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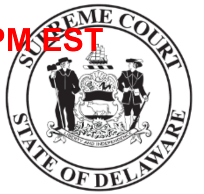

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: REQUEST OF THE GENERAL ASSEMBLY FOR AN ADVISORY OPINION	)))	**No. 19, 2022**

BRIEF IN THE AFFIRMATIVE FOR QUESTIONS 1 AND 2

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NATURE AND STAGE OF THE PROCEEDINGS

By Concurrent Resolution No. 63 of the 151st General Assembly, the State House and Senate, pursuant to their authority under 10 *Del. C.* §141, requested an opinion from this Court regarding the proper construction of Article III, Section 13 of the Delaware Constitution ("Section 13"), which provides:

> The Governor may for any reasonable cause remove any officer, except the Lieutenant-Governor and members of the General Assembly, upon the address of two-thirds of all the members elected to each House of the General Assembly. Whenever the General Assembly shall so address the Governor, the cause of removal shall be entered on the journals of each House. The person against whom the General Assembly may be about to proceed shall receive notice thereof, accompanied with the cause alleged for his or her removal, at least ten days before the day on which either House of the General Assembly shall act thereon.

This provision authorizes the Governor, in his discretion (the Governor "may" remove), to remove any officer (except the Lieutenant-Governor or a member of the General Assembly) for "reasonable cause" where the General Assembly (two-thirds of each house concurring) has sent what is known as a "bill of address" to the Governor calling for such removal. So far as is known, the General Assembly has never before issued a bill of address, and so has asked this Court a series of questions regarding the application of this constitutional language.

In essence, the General Assembly has asked this Court: (1) whether "reasonable cause" may include an indictment returned by a grand jury, (2) whether, in lieu of removal, the Governor could suspend an officer, (3) what process and

mechanics must the General Assembly employ in reaching a determination, (4) what notice is required to the officer, and (5) whether the decision to remove is subject to judicial review.

By order dated January 26, 2022, this Court appointed Saul Ewing Arnstein & Lehr LLP to brief answers to all five questions, and, with respect to questions 1 and 2, to brief those questions in the affirmative. This is Saul Ewing's brief as requested. It is an honor to be called on to assist the Court.

SUMMARY OF ARGUMENT

1. May "reasonable cause" under Section 13 include an indictment returned by a grand jury?

   RESPONSE: Yes, "reasonable cause" may include an indictment returned by a grand jury. In fact, the Constitutional Debates indicate that the determination of "reasonable cause" was committed to the discretion of the General Assembly.

2. Does the authority under Section 13 to remove a public official implicitly include the authority to take a lesser action, such as suspension of that public official? If Section 13 does implicitly include the authority to take a lesser action, must the General Assembly address the Governor on the lesser action or can the Governor choose to take a lesser action than that addressed to the Governor?

   RESPONSE: Yes, cases in this state and our sister state of Pennsylvania have held that suspension is "inherent" in the power of removal. There is no requirement that the General Assembly "must" address the Governor on the lesser action, although it may want to do so, or it may want to express its belief that only removal is appropriate.

3. Does the application of Section 13 require a hearing on the matter prior to a vote in either House to address the Governor to remove an officer?

   RESPONSE: While Section 13 does not explicitly require a "hearing," we believe, based on the Constitutional Debates concerning Section 13, that some form of hearing was contemplated. Further, it would make no sense to require notice to the office holder if there was no intention to provide the office holder the opportunity to be heard. The precise parameters of any hearing, though, are left to the General Assembly.

   a. If the application of Section 13 requires a hearing, must each House hold a hearing prior to its respective vote to address the Governor, or does a hearing in the first House satisfy the requirement?

   RESPONSE: This issue was not addressed in the Constitutional Debates, nor have we been able to locate discussion of this issue in other states.

Accordingly, we believe this issue is left to the General Assembly and its inherent discretion on the conduct of its proceedings.

b. If the application of Section 13 requires a hearing in each House, would a joint hearing satisfy the requirement?

RESPONSE: The Delegates to the Delaware Constitution discussed a joint session, and recognized that a joint hearing was one possibility—but, in doing so, made clear that following such joint hearing, each chamber should conduct a separate vote so as to comply with the constitutional requirement of two-thirds approval by each chamber.

c. If the application of Section 13 requires a hearing, what are the elements that must be satisfied? For example, must the person against whom each House seeks to proceed be provided the opportunity to attend the hearing, to be represented at the hearing by counsel, to testify at the hearing, to call witnesses, or to introduce evidence at the hearing?

