier Icaza, the son of Ms. Giraldo's cousin, Jasmina Rojas. This call also lasted a minute. This call likely took place after Ms. Giraldo was injured, but before she and Senator Monserrate exited his apartment at 2:50 a.m., as per the video surveillance. Moreover, the video surveillance at the apartment shows that neither the Senator, nor Ms. Giraldo, used a mobile phone as they walked from the apartment building to Senator Monserrate's car.

At 3:03 a.m., likely after Ms. Giraldo and Senator Monserrate were in the Senator's car, a call that lasted less than a minute was placed from Ms. Giraldo's phone to a phone belonging to Neife Toro, Ms. Giraldo's aesthetician. Presumably, Ms. Toro did not answer because the call lasted only a few seconds. A minute later, at 3:04 a.m., a call was placed from Ms. Giraldo's phone to a phone belonging to Veronica Zeledon, which lasted less than a minute. Ms. Zeledon was not identified in the trial records. However, an Internet search of the mobile phone number belonging to Ms. Zeledon shows that the number is affiliated with Future Beauty Place, a beauty salon located in Elmhurst, New York. Following the call to Ms. Zeledon, another call was placed to Ms. Toro at 3:05 a.m., which lasted approximately ten minutes. It is likely during this call that Ms. Giraldo and Ms. Toro had the conversation that both of them testified about at Senator Monserrate's trial. At 3:25 a.m., a call was placed from Ms. Giraldo's phone to a phone belonging to Jasmina Rojas, which lasted approximately four seconds. At 3:26 a.m., a call was placed from Ms. Giraldo's phone to Mr.

Icaza's phone, which lasted under a minute. Following this phone call, Senator Monserrate and Ms. Giraldo likely had arrived at LIJ where they were recorded on the video surveillance at 3:27 a.m.

At 3:53 a.m., two calls were placed from Ms. Giraldo's phone to T-Mobile's voicemail number. Both calls lasted under a minute. At approximately this same time, Senator Monserrate can be seen on the hospital surveillance footage in the emergency room waiting area using a pink or red cell phone, presumably Ms. Giraldo's. At 3:59 a.m., Ms. Giraldo's phone received a call from Mr. Icaza's phone, which lasted approximately two minutes. At 4:00 a.m., another call was placed to T-Mobile's voicemail number. At 4:01 a.m., Ms. Giraldo's phone received another call from Mr. Icaza's, which lasted approximately two minutes.

Until this point, the records show phone calls made to or received from Ms. Giraldo's family, her aesthetician, and Ms. Zeledon, as well as several calls to voicemail. However, at 4:06 a.m., a call was placed from Ms. Giraldo's phone to a phone belonging to Nyla Rosario, who was at the time a member of then-Councilmember Monserrate's staff. This call lasted approximately one minute. Next, two calls were made to 411 directory assistance. These calls were placed at 4:18 a.m. and 4:56 a.m. and lasted approximately three minutes and four minutes, respectively. After these calls, two calls were placed from Ms. Giraldo's phone to a phone belonging to Nestor Diaz, who had served as Senator Monserrate's General Counsel when he was in the City Council. These calls were placed at 5:04 a.m. and 5:06 a.m. and lasted approximately two minutes and six minutes, respectively. It may be inferred from these early morning telephone calls to members of his staff, that Senator Monserrate was informing them of the incident with Ms. Giraldo and that Senator Monserrate was at the hospital. It may be further inferred that Senator Monserrate did not wish to use his own phone for the calls to his staff and to certain other unknown individuals based on the facts that: (1) he did not use his own mobile phone; (2) he used Ms. Giraldo's phone; (3) he used the hospital's phone; and (4) he used a pay phone.

Finally, included with Ms. Giraldo's phone records is a map that shows T-Mobile's cell tower sites, which provides an approximate location for where a mobile phone is when a particular call is made. This map indicates that when the first call was placed to Ms. Toro at 3:03 a.m., Senator Monserrate and Ms. Giraldo were already traveling on Interstate 678 (the Van Wyck Expressway) approaching the Cross Island Parkway. At 3:25 a.m., when a call was placed from Ms. Giraldo's phone to Ms. Rojas', the map indicates that Ms. Giraldo's phone was located near LIJ. Accordingly, it may be inferred from the map that Senator Monserrate and Ms. Giraldo utilized the Cross Island Parkway to travel to LIJ, which, according to Google Maps, should have taken approximately 19 minutes (without traffic) but was not, in any event, the fastest route to LIJ from Senator Monserrate's apartment. It may be further inferred that it took Senator Monserrate and Ms. Giraldo greater than 22 minutes to actually travel the distance based on the location of Ms. Giraldo's phone at 3:03 a.m. (on Interstate 678) and 3:25 a.m. (near LIJ).

5. *Senator Monserrate's Interviews with the Media*

Because Senator Monserrate exercised his right not to testify at his criminal trial and has declined to make any statements to the Select Committee, his viewpoint regarding the events of December 19, 2008 was notably absent from the record before the Committee. However, on December 8, 2009, Senator Monserrate gave two television interviews regarding his conviction and sentence.[23] The Select Committee cautions that these interviews are of limited value because they were not under oath nor were they subject to the kind of questioning that would happen in a formal proceeding.

Nevertheless, the interviews are useful to document Senator Monserrate's then-current contentions, motivations, and state of mind. In the interviews, Senator Monserrate said, among other things, that: (1) he looked forward to proving his innocence on appeal; (2) he did not intend to cause harm to anyone; (3) his sole purpose on December 19, 2008 was to take Ms. Giraldo to the hospital; (4) his actions were motivated only by concern for Ms. Giraldo; (5) he took Ms. Giraldo to LIJ, at her request. He also stated that he believed that the Select Committee's current process is "clearly unfair."

The Select Committee has reviewed and considered these interviews along with the other evidence before it.

---

[23] *See On the Road to City Hall: December 8, 2009 Interview with Hiram Monserrate* (NY1 television broadcast), *available at* http://ny1.com/1-all-boroughs-news-content/110185/ny1-online--queens-senator-hiram-monserrate-on--road-to-city-hall- (transcript attached at Exhibit 11), and *New York Nightly News with Chuck Scarborough: December 2009 Interview with Hiram Monserrate* (NBC television broadcast), *available at* http://www.nbcnewyork.com/station/as-seen-on/79105902.html (transcript attached at Exhibit 12).

IV. FINDINGS OF THE SELECT COMMITTEE

A. THE SELECT COMMITTEE'S MANDATE

Based on the factual record before it, the Select Committee has been able to make findings on the relevant issues before it. We have not been charged with the task of determining whether the actions within Senator Monserrate's apartment that led to Ms. Giraldo's facial lacerations were intentional or accidental. It is not the mandate of the Select Committee to revisit the allegations for which Senator Monserrate was acquitted or to conduct a second "trial" of those matters.

The facts agreed on by both sides at Senator Monserrate's trial are relatively simple. All agree that Ms. Giraldo was cut badly enough that she needed medical attention, and no one disputes that Senator Monserrate took her to a hospital, where she was given medical care. In the context of criminal prosecutions that go on every day throughout the City and State of New York, this one did not involve a complicated set of facts.

Unfortunately, the only two people that truly know the entirety of what happened that night have never had their versions of events tested by cross-examination under oath. Both Senator Monserrate and Ms. Giraldo refused to cooperate with the Select Committee, and neither appeared to answer its questions on the circumstances underlying the misdemeanor conviction. For that reason, the Select Committee, like the trial court, had to spend much of its effort parsing out-of-court statements made by both Senator Monserrate and Ms. Giraldo in an effort to ascertain the true circumstances surrounding the misdemeanor conviction.

In reviewing the evidence, the Select Committee concluded, consistent with the trial verdict, that Senator Monserrate recklessly assaulted Ms. Giraldo. It quickly became clear, however, that the Select Committee's ultimate task would be to determine, based on the available evidence and reasonable inferences to be drawn, why the assault occurred. If, as Senator Monserrate and Ms. Giraldo have asserted, the Senator had simply been too exuberant in performing the salutary task of getting Ms. Giraldo medical assistance as quickly as possible, it would be difficult to argue that even a criminal conviction in such circumstance is deserving of any sanction. On the other hand, if, as Justice Erlbaum suggested when he delivered his verdict, Senator Monserrate's assault of Ms. Giraldo in the hallway of his apartment building demonstrated that he was clearly concerned with matters other than the health of a bleeding woman, a different recommendation would be in order.

The Select Committee determined early on to look at the evidence with that backdrop, and its findings are geared towards answering these questions.[24]

---

[24] In the Select Committee's letter affording Senator Monserrate the opportunity to be heard before the Select Committee, his counsel were specifically informed that the Select Committee would ask Senator Monserrate to address the portion of Justice Erlbaum's verdict in which he suggested that the Senator's actions might have been designed to "keep the things under the radar" (Record 1293:14-25). *See* Letter from Daniel R. Alonso, Esq. to Joseph Tacopina, Esq. and Chad Seigel, Esq. (Nov. 25, 2009). (Attached at Exhibit 13).

B. KARLA GIRALDO'S VERSIONS OF EVENTS ARE INCONSISTENT AND UNRELIABLE

The Select Committee has reviewed the following sources of testimony and statements by Ms. Giraldo: (1) Ms. Giraldo's statements to LIJ emergency room personnel (reflected in Ms. Giraldo's medical records, the statements and trial testimony of Dr. Kort, Dr. Frogel, and Nurse Cabibbo); (2) Ms. Giraldo's notarized statement, dated December 19, 2008, given to Senator Monserrate's spokesman, Michael Nieves; (3) Ms. Giraldo's grand jury testimony; (4) Ms. Giraldo's trial testimony; and (5) Ms. Giraldo's victim impact statement given at the sentencing of Senator Monserrate. Comparing these statements, the Select Committee notes the following assertions made by Ms. Giraldo that are either inconsistent or otherwise lack credibility and are therefore not reliable:

- Ms. Giraldo testified before the grand jury that she had consumed two drinks on the evening of December 18, 2008 and that that was the extent of her drinking that night. At trial, Ms. Giraldo claimed that she was intoxicated and, when confronted with her grand jury testimony, stated that the prosecutor's question about how many drinks she had was limited to what she had consumed at the party that evening. In fact, the prosecutor specifically asked her if the two drinks she consumed at the party was the extent of her drinking that evening and Ms. Giraldo replied that it was. Indeed, Ms. Giraldo further testified that when she went to Senator Monserrate's apartment after the party she was not drunk but was "okay."

- Ms. Giraldo initially testified before the grand jury that she did not exit the apartment after Senator Monserrate disposed of the PBA card. But after watching the surveillance video, she acknowledged that she had, but stated that she had not remembered doing so.

- Ms. Giraldo also testified before the grand jury that Senator Monserrate was not angry after discovering the PBA card in her purse, but was calm. But after being shown the surveillance video of Senator Monserrate disposing of the PBA card, Ms. Giraldo stated that "sometimes he's a little bit jealous" and that she was surprised that he had thrown the card out and "[i]t was like the devil got inside of him because he threw away the card and he had never done this before." At trial, Ms. Giraldo acknowledged that Senator Monserrate was a "little jealous," but remained calm and did not seem angry.

- In her December 19, 2008 notarized statement, Ms. Giraldo wrote that she and Senator Monserrate had "argued in the bedroom." Ms. Giraldo testified before the grand jury that she did not care that Senator Monserrate was going to throw away the PBA card he had removed from her purse and that she was *not* upset. After watching her apparently agitated state on the surveillance video, however, Ms. Giraldo stated that she was a "little sad" that Senator Monserrate had thrown the card away and acknowledged that there had been an argument, which she characterized as "normal, without any fighting." At trial, however, Ms. Giraldo testified that when Senator Monserrate told her that he was going to throw the card away she became angry.

