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OFFICE OF ATTORNEY GENERAL
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ATTORNEY GENERAL

SECRETARY'S OFFICE

January 11, 2016

Via Hand Delivery

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

Dear Senator Gordner, members of the Senate Committee and all members of the PA Senate:

Please allow this letter to serve as my formal response to your invitation to appear before the Special Committee on Senate Address.

As previously asserted in my correspondences to this committee dated November 6, November 13 and November 16, 2015, this special committee lacks the jurisdiction and cause for inquiry, requests, subpoenas, statements, testimony and critically, **lacks the authority under the Pennsylvania Constitution and the long standing precedent to remove an Attorney General by means other than impeachment, after a conviction.**

Accordingly, with due respect to our institution of government and its members, I decline to appear before you to defend myself in a procedure that is contrary to the Constitution and the rules and precedent set a century ago by this Senate.

I have previously outlined the proper legal framework, the precedent that has existed for over a century (despite the deputy counsel for the senate's opinion that no precedent exists) and the senate's own rules that make clear that this special committee has acted and continues to act against the constitutional procedures, precedent and rules in attempting to remove a high ranking elected official by means of direct removal. This correspondence reiterates the legal arguments to guarantee a complete record.

The actions of the senate in the present day, will create a precedent for Pennsylvanians whereby an elected official may be removed at the whim of a separate branch of government, or political party. This proposition creates chaos in times of political excitement or a rush to

judgment despite a legal process embedded in the Constitution of the United States and of Pennsylvania to protect the rights of all citizens. Constitutional rights are meant to protect the people, not the government. Circumventing the constitutionally proscribed rights of any citizen, elected or not, works to wear away our very system of justice that this country was founded upon. Every member of the General Assembly, as well as all elected officials have taken an oath to uphold these rights.

Accordingly, I again urge you to consider the proper framework by which an Attorney General may be removed with consideration of 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.

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. Auditor General McCamant stated, "I am advised that the "reasonable clause" for which an elected officer can be removed in this manner under this provision, does not refer to or include a cause amounting to an impeachable or indictable offense, but refers only to causes other than impeachable or indictable offenses, incapacitating him from properly discharging his duties, such as insanity senility, incompetency, protracted illness or absence, or other similar cause, which would not be sufficient to warrant either his impeachment or indictment, and in any of which cases there would be no mode of removal possible except for this provision."

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 Assemble 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 determinate 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. Said action deprives an elected official of Due Process rights guaranteed to all citizens, and further attempts to utilize an administrative proceeding, of which there was no hearing, to further deny the elected official due process. As previously stated, this action thereby deprives the citizens of Pennsylvania their votes in the improper removal of an individual duly elected by the citizenry

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. I am confident that after three appearances before the Senate Appropriations Committee and a steady increase in budget to create innovative approaches to fighting drugs and violence (Mobile Street Crimes Unit), creation of the Office of Military and Veterans Affairs, and Intelligence Unit, demonstrate that a removal under a provision for incompetency is misplaced.

Critically, it is imperative to also note that the Supreme Court of Pennsylvania specifically stated in its Order of September 21, 2015 (relating to temporary suspension) "**This order should not be construed as removing Respondent from elected office and is limited to the temporary suspension of her license to practice law.**" A copy of said Order is attached for your reference.

It is unlikely that the highest court in this Commonwealth did not contemplate or take into consideration the potential for direct removal or consider the constitutional procedures for removing an **elected** official from office. In fact, the specific addition of the sentence that announces that this temporary action should not be construed as removing an elected official from office demonstrates contemplation and a direct order disallowing the temporary suspension as a basis for removing an elected Attorney General. This order does not merely

stand mute on the issue, but rather directly addresses the action this Special Committee of the Senate is now investigating, or attempting. Accordingly, the jurisdiction of inquiry is unconstitutional, as the proper forum is found in Article VI relating to impeachment after conviction and the senate action has previously been addressed and specifically rebuked by the Pennsylvania Supreme Court.

Please also note that the suspension is **temporary** and may be dissolved or amended at any time following proper procedures. Senate action of direct removal is permanent with no means of redress for the office holder or the citizens of Pennsylvania. It would be an untenable situation wherein the Senate carries out such a removal and the temporary suspension upon which it relies as justification is thereafter dissolved or amended. The Constitution contemplates a sentence of removal only after a conviction so as to avoid imposing sentence (removal) prior to any due process. I have not received any meaningful hearing in the criminal justice system or with regard to temporary suspension, or in this senate proceedings that would fall within the definition of a "hearing" in accordance with the notion of Due Process. The Constitution makes clear that the proper procedures are followed to avoid violations of due process and the resulting harms thrust upon the citizens. I urge you to follow the proper framework of the Pennsylvania Constitution, the century old precedent set by the Pennsylvania Senate. I also ask you to respect the constitutionally guaranteed rights afforded every Pennsylvanian.

Respectfully,



Kathleen G. Kane
Attorney General

KGK/jma
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cc: w/attachment to:
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
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