RESPONSE: The Delegates did not address the elements for a hearing. Instead, after briefly discussing how the process might work, the Delegates left to "legislative enactment" to "provide the formula." Accordingly, we believe these issues are left to the General Assembly's inherent discretion.

4. Does Section 13 require a 10-day notice for only the first House to take action, or are separate notices required for each House? If Section 13 requires separate 10-day notices for each House's action, may those notices be issued concurrently, or must the second House issue its notice only after the first House has acted pursuant to its respective notice?

   RESPONSE: The Debates on the Delaware Constitution indicate that only one notice is required.

5. Is there a mechanism for an appeal of the decision by the Governor to remove a public officer under Section 13?

   RESPONSE: The Constitution provides no mechanism for an appeal or judicial review. Moreover, the "political question" doctrine and legislative immunity severely limit any review by the courts.

STATEMENT OF FACTS

Counsel has been provided no information about any terms or conditions of any indictment, and so we have addressed the questions presented by the General Assembly in the abstract. Because no facts were provided or assumed, no statement of facts is necessary.

ARGUMENT

Introduction

The Delaware Constitution provides three methods by which individuals may be removed from office. First, under Article VI, any civil officer may be impeached for "treason, bribery, or any high crime or misdemeanor in office." DEL. CONST. art. VI, §§1, 2. Second, under Article XV, "[t]he Governor *shall remove* from office any public officer convicted of misbehavior in office or of any infamous crime." DEL. CONST. art. XV, §1 (emphasis added). Finally, the Constitution provides:

> The Governor may for any reasonable cause remove any officer, except the Lieutenant-Governor and members of the General Assembly, upon the address of two-thirds of all the members elected to each House of the General Assembly. Whenever the General Assembly shall so address the Governor, the cause of removal shall be entered on the journals of each House. The person against whom the General Assembly may be about to proceed shall receive notice thereof, accompanied with the cause alleged for his or her removal, at least ten days before the day on which either House of the General Assembly shall act thereon.

DEL. CONST. art. III, §13. It is with respect to this final method, by "bill of address," that the legislature has sought this Court's guidance and asked five questions. Each of the following five argument sections below addresses one of the questions from the General Assembly.

I. "REASONABLE CAUSE" UNDER ARTICLE III, §13 INCLUDES INDICTMENT BY A GRAND JURY.

A. Question Presented.

May "reasonable cause" under Section 13 include an indictment returned by a grand jury?

B. Standard of Review.

Because this matter arises under the Court's original jurisdiction, and there is no court opinion to review, there is no applicable standard of review. That said, one ordinarily expects the review and interpretation of a legal text, such as constitutional text, to be subject to *de novo* review. Here, however, because of the "political question" doctrine and legislative immunity (as further discussed in argument section III.C.1 below), we believe the question of whether "reasonable cause" includes an indictment is left for the General Assembly and Governor to decide, with, at most, a very limited avenue for review by this Court.

C. Merits of the Argument.

1. Determination Of "Reasonable Cause" Was Left To The Discretion Of The General Assembly And Governor.

Any analysis begins with the words: "reasonable cause." While no further definition is provided in the Constitution, as a preliminary matter, we note that "reasonable cause" must mean something different than "treason, bribery, or any high crime or misdemeanor in office," for which removal is provided by impeachment, and something different than conviction for "misbehavior in office or

of any infamous crime," for which the Governor "shall remove" the convicted officer. It would be illogical for "reasonable cause" to mean either of those two things, as it would render the constitutional provision as mere surplusage, which is, of course, to be avoided. *See, e.g., Oceanport Industries, Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (Del. 1994).

Examining the words themselves, "reasonable cause," means that "cause" must exist and the removal for that cause must be "reasonable." "Cause" is simply a reason. *See Merriam-Webster* (11th ed. 2020) (defining cause as "a reason for an action or condition"). "Reasonable" can be read as "sensible" or "rational." *Id.* So "reasonable cause" means a sensible or rational reason. The opposite of a "reasonable cause" would be an "unreasonable" cause, meaning something baseless or groundless. *Id.* It would be "unreasonable" cause to remove an officer because they were lefthanded, or less than six feet in height, or for a discriminatory reason such as their religion, sex, or race. Put another way, so long as the cause upon which the General Assembly and Governor base their decision is not patently unreasonable (i.e., baseless, groundless, or arbitrary), then it should be deemed "reasonable."