- While stressing that our task is not to determine whether the glass incident was accidental or intentional, in evaluating Ms. Giraldo's credibility, we note the following inconsistency in her descriptions of that incident:[25]
  - In her notarized statement dated December 19, 2008, Ms. Giraldo wrote that "I was accidentally cut by a glass containing water after we argued in the bedroom" and "[t]hat evening I was very upset and moving around frantically and therefore careless around the glass."
  - In her grand jury testimony Ms. Giraldo testified that Senator Monserrate bumped into something, spilled water onto her, and she reacted by "trying to sit up. That's when we bump [*sic*] into each other."
- Ms. Giraldo initially testified at trial that she did not recall asking Senator Monserrate to call 911 after her face was cut. The prosecution referred Ms. Giraldo to her grand jury testimony where she stated that she said to Senator Monserrate "if you want, call an ambulance," and he replied "I want to drive you over." Nonetheless, Ms. Giraldo insisted that her grand jury testimony did not refresh her recollection and insisted that she did not recall whether she asked Senator Monserrate to call an ambulance. Justice Erlbaum concluded that Ms. Giraldo had, in fact, requested an ambulance and, at the sentencing, specifically questioned Ms. Giraldo regarding Senator Monserrate's failure to call 911, asking her if she thinks she is "entitled to the respect of your wishes, or do you think that your wishes are of no account if he thinks better of it, he can just decide for you like a parent or guardian can decide for a minor child?" Ms. Giraldo did not answer the question and only reiterated that the incident was an accident that could happen to anyone. Upon further questioning by the court, Ms. Giraldo stated that she thought that it was better to go to the hospital than call 911 because she wanted to be with Senator Monserrate. When asked if she thought Senator Monserrate would not have accompanied her in the ambulance if 911 had been called, Ms. Giraldo responded that she did not know and that she had acted nervously because she was confused and intoxicated.
- Ms. Giraldo wrote in her December 19, 2008 notarized statement that she initially refused to go to the hospital, but that Senator Monserrate insisted. She also testified before the grand jury that she did not want to go to the hospital because she was afraid of needles. However, she also testified before the grand jury that she approached the neighbor's door because she thought the neighbor could help her get to the hospital. Additionally,

---

[25] The noted inconsistency is entirely separate from the central inconsistency at trial, namely, that hospital personnel testified that Ms. Giraldo told them that the incident was not an accident, whereas after Senator Monserrate was arrested, she consistently asserted both that the incident had in fact been an accident and that she had not made the initial statements attributed to her.

contrary to her professed fear of needles, she stated to the grand jury that she specifically told Senator Monserrate to bring her to LIJ so that she could see a surgeon.

- Ms. Giraldo testified to the grand jury that she "knocked on some neighbor's door suddenly, I thought maybe he could help me to get to the hospital." At trial, Ms. Giraldo claimed that she did not recall having done so. When confronted with her grand jury testimony about having knocked on a neighbor's door because she wanted help, Ms. Giraldo repeatedly insisted that she was "very confused", "nervous" and "panicky," and continued to be evasive in response to questions about whether and why she rang a neighbor's doorbell or knocked on the door.

- In her December 19, 2008 notarized statement, Ms. Giraldo wrote that "[a]s I walked down the hallway of the apartment building with Hiram, I refused to go to the hospital but Hiram insisted that I go for my own good, and thankfully forced me to go for my own good." In her grand jury testimony, prior to watching the surveillance video, Ms. Giraldo insisted that there had been no struggle in the hallway and that she went with Senator Monserrate willingly. Even after watching the video, Ms. Giraldo maintained that she accompanied Senator Monserrate willingly.

- Ms. Giraldo testified before the grand jury that the emergency room personnel realized that "he's a politician then this nightmare began." Ms. Giraldo stated that the hospital personnel "did not clean the blood from my face" when they realized who she was and that they "started to gossip and to make problems by calling the police." Ms. Giraldo repeated these claims at sentencing, but these claims were dismissed by Justice Erlbaum, who stated that "[a] seriously bleeding woman, brought in to the most remote hospital in the county, abutting another county, saying: 'It's not an accident, he is crazy,' trying to get him out of the room so they can give treatment, and you think that they cared one wit whether he was the sweeper or the president?"

It is clear from the numerous inconsistencies and unreliable statements outlined above that there is reason to doubt Ms. Giraldo's credibility about the events of December 19, 2008, and most importantly her testimony at Senator Monserrate's criminal trial. The motivation for her apparent lack of truthfulness appeared to be a desire to assist Senator Monserrate in avoiding criminal liability for the charges brought against him. As the prosecutor stated at Senator Monserrate's sentencing: "It's also clear throughout the course of the proceedings [Ms. Giraldo] was doing anything possible to assist the defendant in this case in terms of the trial. She was testifying opposite of Grand Jury Testimony, she was not recalling testimony that she had recalled earlier in the proceeding, and I think that the court had an opportunity to see in fact when your Honor questioned Miss Giraldo exactly what was going on in connection with their relationship." The Select Committee agrees with the prosecutor's assessment.

Accordingly, based on all of the above-listed inconsistencies and statements lacking in credibility, the Select Committee finds that Ms. Giraldo's testimony cannot be relied on. Specifically, with respect to the hallway incident and the decision not to call 911, the Select Committee finds that Ms. Giraldo's trial testimony cannot be credited. On the critical issue of

whether Ms. Giraldo specifically asked Senator Monserrate to call 911, the Select Committee concurs with the conclusion of Justice Erlbaum that, notwithstanding the inconsistency between Ms. Giraldo's trial and grand jury testimony, she did, in fact, request that Senator Monserrate call an ambulance. The Select Committee further finds that Ms. Giraldo knocked or rang on the neighbor's door because she was seeking assistance, as she testified before the Grand Jury, and not because she was "nervous," as she testified at trial. Finally, Ms. Giraldo's grand jury testimony that there was no "struggle" in the first floor hallway, contrary to the obvious struggle depicted on the video surveillance, cannot be credited.

C. SENATOR MONSERRATE FAILED TO COOPERATE WITH THE SELECT COMMITTEE

On October 20, 2009, Senator Monserrate's office issued a public statement announcing that the Senator and his lawyers would "cooperate fully" with the Select Committee's investigation.[26] Despite this announcement, Senator Monserrate refused to provide any materials requested by the Select Committee and declined the opportunity to appear before the Committee.[27] Specifically, Senator Monserrate refused to provide those materials that the Queens District Attorney's office had provided to defense counsel in connection with Senator Monserrate's criminal case, including Ms. Giraldo's grand jury testimony.[28] In a November 13, 2009 letter, Senator Monserrate's counsel rejected the Select Committee's request for trial exhibits (documents of public record that were in counsel's custody), criticized the legitimacy of the Committee's work and the impartiality of its members, and recommended "that if the Committee does not disband and is instead intent on continuing this process, you order and review the transcript of Senator Hiram Monserrate's trial."[29] In a letter dated November 9, 2009, Senator Monserrate's counsel retreated from Senator Monserrate's initial public promise of cooperation with the Select Committee and defended the decision not to provide the requested materials on the basis that Senator Monserrate's spokesperson had only stated that "we '*expect* to cooperate fully'" with the Select Committee's inquiry.[30]

Senator Monserrate specifically commented in a December 8, 2009 interview with WNBC that, "Well, I think that some, several of them including those that are on the committee

---

26 *See* Jeremy W. Peters & Nicholas Confessore, *State Senate to Consider Expelling Monserrate in Wake of His Assault Conviction*, N.Y. Times (Oct. 20, 2009) *available at* http://www.nytimes.com/2009/10/21/nyregion/21hiram.html ("[Senator Monserrate's] office issued a statement that said the Senator pledged his cooperation during the Senate investigation.") (Attached at Exhibit 14).

27 Senator Monserrate communicated his refusal to cooperate to the Select Committee via Tacopina & Seigel, his counsel for this matter, as well as the criminal matter.

28 Letter from Daniel R. Alonso, Esq., to Joseph Tacopina, Esq. and Chad Seigel, Esq. (Nov. 11, 2009) (Attached at Exhibit 15).

29 Letter from Chad Seigel, Esq. to Daniel R. Alonso, Esq. (Nov. 13, 2009) (Attached at Exhibit 16).

30 Letter from Joseph Tacopina, Esq. to Daniel R. Alonso, Esq. (Nov. 9, 2009) (Attached at Exhibit 17).

today, have asked me to resign prior to knowing all the facts. And I think that that really speaks to what kind of committee of inquiry this is. That people walking into the inquiry before reviewing a piece of evidence or any type of witness accountings would say you should resign. That's unfortunate. Unfortunately half of the committee has already gone in there with a predisposed opinion. I think that speaks to the lack of due process of that committee."

In fact, Senator Monserrate's counsel had raised these very same concerns with the Select Committee's Special Counsel on October 27, 2009. The Select Committee took these concerns very seriously and, at the Select Committee's first meeting, the Chair specifically questioned the Committee's members, who all confirmed on the record that each member could review the evidence and participate in the task mandated by the Resolution fairly and dispassionately. In accordance with New York Civil Rights Law § 73, Senator Monserrate was invited to appear with counsel and provided with an opportunity to "submit proposed relevant questions in advance that [he] would like the Select Committee to ask."[31] Further, Senator Monserrate was provided with the options of testifying in person, presenting arguments or evidence through an oral presentation by counsel, or making arguments or presenting evidence in writing.[32]

Although Senator Monserrate refused to cooperate with the Select Committee in any way, he has willingly provided the media with details relating to his misdemeanor conviction. For example, in his December 8, 2009 interview with NY1, Monserrate provided information regarding his perspective on the decision to take Karla Giraldo to Long Island Jewish Medical Center on December 19, 2008. In the interview, he claimed that his actions on December 19, 2008 were motivated only by concern for Karla Giraldo and he took Giraldo to LIJ at her request. He also indicated that his decision not to call an ambulance may have been a mistake.[33] These assertions are material to the Select Committee's inquiry. However, due to Senator Monserrate's decision not to testify in the criminal proceeding or before the Select Committee, Senator Monserrate deprived the Select Committee of the ability to test the veracity of his version of events using "the greatest legal engine ever invented for the discovery of truth,"[34] cross-examination under oath.

It is well-settled law that a party may invoke the Fifth Amendment's protection against self-incrimination in both civil and criminal proceedings.[35] It is equally well-settled that while a fact-finder in a *criminal* proceeding may not draw an adverse inference against an individual who asserts the Fifth Amendment in that criminal proceeding,[36] a fact-finder in a *civil* proceeding is free

---

31 Letter from Daniel R. Alonso, Esq. to Joseph Tacopina, Esq. and Chad Seigel, Esq. (Nov. 25, 2009).

32 *Id.*

33 *On the Road to City Hall: December 8, 2009 Interview with Hiram Monserrate, supra.*

34 5 J. Wigmore, Evidence 1367, p. 32 (J. Chadbourn rev. 1974).

35 *See McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (Brandeis, J.) (stating that the Fifth Amendment's "privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.").

36 *Griffin v. California*, 380 U.S. 609 (1965).

to draw an adverse inference against an individual who asserts the Fifth Amendment in that civil proceeding or has asserted the Fifth Amendment in a prior civil *or* criminal proceeding.[37] The Select Committee is thus entitled, as it does, to draw an adverse inference against Senator Monserrate based on his refusal to provide information as requested by the Select Committee.

