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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

OPENING AMICUS BRIEF OF RODNEY SMOLLA IN SUPPORT OF THE NEGATIVE POSITION

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NATURE OF THE PROCEEDINGS

In an Order dated January 26, 2022, the Supreme Court of Delaware accepted a Request from the Delaware General Assembly for an Advisory Opinion of the Justices on five questions relating to the proper construction of Article III, § 13 of the Delaware Constitution. Rodney Smolla was appointed as amicus and instructed to brief responses to all five questions, and further instructed to brief the negative positions for Questions 1 and 2.

SUMMARY OF THE ARGUMENT

1. "Reasonable cause" under Article III, § 13 may not be based on a mere indictment in circumstances in which the basis for a Bill of Address is alleged criminality. A Bill of Address may be based on asserted grounds for removal outside the context of alleged criminal conduct, such as claims of physical or mental impairment. However, when the asserted grounds for removal emanate from allegations of criminal misconduct, a conviction, not a mere indictment, should be deemed required.

2. The authority to remove under § 13 should not be construed to authorize a lesser sanction, such as suspension. There is authority permitting such a lesser sanction in the context of the regulation of the judicial branch by the Court on the Judiciary, under Article IV, § 37. That implicit authority is based on the unique responsibility of the Court on the Judiciary to supervise the conduct of judicial officers. Entirely different considerations, however, apply to a Bill of Address, especially as applied to "constitutional officers" elected by voters pursuant to Article III, § 21. Sound principles of constitutional interpretation and construction, and separation of powers concerns, militate against recognition of any power to issue a sanction other than removal.

3. Procedurally, a hearing is required before the issuance of a Bill of Address. The hearing may be conducted before both Houses sitting in joint session.

Following the hearing, however, separate votes are required in each House, with the constitutionally mandated two-thirds majority applying separately to each Chamber. The frequent references during the Constitutional Convention to the hearing as a "trial," as well as constitutional principles governing due process, counsel that the General Assembly is well-advised to adopt the basic elements of due process of the sort customary for adversarial proceedings, such as the opportunity of the person subject to the potential Bill of Address to attend the hearing, have representation of counsel, testify, call witnesses, or introduce evidence.

4. Only one ten-day notice is required, prior to the commencement of proceedings in either House, or the commencement of a joint hearing.

5. There is no mechanism set forth in the Constitution for appeal of a decision by the Governor to remove a public officer pursuant to § 13. The ultimate decision to remove or not remove is a discretionary decision vested by the Constitution in the Governor. Separation of Powers principles such as the reluctance of courts to presume to review a "discretionary act" of the Executive, and the "political question doctrine," counsel against permitting any such appeal.

STATEMENT OF FACTS

On January 13, 2022, in Senate Concurrent Resolution No. 63, the General Assembly requested the Advisory Opinion of the Justices on the Questions Presented. The Supreme Court accepted the request and appointed counsel by Order dated January 26, 2022.

ARGUMENT

I. "REASONABLE CAUSE" UNDER SECTION 13 MAY NOT BE BASED ON A MERE INDICTMENT IN CIRCUMSTANCES IN WHICH ALLEGED CRIMINALITY FORMS THE BASIS FOR A BILL OF ADDRESS.

QUESTION PRESENTED

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

STANDARD OF REVIEW

Not applicable because this matter arises under the Court's original jurisdiction.

MERITS OF THE ARGUMENT

A. The Text.

Article III, § 13 reads in its entirety:

> 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.

Delaware Constitution, Article III §13.

The text of § 13 does not on its face provide an answer to whether "reasonable cause" may include an indictment returned by a grand jury. Section 13 merely invokes the phrase "any reasonable cause," without elaboration.

B. The Debates.

This Amicus Brief relies heavily on the statements of the Framers, those who participated as Delegates to the Delaware Constitutional Convention of 1897, which commenced in Dover on December 1, 1896. Charles G. Guyer and Edmond C. Hardesty, DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF DELAWARE (Delaware Supreme Court 1958) ("*Debates*"). The observations of the Framers strongly support the position that a mere indictment does not suffice as "reasonable cause" for the issuance of a Bill of Address, when the grounds for removal are based on allegations of criminality.

C. The Linkage to Other Constitutional Provisions.

In American traditions of constitutional interpretation, courts often find it useful, in discerning the meaning of one provision of a constitutional text, to reference other constitutional provisions that may illuminate the meaning of the principal provision being considered. This interpretive tool was often employed by Chief Justice John Marshall. *See Marbury v. Madison*, 5 U.S. 137, 179 (1803) ("There are many other parts of the constitution which serve to illustrate this

subject."). "We must never forget it is a *constitution* we are expounding." *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (Marshall, C.J.) (Emphasis in original).

