

Commonwealth of Pennsylvania  
Legislative Reference Bureau

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LEGAL OPINION

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Vincent C. DeLiberato, Jr.  
Director

**SUBJECT:** Whether The Senate of Pennsylvania Has The Authority, With The Approval Of The Governor, To Remove The Attorney General From Office Under Article VI, § 7 Of The Constitution Of Pennsylvania.

**TO:** John R. Gordner  
Chairman  
Special Committee on Senate Address  
Senate of Pennsylvania

**FROM:** Legislative Reference Bureau

QUESTION PRESENTED

Does Article VI, § 7 of the Constitution of Pennsylvania confer upon the Senate the authority to consider the removal of an elected Attorney General?

## BRIEF ANSWER

Yes. Article VI, § 7 of the Constitution of Pennsylvania allows for the removal of certain elected civil officers from office for reasonable cause, including the Attorney General, by the Governor on address of two-thirds of the Senate of Pennsylvania.

## STATEMENT OF FACTS

By letter dated November 13, 2015, to Vince DeLiberato, Director of the Legislative Reference Bureau, Senator John R. Gordner requested a legal opinion as to whether the Senate of Pennsylvania has the authority under Article VI, § 7 of the Constitution of Pennsylvania {hereinafter referred to as § 7} to remove an elected Attorney General from office. Pa. Const. (1984 Ed.) Art. VI, § 7, *Purdon's Statutes*, Const. Art. 6, § 7 (2011).

## DISCUSSION

***Does Article VI, § 7 of the Constitution of Pennsylvania confer upon the Senate the authority to consider the removal of an elected Attorney General?***

The Supreme Court of Pennsylvania suspended the law license of Attorney General Kathleen Kane by *per curiam* order dated September 21, 2015. *Office of Disciplinary Counsel v. Kathleen Granahan Kane* (No. 2202 Disciplinary Docket No. 3, Board File No. C3-15-558) (*per curiam*). The Senate of Pennsylvania recently empaneled an *ad hoc* committee to examine whether Attorney General

Kane can perform the duties of her office with a suspended law license.

Article VI, § 7 of the Constitution of Pennsylvania provides three distinct methods for removing certain individuals from office: (1) mandatory removal of any civil officer upon conviction for any misbehavior in office or an infamous crime; (2) permissive removal of an appointed civil officer, except judges, at the pleasure of the appointing power; and (3) mandatory removal of an elected civil officer, with exceptions that do not include the Attorney General, "by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate." Pa. Const. (1984 Ed.) Art. VI, § 7, *Purdon's Statutes*, Const. Art. 6, § 7 (2011). The antecedents to this constitutional provision date back to English law of the 1600s. June 10, 1885 *Commonwealth Legislative Journal House*, p. 1431.

Prior to 1874, only judges were susceptible to removal by legislative address to the Governor. In 1885, the General Assembly, by concurrent resolution, empaneled a special committee to investigate the removal of Judge Kirkpatrick of Allegheny County for mental incompetence under Article V, § 15 of the Constitution of 1874. The Journal of the House of Representatives for the 1885 session contains the majority and the minority reports of the special committee. Both reports contain a

discussion of the history of the removal provision included in Article V, § 15 of the Constitution of 1874. The majority report states that "this part of the constitution especially should be construed in a historical sense, in order that its true meaning be ascertained." June 10, 1885 *Commonwealth Legislative Journal House*, p. 1431. Under the English constitution in the late 1600s, Parliament had the right to remove judges without any assignable reason. *Id.* When the right of removal was incorporated into Pennsylvania's Constitution of 1790, the limitation that the removal be for reasonable cause was added. *Id.* The applicable provision of the Constitution of 1790 read as follows:

Sec. 2. The judges of the supreme court, and of the several courts of common pleas, shall hold their offices during good behaviour. But for any reasonable cause, which shall not be sufficient ground of impeachment, the governor may remove any of them, on the address of two-thirds of each branch of the legislature.

Article V, § 2 of the Constitution of 1790.

The Constitution of 1838 did not change the removal provision:

Sect. 2. The judges of the supreme court, of the several courts of common pleas, and of such other courts of record as are or shall be established by law, shall be nominated by the governor and, by and with the consent of the senate appointed and commissioned by him. The judges of the supreme court shall hold their offices for the term of fifteen years, if they shall so long behave themselves well. The president judges of the several courts of common pleas, and of such other courts of record as are or shall be established by law, and all other judges, required to be learned

in the law, shall hold their offices for the term of ten years, if they shall so long behave themselves well. The associate judges of the courts of common pleas shall hold their offices for the term of five years, if they shall so long behave themselves well. But for any reasonable cause, which shall not be sufficient ground of impeachment, the governor may remove any of them on the address of two-thirds of each branch of the legislature.