D. ADDITIONAL FINDINGS OF THE SELECT COMMITTEE

1. *The Two Versions of Events Are Mutually Inconsistent*

During the course of the District Attorney's investigation and the trial, and throughout the Select Committee's investigation, two fundamentally inconsistent versions of the facts have been put forward. In Senator Monserrate's version, backed up since his arrest by Karla Giraldo, he did what was necessary to make sure that Ms. Giraldo — injured, bleeding, and upset — was given the medical treatment she desperately needed. In the second version, advanced by the District Attorney, a terrified Karla Giraldo attempted to escape from Senator Monserrate, while Senator Monserrate violently pulled her through the hallway, doing his best to ensure that the incident would stay, in the trial judge's words, "under the radar."

These two versions are mutually inconsistent, and both cannot be true.

2. *The Select Committee Rejects Senator Monserrate's Version of Events*

Based on all of the evidence it has examined, the Select Committee agrees with the latter view, which is closer to that presented at trial by the prosecution. We are compelled to this conclusion by the fact that Ms. Giraldo's story lacks credibility, the obvious terror on Ms. Giraldo's face on the video recording together with Senator Monserrate's violent actions in the hallway, and the supporting evidence that corroborates Senator Monserrate's intent to avoid the incident's coming to light. Conversely, to believe Senator Monserrate's version of events, the Select Committee would need to conclude that LIJ medical personnel were dishonest under oath, his neighbor was unreliable, and that LIJ medical personnel immediately became biased against Ms. Giraldo, a seriously injured woman, when they found out her boyfriend was a politician, despite the fact that there is no clear evidence adduced regarding such dishonesty, unreliability, or bias. The more compelling version of events is straightforward and heavily corroborated by a video that is unimpeachable.

Thus, the Select Committee finds that Karla Giraldo and Senator Monserrate engaged in a long argument before she was injured. There was enough blood to require several towels, and Ms. Giraldo was in distress. She asked Senator Monserrate to call an ambulance for her, but instead, he decided that he was going to take her to the hospital. As they were leaving to go to the hospital, Ms. Giraldo attempted to get away from Senator Monserrate. In the middle of the night, in a building that was not hers, at a time when she was *not* intoxicated (see below) she rang the doorbell of a neighbor because she "thought maybe he could help me get to the hospital."

When Senator Monserrate saw that Ms. Giraldo rang Ms. Loudon's bell, his behavior changed. Rather than reconsider his decision not to call 911, or even to soothe Ms. Giraldo and try to convince her that his decision was somehow better than calling paramedics, he deliberately chose to grab her forcefully and pull her out of the building. His intent to do so is evident from the video

---

[37] *Baxter v Palmigiano*, 425 U.S. 308 (1976).

evidence showing Ms. Giraldo clinging to the banister in terror, resisting Senator Monserrate's effort to force her to leave the building. Additionally, when Ms. Giraldo dropped the towel she was pressing on her face to stop the bleeding, Senator Monserrate continued to drag her out of the building. Indeed, he appeared to pull harder after Ms. Giraldo no longer had the towel pressed to her face. The combination of all of these facts led in part to the Court's conclusion — with which the Select Committee agrees — that the Senator was proceeding in a reckless manner.

The Select Committee considered many factors, including (1) the delay in obtaining treatment; (2) the choice of hospital; (3) the explanation Senator Monserrate advanced at trial; (4) the Court's findings; (5) the cell-site information; (6) the various possible routes to LIJ and the apparent route used; (7) the decision to park on the street rather than use the emergency entrance; (8) the need for the long walk through the hospital; and other evidence concerning Ms. Giraldo's treatment and Senator Monserrate's behavior. Based on those factors, the Select Committee concludes that the decisions made that night by Senator Monserrate as to the treatment of someone he ostensibly loved and cared for, were not consistent with the obvious need to obtain swift medical care for an injury of the seriousness of Ms. Giraldo's. Whether the Senator was worried for his political future or not, the evidence demonstrates both recklessness and callousness.

The Select Committee was also troubled by the fact that three individuals who worked for Senator Monserrate appear to have been involved in "managing" Ms. Giraldo in connection with the Senator's defense in his criminal trial. As described in Section III.C.2 above, Edward Irizzary, an attorney who is currently employed as counsel to the New York State Senate Consumer Protection Committee, chaired by Senator Monserrate, drafted Ms. Giraldo's notarized statement dated December 19, 2008 in English. Additionally, Michael D. Nieves, who acted as a spokesman for Senator Monserrate, notarized the statement. Luis E. Castro, who currently works for Senator Monserrate on the Senate Consumer Protection Committee, was in contact with Ms. Giraldo throughout the criminal trial and sentencing, and escorted her to and from court on the day that she testified.[38]

Finally, the Select Committee finds that although Ms. Giraldo had been drinking earlier in the evening, she was not intoxicated at the time of the events in the hallway, contrary to the defense position at trial. This is evident based on two facts. First, in her grand jury testimony, she swore, at a time before she knew that Senator Monserrate's defense would try to establish that

---

[38] *See* Barbara Ross, *Pal of state Sen. Hiram Monserrate arranged Karla Giraldo's trial security*, N.Y. DAILY NEWS, Nov. 16, 2009. As discussed above, counsel for the Select Committee interviewed both Mr. Nieves and Mr. Castro. Both individuals confirmed that they have significant personal and/or professional relationships with Senator Monserrate. Mr. Nieves stated that he advised Senator Monserrate in his campaign for District Leader, worked for Senator Monserrate while the Senator was a New York City Councilman, and has served as a political consultant and spokesman for Senator Monserrate. Mr. Castro acknowledged that he accompanied Ms. Giraldo to court on the day that she testified at trial, September 30, 2009. He also stated that he has known Senator Monserrate since the Senator's birth, worked for Senator Monserrate when the Senator was a New York City Councilman, and communicates with Senator Monserrate approximately every other day. Additionally, Mr. Castro confirmed that he is employed currently as a Special Assistant to the New York State Senate Consumer Protection Committee, chaired by Senator Monserrate.

she was intoxicated, that she was *not* intoxicated. The Select Committee finds that more convincing than her testimony at the trial, which was clearly intended to bolster the defense's arguments. Second, in the video recording made at LIJ, just 37 minutes after the hallway incident, Ms. Giraldo is plainly not intoxicated and clearly walked through the hospital in a normal stride.

3. *Senator Monserrate Has Not Accepted Responsibility For His Actions*

The Select Committee believes that a relevant consideration to its task is whether Senator Monserrate has accepted responsibility for his actions surrounding the events of December 19, 2008. At the time of the sentencing, the Court and the People engaged in a discussion as to whether their recommendation that the Senator serve some jail time might be ameliorated by Senator Monserrate's taking responsibility for his actions. The prosecution demurred, citing a number of other factors that supported its request for a period of incarceration. As is required by law, Senator Monserrate was given an opportunity to speak, and he did say that he took responsibility. But the nature of the statement provided more questions than answers. His carefully tailored statement, which was careful to preserve his options on appeal, asserted that he took "full responsibility for those actions," and that he was "sorry for the harm that Karla endured and has suffered."[39]

The problem with such a passive and, ultimately, hollow claim of acceptance of responsibility is that the Senator has in no way taken responsibility for being the cause or the source of the harm to Ms Giraldo. Indeed, what is striking is the abiding sense that Senator Monserrate was referring to matters *outside* the criminal case, such as unwanted media attention. In the course of being able to speak unfettered and unquestioned, even with his freedom at stake, Senator Monserrate failed to state *what* actions he was responsible for and what it meant to him to take such responsibility. It is therefore fair to conclude that his "taking of responsibility" was tenuous at best.

The Select Committee's concern that Senator Monserrate has failed to accept responsibility is further supported by his refusal to cooperate with the Select Committee's investigation, his public statements impugning the bipartisan Select Committee's integrity and impartiality, and especially by statements that Senator Monserrate made during two television interviews that he gave four days after his sentencing, which contradict the protestations of remorse at sentencing.

In his interview with NY1, Senator Monserrate made it clear that he was not convicted of any intentional act, only a reckless act, and that he was appealing that conviction because "I don't believe I was reckless. I believe what I was trying to do and I was determined to get her the medical attention she needed, which I understood she needed. She was not, at that time, at that moment in a correct mental state." He then expressed regret for the "things happening to" Ms. Giraldo over the prior year, such as, "photographers at her home, the destruction of her personal life and her family's," explaining that, "I'm really sorry that that occurred," but at no point did he express remorse for the pain that he *caused* Ms. Giraldo.

While he did admit that he "could have handled things better that night," his admission was limited to his professed mistake in not going "against her wishes" and taking her to the closest hospital or calling 911. At no point did he take responsibility for his actions — as these

---

[39] Sentencing 130:20-21, 23-24.

statements make clear, he instead effectively blamed Ms. Giraldo for the decisions made that night, and blamed himself only secondarily for not overruling her purported decisions.[40]

Senator Monserrate made similar representations in his interview with NBC's Chuck Scarborough, stating, "I still look forward to fighting to prove the innocence of these charges" and that the only thing that he was guilty of was that "I took someone who was reluctant, reticent to go and seek medical attention to the hospital."

Notably, Senator Monserrate has refused even to acknowledge that his misdemeanor conviction was a domestic violence offense. In the NY1 interview, Senator Monserrate rejected the assertion that he committed any act of "domestic violence," and stated that he does not believe that counseling is warranted (although he noted that he would follow the Court's instruction, pending appeal). Additionally, in a letter dated November 13, 2009, Senator Monserrate's counsel asserted that Ms. Giraldo "takes umbrage at being *defamed* as a 'domestic violence' victim."[41] Based on its review of the entire record in this case, the Select Committee finds that the reckless assault of Karla Giraldo by Senator Monserrate on December 19, 2008 *was* a crime of domestic violence involving the use of physical force against an intimate partner, Ms. Giraldo, resulting in physical injury to Ms. Giraldo.

This is evident from Ms. Giraldo's own testimony. At trial and again at sentencing, she repeatedly referred to Senator Monserrate as her "boyfriend"[42] or "beau"[43] and acknowledged that, while she does not have a key to his apartment,[44] she kept a "small amount" of her clothes there.[45] In trying to convince the judge during the sentencing proceeding that she did not need an order of protection issued on her behalf, Ms. Giraldo explained to the Court that she "want[s] to continue ... [her] normal life" with Senator Monserrate and that "prior to this [incident] happening we had plans and we would like to get married."[46] Senator Monserrate's own comments to the judge at sentencing emphasizing his love for Ms. Giraldo,[47] his desire to "continue to be... with her,"[48] and his being committed to "providing her with happiness and good," further support the Committee's belief that this relationship was not a transitory or "one-night" affair, but rather a non-marital "intimate relationship" as that term is used in the "family offense" section of the Criminal Procedure Law.

Thus, pursuant to CPL § 530.11(1) (e), persons who are in a non-marital "intimate relationship" are included within the definition of "member of the same family or household" for

---

40 *On the Road to City Hall: December 8, 2009 Interview with Hiram Monserrate, supra.*

41 Letter from Chad Seigel, Esq. to Daniel R. Alonso, Esq. (Nov. 13, 2009).

42 Record 610, 612; Sentencing 55.

43 Record 668.

44 Record 611.

45 Record 635.

46 Sentencing 53.

47 Sentencing 130, 132.

48 Sentencing 132.

purposes of determining whether an offense is a "family offense" under that section. Under this recently-added provision of CPL § 530.11, "members of the same family or household" include:

> persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an "intimate relationship" include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship."[49]

Certain Penal Law offenses, including assault, when committed between "members of the same family or household," are considered "family offenses" for which the victim has a statutory right to proceed civilly (through the filing of a family offense petition in Family Court), criminally or both. Notably, the judge at sentencing in this case issued a "family offense" final order of protection under CPL § 530.12 rather than a "non-family offense" order under CPL § 530.13, thus entitling the victim to the added protections and safeguards of a CPL § 530.12 order. These include automatic entry of the order into the statewide electronic registry of orders of protection.[50]

Despite his protestations to the contrary, Senator Monserrate was indeed convicted of an act of domestic violence.