Discussions during the Constitutional Debates support a broad reading of "reasonable cause." In particular, one of the leading Delegates observed with respect to Section 13 and what "reasonable cause" encompasses:

> [In addition to impeachment, and removal upon conviction for misbehavior in office], you find another way [i.e., Section 13], and that

> may or may not be for offenses committed in office, or for crimes not connected with the office, or for no crime at all, but for mere misfortune, mere incapacity, or for unseemly conduct which does not reach a degree of crime of any sort, but more particularly, probably, would be applied to cases of mental or physical disability.

See DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF DELAWARE (Del. 1958) (the "Debates") at 2968. That same Delegate also observed with respect to Section 13:

> There is another class of cases where there is no crime, but there is physical disability, *or a thousand other things* that might make it desirable that a man should be taken off the Bench, or removed from any other office. Therefore there is this provision.

Debates at 1855 (emphasis added). Thus, with the phrase "reasonable cause," the Delegates left to the wisdom and discretion of the General Assembly and the Governor as to whether a particular instance was one of those "thousand other things" that might make it desirable for an office holder to be removed from office. And those "thousand other things," depending on the circumstances, might include, but are not limited to, "unseemly conduct," "incapacity," "disability," "mere misfortune," and "crimes not connected with the office, or for no crime at all."

Ultimately, the question of whether an indictment constitutes "reasonable cause" is left to the facts and circumstances of the particular case, and whether the General Assembly and the Governor believe the particular indictment constitutes "reasonable cause." The General Assembly and Governor might, for example, conclude that the particular indictment provides a distraction or otherwise unduly

interferes with the office holder's performance of duties, or they might conclude that, under the facts and circumstances of the conduct associated with the indictment, it is better to remove the indicted office holder from office immediately rather than wait for a trial to take place. The General Assembly and Governor might also conclude that even if the office holder is not convicted, there has been such an erosion of public trust and confidence that the office holder should not be permitted to continue. In short, depending on the facts and circumstances, we see no reason why an indictment could not constitute "reasonable cause" for removal from office. Section 13 was meant to encompass "a thousand other things that might make it desirable" to remove an officer from office. The final determination, though, is left to the General Assembly and Governor.

2. "Reasonable Cause" May Include An Indictment.

Cases from Delaware and Pennsylvania both support the conclusion that an indictment may constitute "reasonable cause." In *Sussex County Dept. of Elections v. Sussex County Republican Committee*, 58 A.3d 418 (Del. 2013), this Court held that a state senate candidate's indictment on 113 counts of child abuse constituted an "incapacity" allowing the candidate to withdraw from the race and the candidate's party to nominate a replacement candidate. In so holding, this Court noted that the indicted candidate was subject to a non-contact order with minors and to monitoring by a GPS ankle bracelet. *Id.* at 426. The Court further noted that the indicted

candidate "will understandably spend a considerable amount of his time preparing a defense." *Id.* In short, the indictment created an "incapacity." While *Sussex County Dept. of Elections* represents a particularly horrific indictment, certainly it would be "reasonable cause" for the General Assembly and the Governor to remove an indicted officer pursuant to Section 13 under similar circumstances.

And, if the indictment in *Sussex County Dept. of Elections* would be "reasonable cause" for removal under Section 13, then the answer to the question asked by the General Assembly is clearly "yes"—an indictment could, depending on the circumstances of the particular indictment and the informed judgment of two-thirds of the House and Senate, as well as the judgment of the Governor, constitute "reasonable cause" to remove an elected official from office.

Similarly, in *McSorely v. Penna. Turnpike Comm'n*, 134 A.2d 201 (Pa. 1957), the Pennsylvania Supreme Court found an indictment provided "probable cause" for the Governor to remove two state officers from office "for cause" under the Pennsylvania Constitution, stating: "the indictments do furnish probable cause for the Governor's belief that the plaintiffs have been guilty of wrongdoing in their offices which is sufficient to constitute just cause." *Id.* at 204-205.[1]

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[1] The particular constitutional provision in *McSorely* was not the Pennsylvania Constitution's analog to Section 13, but a different section regarding the Governor's ability to appoint certain officers and remove them for cause. Nevertheless, the analysis is the same. An indictment can provide cause for removal.