Article V, § 2 of the Constitution of 1838.

Likewise, the Constitution of 1874 did not change the removal provision:

Sec. 15. Election of judges. Term. Removal. All judges required to be learned in the law, except the judges of the Supreme Court, shall be elected by the qualified electors of the respective districts over which they are to preside, and shall hold their offices for the period of ten years, if they shall so long behave themselves well; but for any reasonable cause, which shall not be sufficient ground for impeachment, the Governor may remove any of them on the address of two-thirds of each House of the General Assembly.

Article V, § 15 of the Constitution of 1874.

It was under this provision (Article V, § 15 of the Constitution of 1874) that the General Assembly adopted the majority report of the special committee, by resolution, that concluded "[a]fter a full hearing and serious consideration of the whole testimony, as well as of the constitutional question involved as to the power of the Legislature to recommend a removal from office," that the incompetency of the judge subject to the removal proceeding was fully evidenced and "that the

Legislature, under [Article V, § 15 of the Constitution of 1874] have full power to recommend his removal." June 10, 1885  
*Commonwealth Legislative Journal House*, pp. 1432-33.

As to the latter finding, the majority report addressed the issue in response to the suggestion that a misuse or abuse of office can only be judicially determined and that the General Assembly did not have authority to make an inquiry into such misuse or abuse. *Id.* at 1432. The majority report stated that it would be unreasonable for framers of the Constitution to give the legislature the power to remove for cause on the one hand and deny the legislature the right to ascertain the cause on the other. *Id.* The majority report then reiterated the well-established principle of constitutional law that inherent with the authority to perform is the authority to determine the cause for the performance. *Id.*

The minority report also considered the history of the removal provision. *Id.* at 1434. Its discussion included how the Constitution of 1776 was amended by the Constitution of 1790, the first Pennsylvania Constitution to contain the removal for reasonable cause language. *Id.* at 1434-35.

The Constitution of 1776 provided for removal as follows:

Section the Twenty-second. Every officer of state, whether judicial or executive, shall be liable to be impeached by the general assembly, either when in office, or after his resignation or removal for mal-administration: All impeachments shall be before the president or vice-president and council,

who shall hear and determine the same.

Constitution of 1776, Section 22.

Section the Twenty-third. The judges of the supreme court of judicature shall have fixed salaries, be commissioned for seven years only, though capable of re-appointment at the end of that term, but removable for misbehaviour at any time by the general assembly; they shall not be allowed to sit as members in the continental congress, executive council, or general assembly, nor to hold any other office civil or military, nor to take or receive fees or perquisites of any kind.

Constitution of 1776, Section 23.

The minority report correctly pointed out that the General Assembly's power to remove for cause was absent from the Constitution of 1776. June 10, 1885 *Commonwealth Legislative Journal House*, p. 1435. The minority report then considered how the phrase "but for any reasonable cause, which shall not be sufficient ground of impeachment, the Governor may remove any of them on the address of two thirds of each branch of the Legislature," which appeared in the Constitutions of 1790, 1838 and 1874, came to be added. *Id.* The minority report contended that: the Constitution of 1776 restricted the power of removal to misbehavior generally; under the Constitution of 1790 impeachment became the primary vehicle for removal, and removal by the Governor and the General Assembly was a power to be used only when insufficient cause for impeachment existed, but both methods contemplated removal only for misbehavior; and the Constitutions

of 1838 and 1874 further restricted the power of removal to acts of misbehavior not subject to impeachment to only those acts which reach the level of infamous crimes. *Id.* at 1434-37. The minority reached this conclusion by reading the removal clause in conjunction with Article VI, § 4 of the Constitution of 1874 {hereinafter referred to as § 4 of 1874}, which read in part:

All officers shall hold their offices on the condition that they behave themselves while in office, and shall be removed on conviction of misbehavior in office or of any infamous crime.

The minority view did not carry the day: the House of Representatives concurred in the Senate resolution to request the Governor's removal of the judicial official subject to the resolution. June 10, 1885 *Commonwealth Legislative Journal House*, p. 1441.

