



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
HARRISBURG, PA 17120

16TH FLOOR
STRAWBERRY SQUARE
HARRISBURG, PA 17120
(717) 787-3391

KATHLEEN G. KANE
ATTORNEY GENERAL

November 6, 2015

The Special Committee on Senate Address
Senator John R Gordner, Chairman
Senate Box 203027
Main Capitol Building
Harrisburg, Pa. 17120-3027

Dear Senator Gordner:

I am in receipt of your correspondence dated October 29, 2015 requesting interoffice documents and communications as well as confidential filings submitted to the Office of Disciplinary Counsel, amongst other items. You have requested these materials pursuant to designation as Chairman of the Special Committee on Senate Address to "pursue possible address under Article 6, Section 7 of the Pennsylvania Constitution."

Please allow this letter to serve as my formal response to the above request for information for use in a direct removal or address.

In order to address your request, we must first determine your legal authority to make such a request pursuant to a quest for direct removal. To understand the proper framework by which an Attorney General may be removed, we must consider the Pennsylvania Constitution and the long standing precedent of prior attempts for removal of civil officers pursuant to the relevant Articles of the Constitution and the results and reasoning of such. Despite the assertions of a deputy counsel for the Senate that there exists no precedent in this great Commonwealth related to Direct Removal, there are actually three documented cases. This Senate Committee must consider the history of Pennsylvania and follow the proper framework. What is done today will in essence affect the future of Pennsylvania and its citizens long after these decisions are made.

Article 6, Section 4, (Impeachment and Direct Removal) of the Pennsylvania Constitution was adopted following the constitutional convention of 1872-73 and took effect in January of 1874, and consisted of four sections:

“SECTION 1. The House of Representatives shall have the sole power of impeaching.”

“SECTION 2. All impeachments shall be tried by the Senate. When sitting for that purpose the Senators shall be upon oath or affirmation. No person shall be convicted without the concurrence of two-thirds of the members present.”

“SECTION 3. The Governor, and all other civil officers under this Commonwealth, shall be liable to impeachment for any misdemeanor in office; but judgment in such cases shall not extend further than to removal from office, and disqualification to hold any office of honor, trust or profit under this Commonwealth; the party, whether convicted or acquitted, shall nevertheless be liable to indictment, trial, judgment and punishment, according to law.”

“SECTION 4. All officers shall hold their offices only on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office, or any infamous crime. Appointed officers may be removed at the pleasure of the power by which they are appointed. Elected officers, other than Governor, Lieutenant Governor, members of the General Assembly, and judges of courts of record, shall be removed by the Governor, for reasonable cause, on the address of two-thirds of the senate.”

Of particular importance in the present actions of this committee on Senate Address is a focus on the applicability of Sections 3 and 4, as listed above. Section 3 reads “The Governor, and all other civil officers under this Commonwealth, shall be liable to impeachment for any misdemeanor in office;”

Section 4 proscribes that “All officers shall hold their offices only on the condition that they behave themselves well while in office, and shall be removed on conviction of misbehavior in office, or of any infamous crime. Appointed officers may be removed at the pleasure of the power in which they are appointed. Elected officers, other than Governor, Lieutenant Governor, members of the General Assembly, and judges of courts of record, shall be removed by the Governor, for reasonable cause, on the address of two-thirds of the senate.”

These similar sections were then readopted in the 1960s and remain present in today's Constitution. The aforementioned sections, upon which the senate now relies in its inquiry for direct removal, were adopted prior to the Constitutional Amendment of 1978 which established the Attorney General as an elected position and an independent Commonwealth agency. The significance of Sections 3 and 4, as preceding the amendment of 1978 (Commonwealth Attorneys' Act) is that at the time of their effective date, the Attorney General was appointed by the Governor and was subject to removal “at the pleasure of the power by which they are appointed”. Accordingly, with the Commonwealth Attorneys' Act of 1978 whereby the Attorney General became an elected official, the statement of Article 6, Section 4, “appointed officers may be removed at the pleasure of the power by which they are appointed”, is rendered moot with respect to the removal of the Attorney General by the Governor. The Commonwealth Attorneys' Act displaced entirely that means of removal.