---

[49] CPL § 530.11(1)(e).

[50] In spite of Ms. Giraldo's claims as to the benevolent nature of Senator Monserrate's forcible conduct in the hallway, no effort was made by the defense in this case to characterize that conduct as non-criminal under the "justification" defense set forth in Penal Law § 35.05(2). Under that section, forcible conduct that would otherwise rise to the level of a criminal assault is "justifiable and not criminal" when, under specified circumstances, "such conduct is necessary as an emergency measure to avoid an imminent public or private injury." Penal Law § 35.05(2). The failure to raise this possible defense was apparently not an oversight but rather a recognition by the defense, based on the clear weight of the evidence, that Senator Monserrate had in fact *failed* to seek immediate emergency medical assistance for Ms. Giraldo by calling 911 or promptly transporting her to the closest hospital emergency room following the broken glass incident.

V. LEGAL AUTHORITY TO SANCTION

It is well established that a legislative body has the right to regulate the conduct of its members and may discipline a member as it deems appropriate.[51] The power to judge the qualifications of members includes the power to discipline a seated member.[52] "It is a power of self protection that is inherent in legislative assemblies."[53] The New York Court of Appeals has observed that although the New York Constitution, like many state constitutions, does not explicitly enumerate the "power to keep order or to punish members or others for disorderly conduct, or to expel a member," "[t]he necessity of the powers mentioned is apparent, and is conceded in all the authorities."[54] Such sanctions may also include censure, removal of privileges,[55] or other remedies which the Senate may choose to fashion.[56] This power is inherent in parliamentary bodies as a "self-disciplinary action necessary to protect the integrity of the institution and its proceedings."[57] It is a "power of protection" that has a long history in parliamentary systems and in the legislatures of the United States.[58] As the Judiciary Committee of the New York Assembly explained in 1920,

---

51 *See* MASON'S MANUAL § 561.2; *Bryan v Liburd*, 1996 WL 785997 (V.I. Dec. 30, 1996) (holding that the Virgin Islands Legislature, pursuant to its power to "judge of qualifications of its members" had the power to suspend a member without pay).

52 *Bryan*, 1996 WL 785997, at *4.

53 *Id.* The *Bryan* court noted that this inherent power to sanction a member included the power to expel a member.

54 *People ex rel. McDonald v Keeler*, 99 N.Y. 463, 481 (1885).

55 As noted below, the New York State Senate and Assembly have previously utilized all of these measures.

56 CUSHING § 675 (the punishments "within the competency of a legislative assembly to inflict" include "the withdrawal of privileges conferred," formal reprimand, and expulsion).

57 *See* CONGRESSIONAL RESEARCH SERVICE, RECALL OF LEGISLATORS AND THE REMOVAL OF MEMBERS OF CONGRESS FROM OFFICE 2 (updated Mar. 20, 2003); *see also Hiss v Bartlett*, 69 Mass. 468 (1855).

58 *Hiss*, 69 Mass. at 475. In this seminal expulsion case, the Massachusetts Supreme Court explained that despite the fact that the Massachusetts Constitution does not contain express language providing for punishment or expulsion of members, the omission of explicit language conferring the power to punish was of no moment:

> because it was regarded as inherent, incidental and necessary, and must exist in every aggregate and deliberative body, in order to the exercise of its functions, and because without it such body would be powerless to accomplish the purposes of its constitution; and therefore any attempt to express or define it would impair, rather than strengthen it.... But independently of parliamentary custom and usages, our legislative houses have the power to protect themselves, by the punishment and expulsion of a member.

Id.

> Each house has also the sanction to punish members for disorderly behavior and other contempts of its authority, as well as to expel a member for any cause which seems to the body to render it unfit that he continue to occupy one of its seats. This power is generally enumerated in the Constitution among those which the two houses may exercise, but it need not be specified in that instrument since it would exist whether expressly conferred or not. It is a necessary and incidental power to enable the House to perform its high functions and is necessary to the safety of the State; it is a power of protection.[59]

It should be noted that while the Select Committee may make a recommendation regarding an appropriate sanction, the Select Committee does not itself have the power to issue any sanction under Senate Resolution 3409. Any Senator may choose to adopt or disregard the report and recommendation of the Select Committee as his or her conscience and duties under his or her oath of office dictate.[60]

---

[59] 3 PROCEEDINGS OF THE JUDICIARY COMMITTEE OF THE ASSEMBLY IN THE MATTER OF THE INVESTIGATION BY THE ASSEMBLY OF THE STATE OF NEW YORK AS TO THE QUALIFICATIONS OF LOUIS WALDMAN, AUGUST CLAESSENS, SAMUEL A. DEWITT, SAMUEL ORR AND CHARLES SOLOMON, TO RETAIN THEIR SEATS IN SAID BODY, Assembly Doc. No. 35 at 2746-47 (1920), *quoting* JUSTICE THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 133 (1871). *See also In re Lithuanian Workers' Literature Soc.*, 196 App. Div. 262, 268 (2d Dept. 1921), in which the court acknowledged the Assembly's ultimate determination as to its authority to sanction and ultimately expel members, stating that "I am not insensible that there was and still is a wide difference of opinion as to the propriety of that action of the Assembly, but we, as a court of the State, are reasonably bound to give respectful consideration to its action in that regard, as being that of the constitutional authority having final jurisdiction in the matter." Absent contrary authority, this decision is binding. *Mountain View Coach Lines, Inc. v Storms*, 102 A.D.2d 663, 664 (.1984)

[60] *See French v Senate*, 146 Cal. 604 (1905). In this seminal case on the disciplinary powers of state legislatures, the Supreme Court of California explained that decision of the full Senate to discipline a member (in that case, to expel a member) rested on "[t]he oath of each individual member of the Senate, and his duty under it to act conscientiously for the general good." *Id.* at 1034. The California Oath of Office on which the *French* Court relied is virtually identical to the current New York Oath of Office. *See* CAL. CONST. art. XX, sec. 3 (1879), *amended* Nov. 4, 1952. The New York Oath of Office states:

> I do solemnly swear (or affirm) that I will support the constitution of the United States, and the constitution of the State of New York, and that I will faithfully discharge the duties of the office of _____, according to the best of my ability.

N.Y. CONST. art. XIII, § 1.

A. EXPULSION

1. *Legislative Law § 3*

In general, "[t]he power to expel a member is naturally and even necessarily incidental to all aggregate, and especially all legislative bodies; which without such power, could not exist honorably, and fulfill the object of their creation."[61] The New York legislature has established procedures for the exercise of this power in the enactment of Legislative Law § 3, which provides simply:

> Each house has the power to expel any of its members, after the report of a committee to inquire into the charges against him shall have been made.[62]

This power may only be exercised by the full Senate, provided that prior to the vote to expel, a Senate committee (1) conducts an inquiry into the charges against that member, and (2) issues a report of its inquiry to the full Senate for its consideration.

As is evident from the minimal requirements of Legislative Law § 3, the expulsion power is necessarily broad, deriving from "an ancient parliamentary privilege."[63] As noted judge and scholar Luther Stearns Cushing explains in his authoritative treatise on the subject of legislative procedure in the United States, the power "is in its very nature discretionary, that is, it is impossible to specify beforehand all the causes for which a member ought to be expelled; and, therefore, in the exercise of this power, in each particular case a legislative body should be governed by the strictest justice."[64] Therefore, other than compliance with requirements of Legislative Law § 3, and the requirement of a majority vote of the Senate that would be required for any typical Senate action, "[i]n all other respects the power is absolute."[65]

The Senate therefore has the discretion to determine, as it has through Senate Resolution 3409, the composition of the committee, its procedures, and the required contents of its report, and any other issues. By delegating the "inquiry" in this matter to a "committee" and mandating the issuance of a "report" of this inquiry upon the full Senate, the requirements of Legislative Law § 3 have been met.[66] By implication, Legislative Law § 3 places no limits on the

---

61 CUSHING § 625.

62 N.Y. LEGIS. LAW § 3.

63 *See* 1 CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 98-99 (1906) ("LINCOLN").

64 CUSHING § 625.

65 MASON'S MANUAL § 562.2.

66 It should again be noted that the Senate did not rely on Legislative Law § 3 in establishing the Select Committee, nor is the Select Committee solely directed to consider expulsion. As explained in the section entitled "Investigation of the Select Committee," above, the Select Committee was formed not pursuant to the Senate's expulsion powers, but pursuant to the Senate's broad investigative powers and disciplinary powers. Senate Resolution 3409 also granted the Select Committee the discretion to consider "sanctions" generally, which includes, but is not limited to expulsion. Regardless, by conducting a committee inquiry and

(continued...)

Senate and by extension, on the Select Committee, in determining whether and how to hold hearings, take testimony, and conduct fact-finding. The only limitations on the procedures adopted are those that may be imposed by due process.[67]

The language of Legislative Law § 3 was enacted in its present form pursuant to "AN ACT in relation to legislation" on May 18, 1892.[68] A predecessor version of the statute appears in Chapter VII of *The Revised Statutes of the State of New York*, published in 1829, as § 12 of Title II and reads:

> Each house has the power to expel any of its members, and to punish its members and officers for disorderly behavior, by imprisonment; but no member shall be expelled, until the report of a committee, appointed to inquire into the facts alleged as the ground of his expulsion, shall have been made.[69]

This statute was drafted by a commission appointed by the legislature in 1825 to update the legislative law, with a specific view to elucidate an area that was, at that time, governed principally by uncodified privileges and rights inherited by tradition at common law.[70] It is apparent that by enacting this provision, the legislature sought simply (1) to formally declare an already-existing inherent right of the legislature, and (2) to generally define its contours,[71] the rationale being that providing additional notice and general guidelines for the exercise of venerable and well-worn legislative rights and privileges through written law was proper — one of the Commission's stated goals was to provide some "legislative definition of those privileges of the houses" and remove any "snare for the unwary."[72]

---

issuing a report to the full Senate, the requirements of Legislative Law § 3 have been met, and the full Senate is free to expel or not expel Senator Monserrate as each Senator's conscience and oath of office dictates.

67 This includes compliance with New York Civil Rights Law § 73, which enumerates a "Code of fair procedure" for investigative bodies. Most of the requirements relate to the treatment of witnesses and witness testimony. As no witnesses appeared before the Select Committee, the majority of the requirements are inapposite in the present case. Senator Monserrate was invited to testify and served with a copy of § 73, but declined to participate in the Select Committee's process.

68 1892 N.Y. Laws ch. 682, at Vol. 2, at 1670.

69 1 Revised Statutes of New York, part 1, ch. VII, tit. II, § 12, at 154 (1st ed. 1829). The statute appears in subsequent editions of the *Revised Statutes* in substantially the same form.

70 REPORT OF THE COMMISSIONERS, APPOINTED BY THE ACT OF APRIL 21, 1825, TO REVISE THE STATUTE LAWS OF THIS STATE (1827) (Legislative Document No. 7) ("1827 REPORT OF THE COMMISSIONERS"). This Report was made to the Senate on February 10, 1827. The Commissioners submitted a draft of Chapter VII, entitled "Of the Legislature."