Prior to the 1885 removal proceeding, the General Assembly considered the removal of a judge on petition of the residents of Westmoreland County. February 27, 1832 *Journal of the House 1831-32*, Vol. II, p. 688. Ultimately, the committee charged with investigating the complaint determined that insufficient evidence was produced to make a finding of incompetency. *Id.* at 690. In arriving at its conclusion, the committee considered its authority to conduct an investigation, and stated that the removal provision was intended to apply where a judge becomes incapable of discharging the duties of office from physical or mental incapacity. *Id.* at 689. The committee also made the more

general statement that it is the obligation of the General Assembly to exercise its removal power to correct a situation in which the public has lost confidence in its court, which seldom happens without good cause. *Id.*

The constitutional authority to remove officers for reasonable cause on legislative address was extended to elected officials in the Constitution of 1874. Article VI, § 4 of 1874 provided for the removal of all civil officers elected by the people, with certain exceptions, "for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate."

Under this provision, the Senate sought the removal of State Treasurer Henry Boyer and Auditor General Thomas MaCamant in 1891 for alleged misconduct in office. November 10, 1891 *Journal of the Senate, Extraordinary Session 1891* p. 618. The Senate, however, voted by resolution to remove the case from the Senate on jurisdictional grounds. *Id.* at 701-02. The resolution stated that, because Boyer and MaCamant were accused of misdemeanors while in office, the better venue would be impeachment rather than removal by address of the Senate. *Id.* at 619.

During the Senate debate on jurisdiction during the 1891 removal proceedings, an instance where the Senate acted to remove a magistrate for offenses that were subject to impeachment and indictment, as well as for incompetency and inefficiency, was

advanced as an argument in favor of finding jurisdiction. *Id.* at 626. Also referred to during the Senate debate in support of a finding of jurisdiction was a Supreme Court case, *Houseman v. Commonwealth ex rel. Tener*, 10 W.N.C. 505, 100 Pa. 222 (Pa. 1882). The *Houseman* opinion included an analysis of the removal provision under Article VI, § 4. The Supreme Court viewed the Constitution of 1874 as enlarging the power of removal and as providing more certainty as to the authority and manner by which an elected officer shall be removed by the Governor on the address of two-thirds of the Senate. November 10, 1891 *Journal of the Senate, Extraordinary Session 1891* p. 627; *Houseman* at 230. The removal action taken by the Senate in the case of the magistrate, an action that was met without objection, and, more significantly, the Supreme Court analysis in *Houseman* support the proposition that the Senate may act to remove an elected Attorney General from office under Article VI, § 7.

The debate surrounding the adoption of § 4 of 1874 at the Constitutional Convention of 1872-73 also supports that proposition. The debate as to whom the new constitutional provision would apply suggests that the drafters intended § 4 of 1874 to apply to all elected officers not specifically exempted. The focus of the drafter who offered the amendment to include all officers elected by the people, a Mr. Darlington, was to protect the integrity of the elected office. The first iteration of § 4

referred to "[e]lected officers" and required the address of just two-thirds of the Senate. Debates of the Constitutional Convention of 1872-73, Vol. III, p. 224. Mr. Darlington offered an amendment to change "elected officers" to "all officers elected by the people"<sup>1</sup> and increased the requirement to "two-thirds of each branch of the [l]egislature." *Id.* at 230-31.<sup>2</sup> Mr. Darlington wanted a mechanism to "remove an officer more speedily than trial by impeachment may accomplish." *Id.* at 231. He offered the examples of a State Treasurer who is either "totally unfit for the office" or attempts to steal funds and that of an Auditor General who may "pass an account through his office, which may take millions of dollars from the Treasury." *Id.* Both the State Treasurer and the Auditor General became popularly elected offices under the Constitution of 1874.

While Mr. Darlington understood the need for an expeditious removal procedure, he cautioned against requiring the address of only one house of the General Assembly. Mr. Darlington reasoned that "an officer elected by the people should only be removed in some proper and judicious way" and wanted each house to be a check on the political whims of the other. *Id.* at 231-32. Adding

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<sup>1</sup>Mr. Darlington, it seems, wanted to ensure that Article VI, § 4 would apply to officers who were previously elected by the legislature under the Constitution of 1838, but who would then, under the Constitution of 1874, be elected by the people.

to this amendment, two drafters offered amendments to include a requirement for due notice and a full hearing, to which Mr. Darlington agreed.