II. THE GOVERNOR'S DISCRETION INCLUDES THE POWER TO SUSPEND RATHER THAN REMOVE.

A. Question Presented.

Does the authority under Section 13 to remove a public official implicitly include the authority to take a lesser action, such as suspension of that public official? If Section 13 does implicitly include the authority to take a lesser action, must the General Assembly address the Governor on the lesser action or can the Governor choose to take a lesser action than that addressed to the Governor?

B. Standard of Review.

As explained above, this matter arises under the Court's original jurisdiction, and there is no lower court decision to review.

C. Merits of Argument.

Some may argue that Section 13's authority for the Governor to "remove" an office holder is strictly limited to just that: removal. But, this Court has previously held, in a similar context, that the power of removal includes the power to suspend. Because a Constitution is to be read broadly to accomplish its purposes, *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819), the power to suspend should be read as inherent in the power to remove.

Article IV, Section 37 of the Delaware Constitution creates the Court on the Judiciary and grants it the power to "censure, remove or retire" any judicial officer. In *In The Matter of Rowe*, 566 A.2d 1001, 1010 (Del.Jud. 1989), the Court held:

> The power to suspend a judicial officer is inherent in the express powers granted to the Court.

There would seem to be no reason why this same logic would not apply to Section 13. If the Governor "may remove" for reasonable cause on the address of two-thirds of each chamber, then surely the Governor may suspend under appropriate circumstances. Such power is "inherent" in the express power to remove.

At least one other state court has also recognized that the power to remove includes the power to suspend. In the *McSorley* case discussed above, where the Pennsylvania Supreme Court held that an indictment could be cause for removal, the Court further observed "[t]he power of the Governor to remove an appointee for cause embraces the power *to suspend* for cause; the greater implies the less." 134 A.2d at 204 (emphasis in original). Thus, the Court upheld the suspension of two Turnpike Commissioners who had been indicted by a grand jury for willful misbehavior and criminal conspiracy to defraud.[2]

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[2] While the *McSorley* Court found the power to remove included the power to suspend under the constitutional provision at issue, the Court also observed, with respect Article VI, Section 7 of the Pennsylvania Constitution, which authorizes the Pennsylvania State Senate to issue a bill of address to the Governor upon a two-thirds approval, the framers of the Pennsylvania Constitution did *not* intend to include suspension as part of the removal power. *See McSorley*, 134 A.2d at 205. In fact, during the debates on the Pennsylvania Constitution on the article regarding a bill of address, in response to a question as to whether it was intended to grant the Governor any power of suspension, the response was: "Mr. Chairman, I will answer the gentleman . . . speaking for the Committee on Impeachment and Removal from Office, that it was not the intention of that committee to give to the Executive any power of suspending any office." III DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA (State Printer, 1873) at 233 (the "Penn. Debates"). This statement, though, is inapplicable here for at least two reasons. First, there is no indication that the Delegates to the Delaware

Indeed, the argument for a power to "suspend" is particularly powerful in the context of an indictment. Depending on the facts and circumstances of the indictment, the General Assembly and the Governor may want to give the indicted officer their day in court, but during the pendency of such process, remove the indicted officer from State offices. If convicted, the Governor would remove, but if not convicted, the suspension would end.

Without the power to suspend, the General Assembly and Governor might find themselves in the position of wanting to protect the indicted officer's presumption of innocence while, at the same time, wanting to ensure that the officer is not in a further position to engage in potentially criminal acts. Moreover, the officer will need time away from office to prepare their defense and appear at trial. The "inherent" power to suspend could, depending on the circumstances and nature

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Constitutional Convention had read or were familiar with the Pennsylvania debates, and no Delaware Delegate expressed a similar sentiment. Second, the Pennsylvania constitutional provision, unlike the Delaware provision, affords the Governor no discretion. Rather, the provision provides that upon receipt of a bill of address, the Pennsylvania Governor "shall remove" the officer. PA. CONST. art. VI, §7 ("officers . . . shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate"). The word "shall" was a deliberate choice to remove any discretion by the Pennsylvania Governor. *See* Penn. Debates at 225. Conversely, in Delaware, the Delegates recognized that the word "may" did not *require* removal, but granted discretion. *See* Debates at 3188 ("The Governor may then remove a man from office—not that he 'shall' but he 'may.'").