In discerning the meaning of the phrase "reasonable cause" as used in Article III, § 13, it is sensible to also consider the language that would ultimately be placed in Article XV, § 6:

> "All public officers shall hold their offices on condition that they behave themselves well. The Governor shall remove from office any public officer convicted of misbehavior in office or of any infamous crime."

Delaware Constitution, Article XV, §6.

Article XV, § 6 uses the quaint phrasing that officers will stay in office as long as they "behave themselves well." The second sentence does contain both the phrases "misbehavior in office" and "any infamous crime." Yet those two phrases are prefaced by the phrase "convicted of." As this Court noted in *Slawik v. Folsom*, 410 A.2d 512 (Del. 1979) ("*Slawik I*"): "In the Debates relating to art. XV, § 6, there are several references to the proposition that the word 'convicted' means 'convicted by a court' so that a public official subject to removal may be assured of his or her 'day in Court.'" *Id*. at 515.

Similarly, Article III, § 21 states: "No person who shall be convicted of embezzlement of the public money, bribery, perjury, or other infamous crime, shall be eligible to a seat in either House of the General Assembly, or capable of holding

any office of trust, honor, or profit under this State." Section 21 does not disqualify any person *indicted*, but any person *convicted*. The Framers required a conviction to trigger the bar to holding future office. It is a sensible inference that they similarly intended conviction a requirement for removal.

D. The Influence of the Pennsylvania Constitution.

The language that would ultimately appear in Article III, § 13 and in Article XV, § 6 was patterned after Article VI, § 4 of the Constitution of 1874 of Pennsylvania. The Pennsylvania Constitution created in one unified section provisions that would be split into different sections in Delaware. The Pennsylvania section reads in pertinent part:

> All officers shall hold their offices 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. . . . All officers elected by the people, except Governor, Lieutenant Governor, members of the General Assembly and judges of the courts of record learned in the law, shall be removed by the Governor for reasonable cause, after due notice and full hearing, on the address of two–thirds of the Senate.

Pennsylvania Constitution of 1874, Article. VI, § 4.

William C. Spruance, who more than any other figure in the Delaware Constitutional Convention was a driving advocate concerning the sections governing removal, referred often to the Pennsylvania provision, observing that "I find this provision in the Constitution of Pennsylvania and it is a good safe one." *Debates* 1937.

The proceedings of the Constitutional Convention leading to the adoption of the Pennsylvania Constitution of 1874, a 9-volume set entitled "Debates of the Convention to Amend the Constitution of Pennsylvania Convened at Harrisburg November 1872" may be accessed digitally online at: https://www.paconstitution.org/historical-research/constitutional-convention-1873/ ("*Pennsylvania Debates*").

Conceptually, one may argue that the Pennsylvania debates are of limited probity, as history does not reveal the extent to which the Delaware Framers were conversant with the underlying constitutional *debates* in Pennsylvania, in contrast to the provisions of the Pennsylvania constitutional text that ultimately emerged. To the extent the Pennsylvania debates are probative, they appear to reveal an intent to permit removal through a Bill of Address for reasons such as incompetence in office, thus seeming to contemplate leaving removal for criminality to the process of impeachment. See *Pennsylvania Debates*, Vol. 3, at 231 (distinguishing removal for incompetence from removal through the impeachment process).

E. The Three Principal Processes for Removal.

Citing the Pennsylvania model, Spruance explained that the new Delaware Constitution would provide three methods for removal of officers:

> There are three ways of getting rid of an officer. One is, under these lines, on misbehavior in office, or any infamous crime, and the Governor shall remove that man, because it is his duty to do so. That

> means where he has been convicted on indictment of misbehavior in office or infamous crime. The next deals with removal on the address of the legislature; and then we have the third one, that of impeachment.

Debates 1937. *See also State ex rel. Craven v. Schorr*, 50 Del. 365, 380-81 (1957) (The three "constitutional grounds for removal are: (1) by the Governor, upon the address of two-thirds of all the members elected to each House, art. III, § 13; (2) by impeachment by the House and trial by the Senate, art. VI, § 2; and (3) by the Governor, upon conviction of misbehavior in office or any infamous crime, art. XV, § 6.").

F. Criminal v. Non-Criminal Grounds for Removal

Removal under Article XV, § 6, and impeachment under Article VI, § 2 both focus on criminality. In contrast, criminality did not appear to be the principal focus of the Framers in their creation of a Bill of Address. Indeed, as Justice Holland's book on the Delaware Constitution explains, "[a] public official may be removed by the process of address even though his or her conduct does not constitute an impeachable offense." Randy J. Holland, THE DELAWARE STATE CONSTITUTION 141 (2d ed. 2017).