We must thereby look to the next sentence for means of removal of an Attorney General. That sentence directs that elected officers, in contrast, with the exception of high ranking officials such as Governor, Lieutenant Governor, members of the General Assembly, and judges of courts of record, "shall be removed by the Governor, for reasonable cause, on the address of two-thirds of the senate." (Article 6, Section 7, previously section 4)

The specific exclusion of the high ranking officials to this direct action of the Governor did not contemplate an elected Attorney General, but surely would have included such in the categories of Governor, Lieutenant Governor, members of the General Assembly and judges of courts of record that are specifically delineated and treated separately. It is arguable as well that this provision failed to also contemplate that the Attorney General is an independent Commonwealth agency, not subject to the Governor's jurisdiction, thus again removing the position of Attorney General from the power of the Governor to effectively terminate his or her position. The records from the 1873 convention support the present day inclusion of an elected Attorney General as a member of the delineated high ranking officials. The delegates discuss and proscribe the process by which the Governor appoints the Attorney General in that the Governor "shall nominate, and by advice and consent of two-thirds of all the members of the Senate, appoint a Secretary of the Commonwealth and an Attorney General..." The specific mention of these two obviously important positions in both appointment and stature within the government is surely telling as to the thought and intent of the framers when contemplating the means for removal of civil officers.

Therefore, with the Attorney General as an elected official, and no longer subject to removal by the Governor, for reasonable cause and upon two-thirds of the Senate, as well that the Attorney General is a high ranking official in line with the Governor, Lieutenant Governor, members of the General Assembly and judges of courts, and as such is subject to the specific exclusion of the provisions relating to direct removal or address by the Governor. The proper means of removal for a member of the specified excluded offices, which included the Attorney General when voters approved an amendment to the Constitution by making the office an elected position, is by means of impeachment.

While the Constitution is the supreme law of the land and the Articles related to Impeachment allow for the process by which a present day Attorney General may be removed from office, I will nonetheless discuss the improper use of Article 6, Section 7 by the Senate in their attempt to address alleged misconduct in office.

Of historical significance is an attempt by a Pennsylvania Governor in 1891 to invoke the Direct Removal clause of the Constitution to remove an elected State Treasurer and an elect Auditor General. Here, the office holders were accused, but not convicted, of taking bribes in excess of one million dollars and failing to perform their duties in securing the monies of the Commonwealth. Similar to the present argument, counsel for both Treasurer and Auditor General objected to the jurisdiction of the Senate on the grounds that the Governor had no authority to institute charges and that "no officer could be removed for an impeachable offense

without a previous conviction or upon an impeachment or indictment." See Commentaries on the Constitution of the United States (Boston Book Company 1895) by Roger Foster. It is also important to note that the process by which the elected officials appeared before the committee was largely different from the process employed with the creation of this Special Committee on Senate Address. There, the Governor addressed the Senate by letter requesting the action. Here, the Senate appears to have initiated the process on its own accord. Of additional importance is the formation of a **Joint Legislative Investigating Committee**, upon participation of both Houses before the Direct Removal Proceedings in the Senate. In the present case, this Senate committee has not followed the framework that has gone unchallenged since 1891.

In addition to the deviation of this committee previously discussed, it is critical to address the improper and premature formation of this committee and the proceedings. The letter sent by the Governor in 1891 to the senate stated "I have awaited the resort to and the exhaustion of the process of the criminal laws."

The Auditor General aptly states in his address to the Senate in 1891 "it is proposed to virtually try me, in this form of proceeding, on criminal charges of alleged misdemeanors in office, in direct violation of the law of the land, **without a fair trial by an impartial jury of my vicinage, but before a tribunal not bound by oath or affirmation, which is governed by no legal rules of evidence, and which is essentially a political tribunal called together by the Governor in a time of great political excitement, for the purpose of condemning me, and this when the supreme law of the land provides two certain, ample and clearly constitutional methods for removing me from office if the truth of these charges can be proven against me.**"

Both the Auditor General and the treasurer proclaimed that they were duly elected by the voters and neither had been convicted of a crime and had a constitutional right to a jury trial, as such right is afforded to all citizens. It was also argued that the Governor had "no authority under the constitution and laws of this commonwealth" to seek direct removal. The Auditor General went on to correctly state that the only means of proper removal were by impeachment, which begins in the House, or by conviction by a jury of his peers.