71 According to the note to § 12, the expulsion provision was "[d]eclaratory, and partly new." 1827 REPORT OF THE COMMISSIONERS at 12.

72 *Id.* at 14.

Because Legislative Law § 3, as an act of the Legislature, is presumptively valid,[73] and has never been challenged nor held unconstitutional, the Select Committee's analysis of the legal basis of the power of expulsion could end there. However, for the benefit of the Senate as it considers this matter, we set forth in the following sections an analysis of the relevant authority from the New York State Constitution that grant the Senate the power to expel a member.

2. *Constitutional Authority*

Unlike some state constitutions,[74] the New York Constitution has no express provision explicitly authorizing either house to expel its members. The most our Constitution states relating to the subject is simply that "[e]ach house shall determine the rules of its own proceedings, and be the judge of the elections, returns and qualifications of its own members."[75] However, the weight of authority is that a house of the state legislature has the power to expel its members even without an express constitutional mandate. As Cushing explains, "[i]n the States of Massachusetts, New Hampshire, *New York*, and North Carolina there being no constitutional provision on this subject, the power to expel exists as a necessary incident to every deliberative body and may be exercised at the discretion of the assembly and in the usual way of proceeding."[76] Moreover, "[w]here no provision is made relating to this subject, expulsion takes place in the same manner with any other proceeding. In some of the constitutions there are express provisions upon this subject which in those States, of course, must be observed."[77] In other words, because there is no express provision to the contrary, the New York Senate may expel a member by a simple majority vote.

---

73 *LaValle v Hayden*, 98 N.Y.2d 155 (2002) "Legislative enactments enjoy a strong presumption of constitutionality. While the presumption is not irrefutable, parties challenging a duly enacted statute face the initial burden of demonstrating the statute's invalidity 'beyond a reasonable doubt'. Moreover, courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional." *Id.* at 161. *See also Paterson v University of State of N.Y.*, 14 N.Y.2d 432, 438, (1964); *People v Tichenor*, 89 N.Y.2d 769, 773,(1997); *People v Pagnotta*, 25 N.Y.2d 333, 337, (1969); *Alliance of Am Insurers v Chu*, 77 N.Y.2d 573, 585 (1991).

74 *See, e.g., French*, 146 Cal. 604, 606 (1905) (stating that the California Constitution expressly provides that the senate "shall determine the rule of its proceeding, and may, with the concurrence of two thirds of all the members elected, expel a member." (CAL. CONST., ART. IV, § 9.); *State Ex Rel. Haviland v Beadle*, 111 P. 720, 722 (Mont. 1910) ("Section 9, art. 5, provides that each House shall judge of the election, returns, and qualifications of its members. Section 11 provides that each house shall have power, with the concurrence of two-thirds, to expel a member.") U.S. CONST. ART. I, § 5 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and . . . may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two-thirds, expel a Member.")

75 N.Y. CONST. ART. III, § 9.

76 CUSHING § 687.

77 *Id.* § 683.

In the well-known expulsion case of *French v. Senate*, the California Supreme Court entertained a mandamus action initiated by duly elected members of the California Senate who had been expelled for, allegedly, the taking of bribes. The Senate refused to allow the Senators to sit and did not afford them any process to contest the charges, although none was convicted of any crime. The court held, based on "high authority," that "even in the absence of an express provision conferring the power, every legislative body in which is vested the general legislative power of the state, has the implied power to expel a member for any cause which it may deem sufficient."[78] In explaining the existence of explicit expulsion provisions that exist in many constitutions (including the federal Constitution) and often contain a super-majority requirement, the Court stated that "[t]he only effect of th[ose] provision[s] is to make the concurrence of two thirds of the members elected necessary to its exercise.... If this provision were omitted, and there were no other constitutional limitations on the power, the power would nevertheless exist and could be exercised by a majority."[79]

French relied in part on the important case of *Hiss v. Bartlett*, which observed that "The only clause in the constitution which can have a bearing on this question [the legislature's power to expel a member] is as follows: 'The house of representatives shall be judge of the returns, elections and qualifications of its own members, as pointed out in the constitution; shall choose their own speaker, appoint their own officers, and settle the rules and orders of proceeding in their own house.'"[80] The Court held that "this clause gives the power [to expel members]." The Court acknowledged the clause's express omission of the ability to punish representatives, but reasoned that "the omission of an authority to punish members, when that of punishing persons, not members, is so distinctly given, may well have been made because their implied power over their own members was full and complete, though an express grant of power was necessary, in regard to persons not members.... There is nothing to show that the framers of the constitution intended to withhold this power. It may have been given expressly in other states, either *ex majori cautela* [as a precaution] or for the purpose of limiting it, by requiring a vote of more than a majority."[81]

This view is shared by most of the authoritative resources on legislative procedure. *Mason's Manual of Legislature Procedure* explains that "[m]ost state constitutions provide that each house, with the concurrence of two-thirds of all members elected, may expel a member. If these constitutional provisions were omitted and there were no other constitutional limitations, the power to expel would nevertheless exist and could be exercised by a majority. The only effect of the constitutional provisions is to make the concurrence of two-thirds of the members necessary to expel a member. In all other respects the power is absolute."[82] In his treatise, Cushing explains that "[t]he power to expel a member is naturally and even necessarily incidental to all aggregate, and especially all legislative bodies; which without such power, could not exist honorably, and fulfill the

---

78 146 Cal. at 606.

79 *Id.*

80 69 Mass. at 471-72.

81 *Id.* at 472-473.

82 MASON'S MANUAL §§ 562.1-562.2.

object of their creation."[83] As stated previously, the New York courts have acknowledged this power.[84]

a. The Nature of State Legislative Power

Unlike the houses of the United States Congress, which under the federal Constitution wield only those powers that have been specifically *enumerated*, the powers possessed by state legislatures are general and plenary unless expressly *limited* or *prohibited* by the state (or federal) constitution.[85]

> [I]n determining whether state government possesses the requisite power to act in a given area . . . it must [] be presumed that the state government possesses the inherent power to act in the area involved. This presumption of inherent power can only be overcome by an express prohibition in a state constitution on the exercise of the power at issue, or a provision regulating the manner in which it is to be exercised.[86]

As explained succinctly by the Kansas Supreme Court, "the sources of power of the legislative branches of the federal and state governments differ profoundly. Federal legislative power derives solely from the federal Constitution; a state legislature is free to act except as it is restricted by the state constitution."[87]

This is the same view that has been adopted in New York: "[state] Constitutions, unlike the federal Constitution, are not grants of power but, on the contrary, are limitations 'of the powers of the people themselves, self-imposed by the constitutional compact.'"[88] The courts have emphatically explained the significant breadth of this legislative power in New York: "except as limited by the Constitution, the power of the Legislature to enact laws is absolute, plenary and unlimited and may or may not be exercised, as the legislators choose, and its acts may be general in their application or may enunciate a rule for special cases."[89] Likewise, the Court of Appeals has

---

83 CUSHING § 625.

84 *See People ex rel. McDonald v Keeler*, 99 N.Y. 463, 481 (1885); *In re Lithuanian Workers' Literature Soc*, 196 App. Div. 262, 268 (2d Dept. 1921).

85 *See* THOMAS C. MARKS, JR. & JOHN F. COOPER, STATE CONSTITUTIONAL LAW IN A NUTSHELL § 6 (2d ed. 2003).

86 *Id.*

87 *Sedlak v Dick*, 256 Kan. 779, 791 (1995) (internal citation omitted).

88 *People v Long Island R.R.*, 185 N.Y.S. 594 (Sup. Ct. 1920), *rev'd on other grounds*, 186 N.Y.S. 589 (2d Dep't 1921) (quoting *People v Draper*, 15 N.Y. 532, 1857 WL 7076, at *9 (1857)). The *Draper* court goes so far as to hold that "[t]he constitution vests all legislative power in the senate and assembly, with certain restrictions and limitations imposed on that body by the constitution itself. Independent of those limitations, *the legislative power is omnipotent within its proper sphere*." 1857 WL 7076, at *9 (emphasis added).

89 *Rieseberg v State*, 243 N.Y.S.2d 887, 892 (N.Y. Ct. Cl. 1963).

stated that "[t]he general legislative power is absolute and unlimited except as restrained by the Constitution. Every act of the Legislature must be presumed to be in harmony with the fundamental law until the contrary is clearly made to appear."[90]

b. The New York Constitution

The history of New York's Constitution further supports the view that each house of the legislature may exercise this expulsion power, either as an "inherent power," or as a power necessarily implied in Article III, § 9's provision that permits each house to judge the qualifications of its members. As noted previously, this is essentially identical to the provision of the Massachusetts Constitution that the *Hiss* court relied upon in finding that the Massachusetts House has constitutional authority to expel a member.[91]

According to Charles Z. Lincoln's authoritative multi-volume history of the New York Constitution, the right of a house to remove its members traces its roots at least as far back as the original 1683 New York *Charter of Liberties and Privileges*, which provided "THAT THE said Representatives are the sole Judges of the Qualifications of their own members, and likewise of all undue Eleccons [sic] *and may from time to time purge their house as they shall see occasion* during the said sessions."[92] In the note on this section, Lincoln indicates that this provision is the predecessor to the clauses that appear in subsequent versions of the New York Constitution granting the legislative houses the power to "judge . . . the qualifications" (the "Qualifications Clause") of their respective members.[93] The note also states that "[t]his was an assertion of an ancient parliamentary privilege and it has continued in all our Constitutions."[94]

The first Constitution, adopted in 1777, does not contain the "purge" language, but instead reads: "the Assembly, thus constituted, shall choose their own speaker, be judges of their own members, and enjoy the same privileges, and proceed in doing business, in like manner as the Assemblies of the colony of New-York of right formerly did."[95] Thus, by implication, the power to expel (along with other privileges and powers inherent under this clause) were expressly, if indirectly, retained. By contrast, the second Constitution, adopted in 1821, reads simply "each house shall determine the rules of its own proceedings, and be the judge of the qualifications of its own members."[96]

---

90 *People v Bradley*, 207 N.Y. 592, 610 (1913) (internal citations omitted).

91 69 Mass. at 473.

92 LINCOLN at 98-99 (emphasis added).

93 *Id.* at 99.

94 *Id.*

95 N.Y. CONST. § 9 (1777).

96 N.Y. CONST. ART. I, § 3 (1821). The 1821 provision is very similar to the current version, with the only difference being the addition of the italicized words in the present version: "[e]ach house shall determine the rules of its own proceedings, and be the judge of the *elections, returns and* qualifications of its own members. N.Y. CONST. ART. III, § 9.

The reports of the convention debates themselves do not shed light onto the motivation for this change, but there is no indication that it was intentionally abrogated.[97] This question was expressly addressed just six years later in the 1827 Report of the Commissioners responsible for the drafting of Legislative Law § 3.[98] As explained previously, the Commission described Legislative Law § 3 as "[d]eclaratory, and partly new."[99] More importantly, the Commissioners observed from the outset that "[t]he amended constitution of this state, is silent upon the subject of the privileges of the legislature, or of either house," and noted the above discrepancy between the 1777 and 1821 Constitutions. It was the Commission's determination that "the omission of these words in the amended constitution, was not intended to deprive, and cannot have the effect of depriving, the two houses of the legislature of the indispensable power of punishing contempts." While the Commissioners' reference is to the legislature's inherent and "indispensible" power to punish contempts (a power that is enumerated in § 13 of their draft revisions) and § 12 is not specifically discussed, the Commissioners' logic is easily extended to the rationale behind § 12 — that it is simply a "declaratory" expression of an "indispensible" parliamentary power that had previously been held at common law, and that the Commission felt

---

97 This is in contrast to the conclusion of the New York State Assembly's eight-member Ethics and Guidance Committee in its 1987 report regarding its inquiry into the actions of Assemblywoman Gerdi E. Lipschutz (the "Lipschutz Report"). (Attached at Exhibit 18). The Committee concluded that the Assembly did not have the authority to expel Assemblywoman Gerdi E. Lipschutz, and instead recommended other discipline. Although a complete analysis of the Assembly's position is beyond the scope of this report, the Select Committee notes that the Lipschutz committee did not consider or even cite to Legislative Law § 3 or any of its legislative history, nor did it cite to any of the cases or authorities relating to the inherent authority of a legislature to expel a member.