In many places in the Convention proceedings, when criminality is referenced as a basis for removal, the Framers plainly contemplated criminality as established by conviction, constantly emphasizing that in such cases the officer for whom

removal is being sought has already had his or her day in court. To illustrate, consider this exchange between Edward Bradford and Spruance. Bradford asked:

> My question is whether a conviction of misbehavior in office or of any infamous crime is necessary to a break of the condition upon which they hold their offices, or whether there may be a breach of that condition which would result in the termination of their holding where there is no conviction of misbehavior in office or of any infamous crime.

Debates 2967.

Spruance, in reply, gave a long but telling answer, with the following most salient highlights:

> [B]y what methods, as provided in this proposed Constitution, can a man be turned out? . . . All public officers shall hold their offices on condition that they behave themselves well, and shall be removed by the Governor on conviction of misbehavior in office or of any infamous crime. . .
>
> That means, as I understand, *conviction in some criminal court* of misbehavior in office . . .
>
> Turn to Section 14, and you find another way, 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*, for *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*. . . .
>
> We go to Section 14, and that is a case which may cover misbehavior in office, but more generally would cover the case *of mental or physical incapacity*; and then he is removed from office.

Debates 2967-68 (emphasis supplied).

Setting aside the examples of physical or mental impairment, the question posed is whether "misbehavior," or the "failure to behave themselves well," that *would* be deemed criminal if proven may constitute "reasonable cause" when the alleged criminal misbehavior exists in the form of an accusation, such as an indictment, but has yet to ripen into conviction.

In facing this conundrum, this Court should consider another revealing exchange. Spruance rekindled a question raised earlier by Bradford, and referenced as well an inquiry by Ezekiel Cooper, concerning the relationship between removal based on criminality and removal based on other infirmities. Spruance explained that "*ipso facto*" conviction of "misdemeanor in office, or other infamous crime" would warrant removal. *Debates* 3188. Spruance then went on to explain the other basis upon which removal might be warranted, including removal through the Bill of Address procedure, when causes such as mental or physical incompetence are shown:

> Another method or condition under which a man may be removed from office is on the address of two–thirds of the General Assembly to the Governor. The Governor may then remove a man from office–not that he 'shall' but he 'may'. That might be a case in which a man had misbehaved himself in office or had become incompetent physically or mentally; then he might be removed from office. This was another case where a man had been convicted in court, whom the Governor shall remove *ipso facto*, because he had had his day in court.

Debates 3188. This exchange was presaged by a similar point made by Spruance earlier in the Proceedings, in which he distinguished criminal from non-criminal causes, loosely referring to a thousand things that might constitute conditions disabling a person from continuing in office. *Debates* 1855 (Spruance) ("But there is another class of cases where there is no crime, but there is physical disability, or 1000 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 [reciting the provision for Bill of Address that would become Section 13]").

This emphasis by Spruance on conviction was repeated more than once. *See Debates* 1938 (Spruance) ("I want to show the gentleman a corresponding provision in the Pennsylvania Constitution. . . . That is substantially the same as we have here, except we say who shall do it; that the Governor shall remove *on conviction*.) (Emphasis supplied); *Debates* 2969 (Spruance) ("there can be no conviction unless the man has had his day in Court.").

What then, should be made of these provisions of the constitutional text, and this historical record? The soundest view is that the Framers contemplated separation of the criminality and non-criminality tracks. Indeed, it may well be that they contemplated that removal based on criminality was covered *exclusively* by Article XV, § 6, or by impeachment. Under this view, removal under a Bill of Address would be limited to non-criminal grounds, such as physical or mental

infirmities. Such infirmities clearly seemed at the forefront of their thinking. The passages from the Convention Proceedings do not not necessarily make such disabilities exclusive—at least as evidenced by Spruance's somewhat cavalier reference to a "1000 other things"—but they do seem to indicate that the Framers were not contemplating removal for criminality as the purpose of a Bill of Address. That would render the Bill of Address procedure redundant as to criminality, given that criminal conviction was already an automatic basis for removal under Article XV, § 6.

It his highly implausible that the Framers intended the Bill of Address to serve as a form of "criminality removal light," in which mere accusations of criminal behavior, such as through an indictment, could serve as a reasonable cause for removal, as an end-run around the rigors of an actual criminal conviction in court required under Article XV, § 6, or conviction by the General Assembly itself through the ordeal of impeachment.