Your predecessors in the Senate held by **PROCLAMATION** sent to the Governor "**Resolved. That as the said charges preferred by the Governor in manner aforesaid against said officers, are charges of misdemeanor in office, for which said officers could be proceeded against, both by impeachment and by indictment, and if convicted thereof, in either of said ways, could be removed; the Senate has no jurisdiction, under Section 4 of Article VI of the Constitution in this proceeding, to inquire into, hear and determine said charges of official misconduct, and to address the Governor asking for the removal of said officers by reason thereof, and thereby to deprive said officers of the right to trial by jury, guaranteed to them under Article I, or to a trial in regular proceedings by impeachment in accordance with Sections 1,2, and 3, of Article VI of the Constitution.**"

As stated above, an Attorney General, by Constitutional amendment in 1978 is an elected officer, and a high ranking member of government who surely is impliedly included (it should be noted that there are no specific exclusion either) in the exclusion articulated in Article 6, Section 7 as related to the Governor, Lieutenant Governor, members of the General Assembly and judges of the courts of record who are excluded from the ability of the Governor or the Senate to be terminated upon direct removal or address. Nonetheless, I have addressed this Senate's improper use of this section to address alleged misconduct and will now address the improper use, despite a lack of jurisdiction, in direct removal for competency to hold office.

Presently, this Senate proposes to strip me of my duly elected position and superimpose the will of the voters based upon an argument that a temporary suspension of a license to practice law allows them authority for direct removal. I will point out that the license suspension was also imposed without the basis of a conviction and without the opportunity for a hearing to determine the truth of the matters asserted. This Senate's reliance upon this administrative proceeding does not relieve them of their constitutional duty to follow the Articles of the Pennsylvania Constitution related to proper removal of an elected official and the historical significance of the precedent long set in this Commonwealth. It is clear that this Senate committee is subverting the process of impeachment and/or trial by jury and attempting direct removal based upon an administrative action that largely relied upon newspaper articles, with no rules of evidence imposed, and an **allegation** of a crime to create an impressionable argument for incompetency to hold office as means for removal. The actual effect of this Senate action is to circumvent the proper procedure and deprive the citizens, and the office holder, of the constitutional guarantees adopted by voters.

Just as this Senate committee has no jurisdiction or authority for direct removal for the aforesaid reasons, the application of the direct removal for incompetency other than senility, mental incapacity or physical incapacity to hold office, fails. Again, there are two more known cases in which direct removal was sought.

In Commentaries on the Constitution (page 666), Roger Foster writes "The Senate of Pennsylvania has also addressed the Governor for the removal of Edward Rowan, high sheriff of Philadelphia, and Judge John M. Kirkpatrick of Pittsburgh –the later in 1885, both for physical and mental incapacity." Once again, the plain meaning of the word "competency" was at the time, senile.

There is no evidence to my knowledge that I have become senile or mentally incompetent to hold office. It is also true that I do not personally engage in the practice of law as Attorney General, to such a degree in the normal course of duties that the public safety is in jeopardy. Quite the opposite. The policies of my administration and the decisions as to where and when resources of budget and man power are placed have made the children of this Commonwealth 800% safer from child predators. With a 30% increase in drug arrest, the neighborhoods of your constituents are safer as well. These are just two examples of the record of my job performance.

To summarize, this Special Committee on Senate Address lacks jurisdiction and cause for inquiry, requests, subpoenas for records of the Office of Attorney General, statements, memos, etc. Equally, this committee has no authority under the Pennsylvania Constitution and the long standing precedent to remove an Attorney General by means other than impeachment, after a conviction.

Thank you for your attention to this matter.

Sincerely,



KATHLEEN G KANE
Attorney General

KGK/jma

cc: Honorable Joseph B. Scarnati, III, President Pro Tempore
Honorable Lisa Baker
Honorable Gene Yaw
Honorable Judith L. Schwank
Honorable Sean Wiley
Honorable Art Haywood
Honorable Mike Turzai, Speaker of the House
Governor Tom Wolf, Governor of Pennsylvania
File (1162015.docx)

Works Cited

Foster, Roger. *Commentaries on the Constitution of the United States Historical and Juridical with Observations upon the Ordinary Provisions of State Constitutions and a Comparison with the Constitutions of Other Countries*. Boston: The Boston Book Company, 1895. Print