of the indictment, solve this dilemma for the State and the indicted office holder.[3]

As to the second part of the General Assembly's question ("must the General Assembly address the Governor on the lesser action"), there is no guidance in the Constitution itself or the Constitutional Debates, as the Delegates did not discuss the issue of suspension. Common sense suggests that, if the General Assembly desires suspension in lieu of removal, it should so state in its bill of address to the Governor. However, it need not do so. In the absence of any discussion of suspension in the bill of address, the Governor would have the discretion to remove, to suspend, or, of course, to do nothing.[4]

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[3] Having been directed to argue that the power to suspend exists, we cannot help but note, however, that a suspension might just as easily create problems rather than solve them. If an officer is removed, there are constitutional provisions for the filling of a vacated office. *See* DEL. CONST. art. III, §9. However, if an officer is merely "suspended," the office is arguably not "vacant," and there may be no one in the office to see that the functions and duties of the office are carried out. Moreover, if "suspended," would the officer continue to receive pay or be permitted to enter onto state property or to speak with state employees? The operational challenges of a "suspension" in the case of at least some officers may be too great for "suspension" to be a practical course of action. These issues, and no doubt more, would need to be addressed if the Governor were to order a suspension in lieu of removal.

[4] A more interesting question arises in the situation where the General Assembly, in its bill of address, calls for the Governor to suspend (but not remove) the office holder, but the Governor desires to remove. Under those circumstances, we do not believe the Governor could remove, as such a result would not have been authorized by the General Assembly. Put another way, the Governor has the discretion to reject the bill of address, or do less than the bill of address calls for (that is, suspend rather than remove), but not to do more than the General Assembly has authorized.

III. THE FRAMERS OF THE DELAWARE CONSTITUTION ENVISIONED A HEARING, BUT LEFT THE DETAILS TO THE GENERAL ASSEMBLY.

A. Question Presented.

Does the application of Section 13 require a hearing on the matter prior to a vote in either House to address the Governor to remove an officer?

a. If the application of Section 13 requires a hearing, must each House hold a hearing prior to its respective vote to address the Governor, or does a hearing in the first House satisfy the requirement?

b. If the application of Section 13 requires a hearing in each House, would a joint hearing satisfy the requirement?

c. If the application of Section 13 requires a hearing, what are the elements that must be satisfied? For example, must the person against whom each House seeks to proceed be provided the opportunity to attend the hearing, to be represented at the hearing by counsel, to testify at the hearing, to call witnesses, or to introduce evidence at the hearing?

B. Standard of Review.

There is no applicable standard of review, as there is no opinion or decision which is the subject of appeal. Further, as discussed below, we believe that legislative immunity and the "political question" doctrine severely limit this Court's ability to review the procedures employed by the General Assembly in conducting any hearing.

C. Merits of Argument.

1. While the Constitution does not explicitly require a hearing (unlike other state constitutions), the Delegates to the Constitutional Convention all assumed some sort of hearing or other opportunity for the officer to appear and be heard would be provided.

Unlike the three other state constitutions that grant their legislatures the authority to issue a bill of address (Pennsylvania, Maine and South Carolina), the Delaware Constitution requires no hearing.[5] Rather, all that is required is "notice" "at least ten days before the day on which either House of the General Assembly shall act thereon." In the absence of any specific requirements, the Constitution leaves it to the General Assembly as to how it will "act thereon."

During the constitutional debates, however, the Delegates clearly envisioned that some sort of hearing would occur. *See, e.g.,* Debates at 1942 ("I do not think

[5] We have found only three states whose constitutions authorize their legislatures to issue bills of address for state officers, and all three explicitly require a hearing, and, in the case of Pennsylvania, a "full" hearing. *See* PA. CONST. art. VI, §7 ("All civil officers elected by the people, except the Governor, the Lieutenant Governor, members of the General Assembly and judges of the courts of record, shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two-thirds of the Senate"); ME. CONST. art. IX, §5 ("before such address shall pass either House, the causes of removal shall be stated and entered on the journal of the House in which it originated, and a copy thereof served on the person in office, that the person may be admitted to a hearing in that person's own defense"); S.C. CONST. art. XV, §3 ("the officer intended to be removed shall be notified of such cause or causes, and shall be admitted to a hearing in his own defense"). Beyond the language in their Constitutions, however, we have found no cases or other debate or discussion indicating what these hearings require.