It is also worth noting that the Select Committee finds the Lipschutz Report's extensive reliance on the Supreme Court's decision in *Powell v McCormack*, 395 U.S. 486 (1969), similarly inapposite. That decision construed the parallel provision in the federal Constitution, which, as explained previously, does not function in the same manner as a state constitution. While the New York Constitution's "qualifications" provision is worded similarly to the federal Constitution's (and most other states' Constitutions), the profound differences between federal and state constitutional structure minimize any precedential value or persuasive authority of *Powell*'s interpretation of the federal Constitution to the question of interpreting the New York Constitution. As the Maine Supreme Court explained in *League of Women Voters v Secretary of State*, states are not bound to adopt the Supreme Court's interpretation of the federal Constitution where the history and structure of their Constitutions differ, even where the language in question is identical. 683 A.2d 769, 772-73 (Me. 1996). The court specifically noted *Powell v McCormack* as an example of this. Moreover, *Powell* is an *exclusion* case, not an *expulsion* case. There is no argument here that the member does not meet the "qualifications" for membership and is seeking to prevent him from taking his seat (which was the case in *Powell*). The invocation of the power of *expulsion* is analytically distinct.

98 1827 REPORT OF THE COMMISSIONERS at 12.

99 *Id.*

the need to statutorily declare and define it pursuant to their stated belief that it was "peculiarly proper, that all the privileges, both of the body and of its members, should be defined by written law."[100]

Finally, two other provisions of the New York Constitution strongly support the Senate's power to expel a member. First, Article XIII, § 6 grants the legislature the power to "declare the cases in which any office shall be deemed vacant when no provision is made for that purpose in this constitution." Because the New York Constitution contains no provision for determining when a member's office is vacant due to expulsion, this provision authorizes the legislature to "declare the cases" in which the offices of members are vacated. The legislature has thus acted in accord with this provision in enacting Legislative Law § 3, which sets out the minimum procedures required to expel a member and thus deem the member's seat vacant.

Second, Article I, § 14 (entitled "Common law and acts of the colonial and state legislatures") specifically preserves powers and rights that were accorded at common law and by the laws of the colony of New York prior to the 1777 Constitution that have not been expressly abrogated.[101] Such "continu[ing]" powers would include the power to "purge" members of a legislative house, since this was a right deriving from the colonial charter — an "act of the legislature" — and expressly recognized in the pre-1777 "colony of New York" which was never expressly abrogated.

3. *Effect of the Timing of Misconduct on the Power to Expel*

It should be noted at the outset that Senator Monserrate was a Senator-elect at the time that he committed the crime for which he was convicted and thus arguably subject to the Rules and jurisdiction of the Senate, rendering any argument as to the propriety of the Select Committee's investigation moot *ab initio*.

Regardless, as explained previously, the power to expel under the Constitution and Legislative Law § 3 is extremely broad. While there is some precedent suggesting that punishment

---

100 *Id* at 14. It is likely that the Commissioners' specific focus on the inherent power of a legislative house to punish for contempt is in response to the then-recent case of *Anderson v Dunn*, 19 U.S. (6 Wheat) 204 (1821), which is in fact cited by the Commissioners in their note to Title II. In *Anderson*, the seminal American case on the power of legislative bodies to punish for contempt, The Supreme Court held that the houses of Congress had the inherent power to punish for contempt "by necessary implication," despite the "constitution of the United States being equally silent [as the New York Constitution] on this subject." *Id.*

101 "Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the nineteenth day of April, one thousand seven hundred seventy-five, and the resolutions of the congress of the said colony, and of the convention of the State of New York, in force on the twentieth day of April, one thousand seven hundred seventy-seven, which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, subject to such alterations as the legislature shall make concerning the same. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this constitution, are hereby abrogated."

of a member for an act of misconduct that occurred prior to that member's taking the oath of office is disfavored under certain circumstances, given the strong policy supporting the right of the electorate to choose its members, it is important to distinguish between the policy choices that a legislative body may make on the one hand, and its ultimate power to act on the other. As a recent report of the Congressional Research Service on the subject of expulsion explains, "[a]lthough such authority appears to be extensive as to the grounds, nature, timing, and the procedure for the expulsion of a Member, *policy* considerations, as opposed to questions of *power* or authority, may have generally restrained the Senate and the House in the exercise of their authority to expel."[102] This "reticence [ ] to expel a Member for past misconduct after the Member has been duly elected or re-elected by the electorate, with knowledge of the Member's conduct, appears to reflect in some part the deference traditionally paid in our heritage to the popular will and election choice of the people."[103]

Moreover, the Judiciary Committee of the United States House of Representatives has explained that "the power of the House to expel or punish by censure a Member for misconduct occurring before his election or in a preceding or former Congress is sustained by the practice of the House, sanctioned by reason and sound policy and in extreme cases is absolutely essential to enable the House to exclude from its deliberations and councils notoriously corrupt men, who have unexpectedly and suddenly dishonored themselves detailed various policy considerations in expulsions for past misconduct."[104]

This policy has been applied in New York as well. In 1910, Senator Jonathan P. Allds was investigated by the Senate on a bribery allegation stemming from actions he had taken in the Assembly nine years earlier, prior to his being seated in the Senate. While Allds resigned before he could be expelled, the Senate nonetheless voted to sustain the charges, affirming that it was its duty to expel, despite the timing of the incident relative to Allds's service in the Senate.[105]

The Select Committee finds that the Senate unquestionably has the power to discipline a member for misconduct occurring prior to the member's taking of the oath of office. It is particularly so in this case, as the misconduct in question occurred when Senator Monserrate was already a Senator-elect, and is extremely close in time to Senator Monserrate's taking of the oath. Moreover, the normal policy considerations underpinning the general reluctance of legislative bodies to punish prior misconduct do not apply here; the Select Committee agrees with the proposition that deference should be paid "to the popular will and election choice of the people," but notes that

---

102 CONGRESSIONAL RESEARCH SERVICE, RECALL OF LEGISLATORS AND THE REMOVAL OF MEMBERS OF CONGRESS FROM OFFICE 3-4 (updated Mar. 20, 2003).

103 *Id.* at 4.

104 REPORT OF THE HOUSE JUDICIARY COMMITTEE, H. Rept. No. 570, 63rd Cong., 2d Sess. (1914).

105 PROCEEDINGS OF THE JUDICIARY COMMITTEE OF THE ASSEMBLY IN THE MATTER OF THE INVESTIGATION BY THE ASSEMBLY OF THE STATE OF NEW YORK AS TO THE QUALIFICATIONS OF LOUIS WALDMAN, AUGUST CLAESSENS, SAMUEL A. DEWITT, SAMUEL ORR AND CHARLES SOLOMON, TO RETAIN THEIR SEATS IN SAID BODY, Assembly Doc. No. 35 at 2290-91 (1920).

although Senator Monserrate "has been duly elected ... by the electorate," it was decidedly not "with knowledge of the Member's conduct." As stated previously, Senator Monserrate was elected on November 4, 2008, prior to the date of the incident, which occurred on December 19, 2008, in the intervening period before he officially took the oath of office on January 7, 2009. In this instance, there is little risk of countervailing the will of the electorate, which had already elected Senator Monserrate without the benefit of foreknowledge of his misconduct, and which had no recourse once it had occurred. It is not sound policy to afford Senator Monserrate protection from punishment because of the mere happenstance that the crime for which he was convicted took place prior to the ministerial act of his taking the oath of office. From a policy perspective, the important question is whether the voters had the benefit of knowledge of his behavior, and in this case, that can be answered in the negative.[106]

4. *Precedent for Expulsion*

a. New York Expulsion Cases

Contrary to the statements made in the Lipschutz Report, there have been a number of cases since the adoption of the first New York Constitution in 1778 where a member of the New York legislature was expelled from the Senate or the Assembly, or where expulsion was considered.[107]

i. Senator John Williams (1779)

Colonel John Williams was a member of the New York State Senate from the Eastern District during the First Session consisting of 1777-78.[108] During the Revolutionary War, Williams was charged with defrauding the officers and privates of his regiment.[109] He was charged with seven counts, including a number of treasonous activities.[110] The Senate resolved that the charges, "if true, render him unworthy to hold his Seat in this Senate."[111] Williams denied all of the

---

106 It is worth noting that a similar issue recently arose in a Congressional investigation into possible impeachment charges against United States District Judge G. Thomas Porteous, Jr. Many of the charges against Porteous involve activities prior to his taking the oath to serve. Nonetheless, the distinguished legal experts testifying before the House Judiciary Committee unanimously and unequivocally agreed that Porteous could be impeached for activities that predated his oath, even though some of these activities took place years prior to his elevation to the federal bench. *See* Statement of Akhil R. Amar, Statement of Charles G. Geyh, and Statement of Michael J. Gerhardt, *available at* http://judiciary.house.gov/hearings/hear_091215.html.

107 *See* EDGAR L. MURLIN, NEW YORK RED BOOK 387, 485 (James B. Lyon 1897) ("RED BOOK").

108 *Id.* at 387.

109 1 JABEZ D. HAMMOND, THE HISTORY OF THE POLITICAL PARTIES IN THE STATE OF NEW-YORK 85 (1850) ("HAMMOND").

110 JOURNAL OF THE SENATE OF THE STATE OF NEW YORK 136-37 (1778).

111 *Id.* at 121.

charges in relevant part, but the Senate found him "guilty" of the fraud charges which had been leveled against him.[112] On February 8, 1779, the Senate determined that

> [t]he Crimes of which John Williams, Esq., stands adjudged by the Resolutions of this Senate ... hold him up as entirely without Integrity, evidenced by his unjust Misapplication of Military Authority, his flagrant Perculation on the United States of North-America, his dishonest Attempts to deprive the Militia under his Command of their just Pay, and his after Attempts to cover his injustice by undue Applications of a great Part of the Monies which he had received from the Pay-Office of the said United States, upon false and fraudulent Pay-Abstracts, fabricated and attested by himself. In this accumulated and just View of his Conduct, he appears to this Senate, wholly unworthy to represent the good People of this State in the dignified and important Place of a Senator thereof.
>
> Resolved, therefore, That the said John Williams, Esquire be, and he is hereby expelled from this Senate.[113]

ii. Senator Ephraim Paine (1781)

Ephraim Paine joined the State Senate in October 1780 but was expelled for "neglect of duty" on March 15, 1781.[114] He was initially cited on a series of contempt charges for failing to "attend in his seat."[115] The Senate ultimately determined

> That the said Ephraim Paine, Esq.; hath undutifully, against the Privilege of this Senate, and in Breach of the Trust committed unto him by the Freeholders of the Middle District of the State, obstinately, unfaithfully, and against his Duty, absented himself from the Service of the Senate, in contempt of the Privilege of this Senate, and to the Evil example of others.
>
> *Resolved therefore*, that the said Ephraim Paine, Esq.; be and he is hereby expelled from this Senate.[116]

---

112 *Id.* at 159-60.