As it read at that moment in time, § 4 of 1874 stated that "all officers elected by the people ... shall be removed by the Governor for reasonable cause after due notice and full hearing, on the address of two-thirds of each branch of the [l]egislature." *Id.* at 232. The responsibility to address the Governor, however, quickly returned to the Senate. A Mr. Hunsicker remarked that requiring both houses to act would produce a "cumbersome machinery." *Id.* Mr. Hunsicker approved of a full hearing after due notice, but he believed action by both houses would "stop the whole business of legislation." *Id.* In response, a Mr. H. W. Palmer offered an amendment to require a two-thirds vote of only the Senate, which was agreed to. *Id.* Section 4 was eventually agreed to and passed in this form.

During the debates, drafters offered varying examples of conduct that would trigger removal on the address of the Senate under § 4 of 1874. In addition to Mr. Darlington's examples, drafters referred to "a derelict official," an "incompetent" official and any officer whose "continuance in office would be prejudicial to the public interest, although they may not be convicted of any infamous crime or misdemeanor within the meaning of the Constitution." *Id.*, at 231-32. Indeed, the drafters

intended to give the Senate wide latitude in applying § 4 of 1874:

I would say that this matter received the very deliberate consideration of the committees... It was thought, however, that there was a very large number of elected officers whose fault would consist rather in incompetency than in anything else. The faults likely to be attributed to them are, of course, very difficult to define, and it was thought best not to throw too much difficulty in the way of their removal.

*Id.* at 225. It should be noted that, generally, "the remarks of... convention delegates are not relevant" in construing a constitutional provision as "they represent only one person's views." R. Woodside, *Pennsylvania Constitutional Law*, pp. 63 and 66 (1985). Pennsylvania courts have, however, ignored this rule and used the remarks of legislators. While statements by legislators during the process of enactment are not dispositive of legislative intent, they may be considered as part of the contemporaneous history. *Commonwealth v. Wilson*, 529 Pa. 268, 275, n.4, 602 A.2d 1290, 1294, n.4 (1992), cert. denied sub nom. *Aultman v. Pennsylvania*, 504 U.S. 977, 112 S. Ct. 2952 (Mem) (1992); *Commonwealth v. Berryman*, 437 Pa. Superior Ct. 258, 269, 649 A.2d 961, 966 (1994), appeal denied, 541 Pa. 632, 663 A.2d 685 (Table) (1995); *Arneson v. Wolf*, 117 A.3d 374, 384, n.10 (Pa. Commonwealth 2015) affirmed, WL6498617 (2015); *Federation of Teachers, AFT, Local 3, AFL-CIO v. School District of*

*Philadelphia*, 109 A.3d 298, 315 (Pa. Commonwealth 2015) appeal granted, 121 A.3d 433 (Mem) (2015); N. Singer, *Statutes and Statutory Construction* § 48:14 (2014).

The provisions of Article VI, § 7 exist in much the same form as they were originally established under Article VI, § 4 of 1874. The drafters of the 1874 Constitution knew that the State Treasurer was changing to a position elected by the people instead of the legislature and wanted to ensure § 4 of 1874 would apply to that office. The office of Attorney General went through a similar change in 1978. The legislature proposed an amendment to the Constitution of 1968 to add the Attorney General to the provisions of Article IV, which dealt with the Executive Department, along with a new section providing for the election of the Attorney General by the people. House Bill No. 84, Printer's No. 94 (1977). House Bill No. 84 was a joint resolution approved by the electorate on May 16, 1978. See also Bill History, Legislative Data Processing Center website. In amending the Constitution, the legislature could have proposed adding the Office of Attorney General to the list of officers exempted from the provisions of Article VI, § 7. Notably they did not. Furthermore, the Executive Department also includes the offices of State Treasurer and Auditor General, both of which the Senate attempted to remove by address to the Governor under then § 4 of 1874 in the aforementioned 1891 matter.

Finally, a plain meaning reading of § 7 does not express or imply any limitation on what could constitute reasonable cause. This omission, we think, is significant. The late 19th and early 20th centuries produced occasion for Pennsylvania courts and, most notably, the General Assembly to interpret "reasonable cause" as it has been found in relation to removing elected individuals from office. Article VI, § 7, however, was not amended to limit or ascribe a rubric for calculating reasonable cause during the most recent constitutional overhaul in 1968.

#### CONCLUSION

A plain reading of Article VI, § 7 of the Constitution of Pennsylvania provides the Senate of Pennsylvania the authority to remove the Attorney General from office. The debate surrounding the adoption of this constitutional provision in its earliest form and the historical removal of officers on legislative address support this conclusion.