ten days' notice from the House of Representatives and the trial by that house…"); 1943 ("what House of the General Assembly will issue an address to remove any officer without hearing his case?"); 1944 ("ten days upon which either house, that means the first one that has the hearing."); 1945 ("I think when a man is to be tried he ought to have ample notice in order that he may prepare himself for his defense"). Thus, it would seem that some sort of hearing or other opportunity is intended, where the officer would appear and be heard—in fact, it would make no sense to give notice to an officer if that officer was to be afforded no opportunity to be heard.

As to the precise conduct of any hearing, nothing was said, other than some brief discussion about whether each chamber should conduct its own hearing, or whether the two houses should sit in joint session, and, if they sat in joint session, how the voting would occur. *See* Debates at 1942-45. As part of this discussion, a separate vote by each chamber was called for. *Id.* at 1944. This is not surprising, though, as without a separate vote of each chamber there would be no way to determine if two-thirds of each chamber were in agreement, as required by Section 13.

But, beyond the fact that the requirement for notice and the statements of various Delegates clearly anticipated some sort of proceeding, including, perhaps, a joint proceeding, there is no other guidance in the Constitution or the Debates.

Ultimately, the Delegates left to future General Assemblies the precise conduct of a hearing, as the following exchange at the end of their discussion indicates:

> Ezekiel W. Cooper: Legislative enactment would provide the formula [for the hearing], would it?
>
> William C. Spruance: I think so.

Debates at 1945.

Federal and state caselaw further supports the General Assembly's power to determine how it will proceed. At the federal level, courts have refused to interfere with the process set by the Senate for the conduct of impeachment proceedings. In *Hastings v. United States*, 837 F.Supp. 3 (D.D.C. 1993), the court rejected complaints by an impeached judge that the Senate violated the Constitution by using a committee of 12 members to hear the evidence rather than all 100 members, explaining that "the Senate's procedures for trying an impeached individual cannot be subject to review by the judiciary" because the use of its trial power "presents nonjusticiable political questions." *Id*. at 5.

Several years later, in *Larsen v. Senate of the Commonwealth of Pennsylvania*, 152 F.3d 240 (3rd Cir. 1998), the Third Circuit held that the Pennsylvania Senate and Senators were entitled to legislative immunity for claims brought by an impeached Pennsylvania Justice that the process by which he was impeached violated due process. The impeached justice attacked the fact that the Senate used a committee of six members to receive evidence and made other objections regarding

the process. Because the claims were federal claims brought in federal court, the Third Circuit held the "political question" doctrine was inapplicable, but then held that the Senators were entitled to legislative immunity on all claims and that the complaint should be dismissed.[6] Federal courts will not review matters entrusted to legislative bodies under their state constitutions. Although *Larsen* dealt with impeachment, the same analysis applies to a bill of address. So, in Delaware, the structure and conduct of any hearing by the General Assembly is left to the General Assembly which enjoys legislative immunity from claims of any federal constitutional violation.

With respect to state courts and state claims, the result is the same. Delaware courts also apply the "political question" doctrine in appropriate cases and will not intrude or interfere with questions and issues left to the General Assembly under the Delaware Constitution. For example, in *State ex rel. Oberly v. Troise*, 526 A.2d 898 (Del. 1987), this Court refused to intervene in a matter where the State Senate would not act on certain nominations made by the Governor and requiring the Senate's consent:

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[6] *Federal* courts only apply the "political question" doctrine to co-equal *federal* branches, and retain the right to enforce *federal* constitutional requirements against the states. *See Larsen*, 152 F.3d at 246-48. However, because legislative immunity protected the Senators in their impeachment actions, all the impeached justice's claims were dismissed under the doctrine of legislative immunity and the court refused to review the matter. Federal courts will not interfere with state legislative processes, including how state legislatures conduct impeachment and other hearings.