113 *Id.* at 166.

114 HAMMOND at 46; RED BOOK at 387.

115 JOURNAL OF THE SENATE OF THE STATE OF NEW YORK 57, 60, 64, 70 (Fish-Kill 1781).

116 *Id.* at 78. While the motivation underlying Paine's expulsion is not immediately clear from the historical record, Alexander Hamilton described him as "a man of strong prejudices; his zeal is fiery, his obstinacy unconquerable," and it has been suggested that he was viewed by his colleagues as a radical and that it was this radicalism that motivated his expulsion from the Senate. *See* 5 ALEXANDER HAMILTON, THE PAPERS OF ALEXANDER HAMILTON 139 (Harold C. Syrett ed., 1962); Citizendia.org, Ephraim Paine, http://www.citizendia.org/Ephraim_Paine (last visited Dec. 28, 2009).

iii. Assemblyman Jay Gibbons (1861)

Jay Gibbons, an Assemblyman from Albany's First District, was expelled from the Assembly on April 13, 1861.[117] On February 17, 1861, Gibbons was arrested and charged with bribery[118] — soliciting consideration for taking official action on a pending bill to increase the salary of the assistant district attorney of Albany County.[119] The Assembly appointed a five-member select committee to "investigate said charge, and to report the facts to this House, with their Conclusions thereon."[120] The resolution also granted subpoena power to the select committee.[121] The committee presented a written report to the full Assembly on March 20, 1861 along with a proposed resolution expelling Gibbons from the Assembly.[122] The Resolution read: "Resolved That Jay Gibbons, the member from the 1st Assembly district of the county of Albany, has been guilty of official misconduct rendering him unworthy of a seat in this House, and that he be, and hereby is expelled."[123] After a series of delays, the motion was again presented to the Assembly on April 4, 1861. Gibbons's counsel argued that the Assembly lacked the power to expel a member, and asked that the matter be referred to the judiciary committee, but the motion was defeated. One Assemblyman then moved to substitute the expulsion resolution for one of censure, which was likewise defeated and Gibbons was subsequently expelled by a majority vote.[124]

It should be noted that the report of the select committee cited as the rationale for its recommendation of expulsion the fact that it independently determined, through its investigation, that Gibbons had indeed committed a bribery offense that the Assembly found constituted "misconduct rendering him unworthy" of his seat, although it does not appear that he was ever criminally convicted for the offense.[125] This is a further indication of a New York legislative body's wide latitude in independently considering the consequences of member misconduct for its own purposes as distinct from any criminal law process related to that misconduct.

iv. Senator Charles G. Cornell (1867)

In October 1866, The New York City Citizens' Association sought the expulsion of Cornell from the Senate based on a number of charges of corruption in his capacity as New York

---

117 RED BOOK at 485.

118 The bribery statute in question is a general criminal statute, *see* 5 Revised Statutes, ch. 539, § 10, p. 159 (John W. Edmonds ed., 1862).

119 JOURNAL OF THE ASSEMBLY OF THE STATE OF NEW YORK 349 (1861).

120 *Id.*

121 *Id.*

122 *Id.* at 601.

123 *Id.*

124 *Id.* at 795.

125 *See* REPORT OF THE SELECT COMMITTEE APPOINTED TO INVESTIGATE THE CHARGE AGAINST JAY GIBBONS, A MEMBER OF THE FIRST ASSEMBLY DISTRICT OF ALBANY COUNTY, Assembly, No. 104, at 1-3 (N.Y. Mar. 20, 1861).

City's Street Commissioner.[126] Cornell refuted the charges and in November 1866, resigned as Street Commissioner. Nonetheless, the charges were pressed and the matter was referred to a five-member Senate committee, which issued a report on February 1, 1867. The committee determined that it would not determine "guilt or culpability of so high a grade as to be worthy of expulsion" based on an inference that Cornell's resignation as Street Commissioner was intended to foil an investigation of the charges against him and was an implicit admission of guilt. The committee concluded that "there must be affirmative evidence" of misconduct. Thus, the committee recommended that no sanction be forthcoming and was "accordingly discharged."[127]

v. Five Socialist Assembly Members (1920)

During the Red Scare, five Socialist Party Assembly Members were prevented from taking their seats in the New York State Assembly on the grounds that membership in the Socialist Party constituted disloyalty to the United States and thus constitutionally disqualified them from membership. These assemblymen (August Claessens, Samuel A. DeWitt, Samuel Orr, Charles Solomon, and Louis Waldman), in conjunction with the Socialist Party, attempted to overturn the Assembly action and be seated as duly elected representatives of their respective assembly districts.[128]

As the Judiciary Committee explained, Legislative Law § 3, while recognized as legitimate, was not implicated in the case because the question was not one of *expulsion* of the members for some misconduct, but rather *exclusion* of the members on the basis that they did not meet the qualifications of the office due to their failure to adhere to the oath of office to uphold the Constitution because of their allegiance to the Socialist Party.[129] It is noteworthy that the Judiciary Committee also concluded that

> [t]he right of the Assembly to exclude and expel members is fundamental, inherent and exclusive and would undoubtedly exist even in the absence of constitutional or statutory provisions, such provisions being generally regarded as merely declaratory of the power and inserted *ex majori cautela*. Such power is declared in the Constitution and statutes of this State. The power to exclude for disqualification is necessarily implied in the power declared by Section 10 of Article III of our State Constitution. Section 3 of the

---

126 4 Proceedings and Debates of the Constitutional Convention of the State of New York, Held in 1867 and 1868 at 3050 (1868).

127 *Id.* at 3051-52.

128 *See* The Tamiment Library/Robert F. Wagner Labor Archives, Guide to the Socialist Assemblymen Papers, *available at* http://dlib.nyu.edu/findingaids/html/tamwag/sa.html.

129 3 PROCEEDINGS OF THE JUDICIARY COMMITTEE OF THE ASSEMBLY IN THE MATTER OF THE INVESTIGATION BY THE ASSEMBLY OF THE STATE OF NEW YORK AS TO THE QUALIFICATIONS OF LOUIS WALDMAN, AUGUST CLAESSENS, SAMUEL A. DEWITT, SAMUEL ORR AND CHARLES SOLOMON, TO RETAIN THEIR SEATS IN SAID BODY, Assembly Doc. No. 35 at 2450-56, 2679. (1920).

> Legislative Law of this State is merely declaratory of the power of expulsion.[130]

b. Other Notable Expulsion Cases

i. Senators Frank French, Eli Wright, E. J. Emmons, & Harry Bunkers (1905)

This case, discussed above and given lengthy treatment by the California Supreme Court, arose out of a number of expulsions relating to the taking of bribes.[131] As explained previously, the court agreed that the Senate had the power to expel these members and explained that the expulsion power was limited only by "[t]he oath of each individual member of the senate, and his duty under it to act conscientiously for the general good."[132]

ii. Representative Thomas E. Wright (2008)

In a recent case, a Select Committee of North Carolina's House of Representatives investigated public corruption charges against State Representative Thomas E. Wright. Recognizing that "the House has the inherent authority to discipline its own members, a power not otherwise limited by the Constitution and thereby remaining with the people of North Carolina which is to be acted upon by and through their elected representatives," the House voted in favor of expulsion, finding that Wright's conduct constituted "conduct unfitting and unbecoming a member."[133]

iii. Senator David Jaye (2001)

In 2001, the Michigan State Senate expelled State Senator David Jaye, predicated in part on unconvicted allegations of domestic violence. The Senate charged that Jaye had engaged in "a recurring pattern of personal misconduct," and noted in particular that

> [i]n spite of sincere efforts to help Senator David Jaye alter his egregious pattern of behavior, he has continued to attempt to use his position as a State Senator in an effort to engage in and subsequently excuse his mistreatment of those less powerful than he. This is evidenced by his conduct on November 19, 2000, when he was involved in a violent physical altercation with his fiancée in Bay County, Michigan, which was witnessed by numerous citizens. This resulted in a citizen's emergency 911 call, and his subsequent apprehension by Michigan State Police troopers.[134]

The Senate concluded the expulsion resolution by explaining that a member "violat[es] the public trust by using his position as a Michigan State Senator against those who are in a lesser position of power." *Id.* at 522.

---

130 *Id.* at 2679.

131 *French v. Senate*, 146 Cal. at 605.

132 *Id.* at 609.

133 H.R. 2, Gen. Assem., 2008 Extra Sess. (N.C. 2008).

134 Mich. S. Res. 47 (2001), as reprinted in 45 Michigan Journal of the Senate 521.

iv. Senator William Blount (1797)

In this early and important federal expulsion case, Williams Blount was charged with attempting to "seduce an American agent among the Indians from his duty, and to alienate the affections and confidence of the Indians from the public authorities of the United States, and a negotiation for services in behalf of the British government among the Indians." Blount challenged the Senate's actions in court, leading to the Supreme Court's ruling that "[t]he right to expel extends to all cases where the offense is such as in the judgment of the senate is inconsistent with the trust and duty of a member."[135]

v. Senator Harrison Williams (1982)

The vast majority of cases in which the United States Senate has actually expelled a member have been for perceived disloyalty to the United States.[136] Some more recent cases, however, have involved other issues. One such case is that of Harrison A. Williams who was investigated in 1980 in connection with the ABSCAM scandal. The Ethics Committee recommended his expulsion based on the rationale that his conduct, which involved influence peddling and intentional concealment of wrongdoing, was found to have been "ethically repugnant," and tended to "bring the Senate into dishonor and disrepute." Williams resigned before the full Senate considered the committee's recommendation.[137]

vi. Senator Bob Packwood (1995)

The most recent expulsion case in the United States Senate is that of former Senator Bob Packwood of Oregon, who was alleged to have engaged in multiple acts of sexual misconduct. Following a protracted investigation, the Senate Ethics Committee issued a lengthy report of the charges and recommended expulsion. The committee relied in part on a 1964 Senate resolution granting it the power to recommend expulsion where it found that a member engaged in "improper conduct which may reflect upon the Senate" — even where such conduct does not specifically violate any law, the Senate code of conduct, or some other rule.[138] The Senate additionally based its expulsion recommendation on the finding that Packwood's sexual misconduct constituted "a pattern of abuse of his position of power and authority."[139] Like Williams, Packwood resigned before the full Senate was able to vote on the committee's recommendation.

Notably, the Senate specifically intended to afford the committee a high degree of flexibility in determining when particular conduct is worthy of discipline, and permits them to apply a rationale that is tailored to the specific facts and circumstances, rather than apply a "bright-line legal standard" in the traditional sense:

---

135 *In re Chapman*, 166 U.S. 661, 669-670 (1897); *see also* United States Senate Journal 892 (1797).

136 *See* ANN M. BUTLER & WENDY WOLFF, UNITED STATES SENATE ELECTION, EXPULSION AND CENSURE CASES 1793-1990 (1995) ("BUTLER & WOLFF").

137 *Id.* at 435.

138 *See* S. Rep't 104-137 at 6 (1995).