> Article III, § 9 clearly assigns the confirmation power to the Senate and to no other body. Appellees point out that the Senate is not acting in its legislative capacity in exercising its confirmation power. However, we see no justification for placing judicial limitations on the Senate's authority even though it has failed to act on a non-legislative duty assigned it by the State constitution. In acting (or choosing not to act) on nominations, the Senate represents a coordinate branch of government to which the constitution has assigned a task consistent with a constitutional pattern of "checks and balances." The Senate's action, or inaction, on gubernatorial appointments rests on its constitutional authority to confirm gubernatorial appointments and even if, arguendo, such power is deemed administrative, it is not a ministerial duty which can be judicially enforced.
>
> Moreover, there is a lack of judicially discoverable or manageable standards which would define the conditions under which the proposed remedy would be available. Courts would be forced to determine at what point senatorial inaction became sufficiently "prolonged" to be deemed consent. This would require examination of the many circumstances which might surround a delay, such as the amount of work before the Senate and the priorities placed on different projects, and even whether the Senate and the Governor have attempted a good faith resolution of their differences. Such an inquiry would put courts in the position of determining and passing upon the Senate's choices and motives, entangle the judiciary in a political thicket, and might ultimately indicate a "lack of the respect due coordinate branches of government."

Id. at 905 (citations omitted); *see also Guy v. City of Wilmington*, 2020 WL 2511122 (Del.Super.Ct.) (recognizing the "political question" doctrine but finding it inapplicable to the case). In determining whether a particular question is justiciable or subject to the political question doctrine, courts will hold the question "political" where at least one of the following factors is present:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and

> manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Troise, 526 A.2d at 904 (citations omitted). Here, the conduct of a hearing is a political question for the same reasons that federal courts will not interfere with the Senate's handling of impeachment matters. The question of whether "reasonable cause" exists is committed to the General Assembly and the Governor. Any attempt by the judiciary to impose its sense of how any hearings should proceed or be conducted would express a "lack of the respect due coordinate branches of government," and overlook how the General Assembly chooses to conduct matters before it. The Delegates to the Constitutional Convention left the matter to "legislative enactment" by the General Assembly as to how any such hearing should be conducted. Perhaps in joint session. Perhaps by a select committee with members from each chamber. Perhaps a full evidentiary hearing with sworn witness and strict rules of evidence. Perhaps the precise type of hearing will depend on the nature of the cause alleged. Regardless, the General Assembly and the Governor are to be afforded control over the issue in accordance with the "political question" doctrine and the doctrine of legislative immunity.

With the foregoing understanding, then, the answers to the various questions posed regarding any hearing become fairly simple.

2. There is no requirement for each Chamber to hold its own hearing.

As to question 3(a) (whether each chamber must conduct its own hearing, or whether a hearing in one chamber is sufficient), we believe that the General Assembly has wide latitude. It could, as the U.S. Senate and the Pennsylvania Senate have done, appoint a committee to receive evidence. Each chamber could have its own committee and hearing, or, as the Delegates discussed, the two chambers could sit together, or, presumably, have their two committees sit together. There is also no reason to think that the members of one chamber could not rely on a report and transcript generated by the other chamber—after all, if, in impeachment proceedings, the members of the U.S. Senate can rely on a report and summary generated by a committee of the Senate, there is no reason why the members of the Delaware House could not, in a matter involving "reasonable cause" under Section 13, rely on a report generated by the members of a Delaware Senate committee any more than the members of the Delaware Senate may rely on such report. In considering the various procedures which the General Assembly might employ, it ought to be remembered that, with a bill of address, no determination of guilt or innocence is being reached, nor is there any criminal punishment or sanction, such as prison time or a fine—the only question is whether "reasonable cause" exists for

removal from office. All of the various due process guarantees that might accompany a criminal proceeding are not required.

3. A joint hearing could be utilized.

With respect to question 3(b) (can the two chambers conduct a joint hearing), we see no reason why the House and Senate could not meet in joint session should they choose to do so. Some of the Delegates recognized that this might be one alternative, although they also were careful to observe that each chamber must vote separately. *See* Debates at 1944.

4. The precise "elements" and procedure of any hearing are left to the General Assembly.

With respect to question 3(c) (what are the elements that must be satisfied as part of any hearing), the General Assembly is afforded wide discretion. Unlike the Pennsylvania Constitution (which explicitly requires a "full hearing"), the Delaware Constitution requires no hearing. The only specific requirement is notice before one of the chambers first acts on the issue. While the Delegates presumed a hearing of some sort would take place, they left it to the legislature to shape that process. Accordingly, beyond the notice requirement, we do not believe the Delaware Constitution imposes any specific requirements on the General Assembly regarding "the elements that must be satisfied" as part of any hearing. It would seem to be enough if the General Assembly provides the required 10-day notice and then gives the officer some opportunity to be heard on the matter. This might be something as

simple as a one hour presentation, or something more elaborate including documentary evidence and witnesses. Certainly the General Assembly members, acting in good faith, will want to make an informed decision on the matter, but how they decide to become informed, and the process they decide to employ was left by the Delegates to "legislative enactment." Debates at 1945.

Moreover, given the great deference afforded the General Assembly under the "political question" doctrine and the doctrine of legislative immunity, we do not believe the judiciary has any authority to police or prescribe the procedure used by the General Assembly. Beyond the constitutional requirement of 10 days' notice, the entire process is left to the discretion of the General Assembly—which is what one would expect in a system of co-equal branches of government.

IV. ONLY ONE 10-DAY NOTICE IS REQUIRED.

A. Question Presented.

Does Section 13 require a 10-day notice for only the first House to take action, or are separate notices required for each House? If Section 13 requires separate 10-day notices for each House's action, may those notices be issued concurrently, or must the second House issue its notice only after the first House has acted pursuant to its respective notice?

B. Standard of Review.

There is no applicable standard of review, as there is no opinion or decision which is the subject of appeal.

C. Merits of Argument.

Of the questions posed by the General Assembly, the question regarding the number of notices is the easiest to answer because it was discussed in a clear, direct matter by the Delegates. Only one notice is required. Debates at 1946.[7]

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[7] The issue of notice was discussed at some length. Debates at 1942-1946. There was concern that two separate 10-day notices could unreasonably extend the time period necessary for the General Assembly to act. Debates at 1942. One delegate suggested that the notice period be shortened to 5 days. *Id.* Ultimately, though, it was stated that the 10-day notice was only required with respect to one chamber, and that two notices would not be required. *Id.* at 1946. And with that, the Delegates moved on.

A requirement for only one notice is also consistent with the purpose for the notice. Several delegates expressed their support for 10 days' notice so the officer would have sufficient time to prepare their response to the alleged reason for removal. Having received 10 days' notice before one chamber acts, and having prepared for the first chamber, there would be no need for a second 10 days' notice, as the officer would already be prepared from the first hearing.

V. ANY JUDICIAL REVIEW WOULD BE STRICTLY LIMITED.

A. Question Presented.

Is there a mechanism for an appeal of the decision by the Governor to remove a public officer under Section 13?

B. Standard of Review.

There is no applicable standard of review, as there is no opinion or decision which is the subject of appeal.

C. Merits of the Argument.

The Constitution provides for no appeal or other judicial review for removal from office under Section 13. As discussed above, legislative immunity and the "political question" doctrine mean, essentially, that no judicial review exists, as the decision is entrusted to the legislative and executive branches.

Only in the most extreme case, where the removal was based on illegally discriminatory grounds (religion, sex, race, etc.) or on reasons which are indisputably and clearly arbitrary (someone is lefthanded, or less than six feet tall) or if 10 days' notice were not given, might a judicial remedy be available. However, we have every confidence that no such case will ever arise. Otherwise, Section 13 has entrusted to the legislative and executive branches – and those two branches alone – the question of removal for "reasonable cause."

CONCLUSION

In answering the central question to this matter (does an indictment constitute "reasonable cause"?), it is tempting to say that "reasonable cause" is whatever the General Assembly says it is. However, we need not go that far. Rather, it is easy to imagine circumstances where two-thirds of each chamber, along with the Governor, believe that a state officer who has been indicted should be immediately removed from office – not suspended, but removed. Immediately. It is also easy to imagine circumstances where the General Assembly and Governor do not believe removal is warranted, but, at the same time, do not believe the officer should be in office pending trial. Trial preparations. The trial itself. Any indicted officer is going to suffer some level of distraction and inefficiency, as well as the loss of at least some public trust. Section 13 commits to the General Assembly and the Governor the discretion to decide whether removal or suspension (or no action) is warranted. The two-thirds requirement for each chamber ensures that any decision will not be made lightly.

It has been an honor to prepare this brief for the Court and we hope that it proves helpful. If the Court requires anything more, please do not hesitate to contact us.

Respectfully submitted,

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