139 *Id.*

> The Senate did not attempt to delineate all the types of conduct or the guidelines which the Committee should follow in determining which actions by a Member would constitute "improper conduct" reflecting on the Senate. It appears that the standards and guidelines of what would be deemed proper or improper conduct for a Member would change and evolve, both as to the perception of the general public as well as for those within the legislature itself. The drafters of the resolution in 1964 intended that "improper conduct" would be cognizable by the Senate when it was so notorious or reprehensible that it could discredit the institution as a whole, not just the individual, thereby invoking the Senate's inherent and constitutional right to protect its own integrity and reputation.[140]

B. SANCTIONS OTHER THAN EXPULSION

1. *Authority*

As stated previously, the Senate possesses broad disciplinary powers, of which expulsion is but one. For purposes of self-protection, "[a] legislative body has the right to regulate the conduct of its members and may discipline a member as it deems appropriate."[141] Some of the sanctions that may appropriately be considered by the Senate are formal censure, withdrawal of privileges, or other informal methods which it may choose to fashion.[142] As Cushing explains, the punishments, besides the withdrawal of privileges conferred, which are usually within the competency of a legislative assembly to inflict are those of fine, imprisonment and reprimand, to which must be added, where the offender is a member, that of expulsion.

Similar to the expulsion power, these disciplinary measures derive from the inherent power of the legislature to protect itself and from parliamentary tradition. They also are declared in part by another clause of Article III, § 9 of New York's Constitution, which provides that "[e]ach house shall determine the rules of its own proceedings."[143]

According to a survey and report issued by the National Conference of State Legislatures, "[t]he power to discipline and expel members is inherent to a legislative body. It originated with the English Parliament in the sixteenth century, and it was exercised by colonial

---

140 *Id.* at 35.

141 MASON'S MANUAL § 561.2.

142 *See* BUTLER & WOLFF at xxix-xxx; CENSURE, EXPULSION AND OTHER DISCIPLINARY ACTIONS *in* NATIONAL CONFERENCE OF STATE LEGISLATURES, INSIDE THE LEGISLATIVE PROCESS, Tab 6 (1996) ("NCSL Report"); CUSHING § 625.

143 New York Senate Rule IX, § 7, for example, is an expression of the Senate's broad power to censure or inflict other penalties: "In all cases of absence of Senators during the sessions of the Senate, the Temporary President or a majority of the Senators elected may take such measures as they deem necessary to secure the presence of the absentees, and in addition to suspension for a given period, may inflict such censure or penalty as they may deem just on those who shall not render sufficient excuse for their absence."

legislatures prior to American independence. When responding to member misconduct, legislatures have the flexibility to view censure, expulsion and other disciplinary actions as points on a continuum."[144]

2. *Precedent*

a. Censure

Censure is a less severe form of discipline used by a legislative body against its members. A censure does not remove a senator from office, and "has no tangible effect on a senator's ability to hold his office."[145] It is merely a formal statement of disapproval, which can, however, have a powerful effect on a member and his or her relationships within the body.[146] Demeter's Manual of Parliamentary Procedure describes censure as "a reprimand, aimed at reformation of the person and prevention of further offending acts." Normally, censure requires the passing of a resolution by a majority vote.

i. Senator Richard Schermerhorn (1980)

While the Second Department was incorrect that Senator Richard Schermerhorn "became the target of the first resolution in the history of the New York State Senate to call for the censure of a Senator," censure has rarely been used in the Senate and is considered a serious response to misconduct. Schermerhorn was charged with allegedly making racial slurs, prompting a number of members to call for a resolution of censure against him. The resolution was eventually defeated when it was shown that the allegations were untrue. There is no indication that any party challenged the Senate's authority to censure Senator Schermerhorn.[147]

ii. Senators Irwin, Saxton, & O'Connor (1892)

These three Senators were held in contempt after refusing to vote on a particular issue. The contempt charges were referred to a committee, which after hearings were conducted, declared the right of the Senate to censure its members when the member's actions cause "an affront to the dignity of the Senate." The committee recommended that the Senators be formally censured, and the Senate passed the resolution by "a strict party vote."[148]

b. Withdrawal of Privileges

This is a relatively common sanction and is used in a wide variety of cases, often in conjunction with a censure or reprimand.

i. Assemblyman Mike Cole (2007)

While at a bar, Assemblyman Mike Cole shared drinks with a member of the Assembly Intern Program and eventually, after imbibing a large amount of alcohol, accompanied the

---

144 NCSL Report at 6-1.

145 BUTLER & WOLFF at xxix-xxx.

146 *Id.*

147 *See Schermerhorn v. Rosenberg*, 426 N.Y.S.2d 274, 279 (2d Dep't 1980).

148 *Senators Are Censured*, N.Y. TIMES, January 20, 1892.

intern back to her apartment and stayed overnight in her bedroom. The Committee on Ethics and Guidance conducted an investigation of the incident and determined that Cole had violated the "non-fraternization" policy of the intern programs and had, therefore, "brought disfavor on the New York State Assembly and the members thereof." The Committee recommended a number of punishments, including (1) removal as Ranking Minority member of the Assembly Committee on Alcoholism and Drug Abuse, (2) prohibition from participation in the Assembly Intern Program, (3) forfeiture of any rights or privileges of seniority, and (4) a public Letter of Censure and Admonition on behalf of the Assembly and its members. The Select Committee is not aware of any suggestion that the authority of the committee, the Speaker, or the Assembly to take this action was placed at issue.[149]

ii. Assemblywoman Gerdi E. Lipschutz (1987)

Following a five-week investigation by the Ethics and Guidance Committee, the Committee found that Lipschutz had committed misconduct by falsely certifying personal service vouchers, approving the hiring of and continuation on the Assembly payroll of a "no-show" employee after knowledge that such employee in fact performed no official duties for the Assembly, and that she had committed these acts in order to obtain or maintain a political benefit for herself. Although the matters had criminal implications, Lipschutz cooperated with the United States Attorney, after a grant of immunity, and provided essential testimony in the case against Richard Rubin, who had participated in the fraud. She was neither charged nor convicted of any crime.

Even though the Committee concluded that it lacked the power to recommend expulsion, it nonetheless concluded that it had the power to recommend other punishments. Among these recommendations were that: (1) Lipschutz be removed as Chair of the Assembly Majority Steering Committee and stripped of any allowances payable to the Chair of that Committee; (2) Lipschutz be removed as Chair of the Assembly Subcommittee on Crime Victims and stripped of any allowances payable to the Chair of that Committee; (3) Lipschutz be stripped of any additional staff allotments; (4) Lipschutz be stripped of any rights or privileges of seniority; (5) the committee report be sent to the attorney general with instructions that a lawsuit be filed to recover the money that Lipschutz wrongly steered; and (6) a resolution censuring the conduct of Lipschutz be considered in an open session of the Assembly and, if adopted, be read to the House in her presence. Lipschutz chose to resign before these sanctions could be acted upon.[150]

---

149 News Release: Assembly Speaker publicly Censures and Admonishes Legislator For Violation of Assembly Policy Prohibiting Fraternization With Student Interns, May 3, 2007.

150 *See* Lipschutz Report.

VI. RECOMMENDATIONS

The Select Committee concludes and believes that sanctions against Senators should only be imposed in cases of serious misconduct. Expulsion should be considered only in the most egregious circumstances. Having considered the available evidence and evaluated the facts relating to the conduct that provided the basis for Senator Monserrate's conviction, the Select Committee finds that this case is serious enough to warrant a severe sanction. In doing so, we are mindful that ultimately, the voters of Senator Monserrate's district, where he plans to run for re-election, will decide whether or not he is returned to office.

The Select Committee finds that the nature and seriousness of Senator Monserrate's conduct, as demonstrated by the surveillance video and the other unrebutted evidence outlined in this Report, showed a reckless disregard for Ms. Giraldo's well-being and for the severity of her injury. We therefore find, that under the particular facts and circumstances presented here, Senator Monserrate's misconduct damages the integrity and the reputation of the New York State Senate and demonstrates a lack of fitness to serve in this body.

Accordingly, the Select Committee recommends that Senator Monserrate be sanctioned by the full Senate, and that the Senate vote to impose one of two punishments: expulsion, or in the alternative, censure with revocation of privileges.[151] The Select Committee recommends that the full Senate convene to consider, debate and vote on both resolutions as soon as reasonably possible. Some members of the Select Committee believe that it would be logical and efficient for the Senate to consider and vote on the resolution for expulsion first, and only consider the second resolution if the resolution to expel fails. However, the Select Committee failed to reach a consensus on whether or not to include such a specific procedural recommendation in this report.

The Select Committee notes that its determinations are based on the totality of the facts and circumstances surrounding Senator Monserrate's overall conduct, not on the fact of his misdemeanor conviction. The Committee has determined that Senator Monserrate's conduct in this case presents particular factors that support the imposition of the sanctions set forth above. Specifically, the Select Committee gave substantial weight to the following factors:

First, Senator Monserrate's assault on Ms. Giraldo was a crime of domestic violence, and therefore in direct contravention of New York's well-established "zero-tolerance" policy in such matters. The following excerpts from the statement of legislative findings in the Family Protection and Domestic Violence Intervention Act of 1994 clearly reflect the Legislature's policy in this area:

> The legislature hereby finds and declares that there are few more prevalent or more serious problems confronting the families and households of New York than domestic violence. It is a crime which

---

151 The proposed sanction of censure with revocation of privileges would apply for the remainder of Senator Monserrate's current term only. Neither proposed sanction would bar Senator Monserrate from seeking future election as a New York State Senator, with all of the attendant privileges of a Senator. Furthermore, the Committee recommends that the resolution for censure with the revocation of privileges include the stripping of any Committee position or leadership post, the cessation of any payment of a legislative stipend beyond the Senate's base salary, and the loss of all seniority privileges.

> destroys the household as a place of safety, sanctuary, freedom and nurturing for all household members. We also know that this violence results in tremendous costs to our social services, legal, medical and criminal justice systems, as they are all confronted with its tragic aftermath.
>
> Domestic violence affects people from every race, religion, ethnic, educational and socio-economic group. It is the single major cause of injury to women. More women are hurt from being beaten than are injured in auto accidents, muggings and rapes combined.
>
> The corrosive effect of domestic violence is far reaching. The batterer's violence injures children both directly and indirectly... [and] no age group is immune from domestic violence... The legislature further finds and declares that domestic violence is criminal conduct occurring between members of the same family or household which warrants stronger intervention than is presently authorized under New York's laws. The integrity of New York's families from its youngest to its oldest members is undermined by a permissive or casual attitude towards violence between household members.
>
> Therefore, the legislature finds and determines that it is necessary to strengthen materially New York's statutes by providing for immediate deterrent action by law enforcement officials and members of the judiciary, by increasing penalties for acts of violence within the household, and by integrating the purposes of the family and criminal laws to assure clear and certain standards of protection for new York's families consistent with the interests of fairness and substantial justice.[152]

The New York State legislature has passed approximately 108 pieces of legislation relating to domestic violence that were enacted into law between 1995 and 2009. A list, together with summaries, of several of these domestic violence statutes is attached to this Report at Exhibit 19.

Second, as discussed in detail in Sections IV.B, IV.D.1, and IV.D.2, above, the Select Committee finds that Ms. Giraldo and Senator Monserrate's statements about the events of December 18 and 19, 2008 are not credible.

Third, as discussed in detail in Sections IV.C and IV.D.3, above, Senator Monserrate has failed to accept responsibility for his misconduct, or to cooperate in any way with the work of the Select Committee.

---

[152] Laws of 1994, c.222 § 1.

Dated: 1/13/2010

Respectfully Submitted,

Senator Eric T. Schneiderman (chair)

Senator Andrew J. Lanza (ranking minority member)

Senator James S. Alesi

Senator John J. Flanagan

Senator Ruth Hassell-Thompson

Senator Diane J. Savino

Senator Toby Ann Stavisky

Senator Andrea Stewart-Cousins

Senator Catharine Young