The view that conviction is required when alleged criminality is the basis for removal aligns the removal requirements of the Delaware Constitution with the ancient presumption of innocence in criminal law. The fundamental notion that an accused person is presumed innocent until proven guilty was applied by Delaware courts prior to the Constitutional Convention. *State v. Blackburn*, 23 Del. 479, 75 A. 536, 540 (Del. O.&T. 1892) ("the law presumes every accused person to be innocent

until he is proven guilty"). The delegates to the Constitutional Convention, many of them distinguished lawyers and jurists, were acutely cognizant of this fundamental constitutional value, as evidenced by their repeated emphasis on the importance of an accused having his or her "day in court." *Debates* 1937; 2967-68.

Consider the consequence if the "criminality track" and the "non-criminality track" are not kept distinct. As a practical matter, the more expansive non-criminality track would essentially swallow up and engulf the criminality track. To permit that engulfing is inconsistent with the strong emphasis of the Framers on the importance of an officer having his or her "full day in court." As to allegations of "reasonable cause" falling within the "criminality track," *conviction* should therefore be deemed a necessary condition precedent. A mere indictment is not enough.

G. Other Interpretive Resources

The general question of removal has not received the scholarly or juridical attention it deserves. *See* Saikrishna Prakash, *Removal and Tenure in Office,* 92 Va. L. Rev. 1779, 1781 (2006) ("[r]emoval is an under-theorized and relatively unexamined area of constitutional law.").

Even with that reservation, however, this Court should consider Delaware's constitutional tradition of hostility toward unbridled removal powers as a factor favoring a narrow construction of removal under a Bill of Address. "Before the Revolution, an unlimited power of removal from office by the executives of the

colonial governments was considered a great evil from which the colonists had suffered." *State ex rel. Green v. Collison*, 39 Del. 245, 197 A. 836, 840 (Del. Super. Ct. 1938), *rev'd on other grounds*, *Collison v. State ex rel. Green*, 39 Del. 460, 2 A.2d 97 (1938).[1]

This deep-seated concern over the potential for abuse of the removal power led Delaware to require "cause" for all removals:

> The historical background of these provisions, including the Debates of the Constitutional Convention of 1897, is set forth at length in the opinion of the majority of the court in the *Collison case*, and the legal principles and precedents are exhaustively discussed. Referring to the reasons that prompted the framers of our Constitution to limit the power of removal from office, Chief Justice Layton said:
>
> 'For these weighty reasons, based upon experience, and with deliberation, certain causes of removal and certain methods of removal were provided as the sole causes and the sole methods. Removal by impeachment if for cause. Removal upon the address of the General Assembly is predicated on cause. Conviction of misbehavior in office or of infamous crime is cause. Every provision in the organic law with respect to removal from office points straight at cause, and nothing except cause.'

Craven, 50 Del. at 380 (quoting *Collison*, 39 Del. at 264-65).

[1] The judgment of the Superior Court in *Green v. Collison* was reversed on grounds not specifically germane to the issues pending here. Significantly, in *Craven*, this Court noted that the Superior Court decision in *Green v. Collison* had been reversed on other grounds, but then proceeded to embrace the Superior Court's more general jurisprudential observations concerning the history and meaning of the removal principles animating the Delaware Constitution. *Craven*, 50 Del. at 381(noting the "dissent in the Superior Court, and the reversal in the Supreme Court, . . . on other grounds.").

The constitutional restrictions on the removal powers of the Governor in Delaware followed a pattern also extant in other states.[2] The model in Delaware and other states restricting the removal power stands in contrast to the model that has evolved in federal constitutional law. In *Myers v. United States*, 272 U.S. 52 (1926), the Supreme Court, in an opinion by Chief Justice Howard Taft (who had himself been President) held that Presidents of the United States possessed inherent and essentially unfettered power to remove Executive Branch officers.[3]

The Superior Court in *Collison* drew a sharp contrast between the restrictions on removal under the Delaware Constitution and the opposite regime established at the federal level in *Myers*, even going so far as to praise Justice Brandeis's dissent in *Myers*, noting that "Mr. Justice Brandeis, in his dissenting opinion in *Myers* . . . , makes the assertion that an uncontrollable power of removal in the Chief Executive 'had been denied in the thirteen states before the framing of the federal Constitution,' and that, 'The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.'"

[2] *See, e.g.*, ARK. CONST. art. XV, § 3 ("The governor, upon the joint address of two-thirds of all the members elected to each House of the General Assembly, for good cause, may remove the Auditor, Treasurer, Secretary of State, Attorney-General, Judges of the Supreme and Circuit Courts, Chancellors and Prosecuting Attorneys."); NEB. CONST. art. IV, § 10 ("The Governor shall have power to remove, for cause and after a public hearing, any person whom he may appoint for a term except officers provided for in Article V of the Constitution . . . .").

[3] The robust presidential removal power recognized in *Myers* has experienced ups and downs in subsequent Supreme Court decisions over the years, but in recent decisions the Supreme Court has tended to return to the strong position originally emphasized in *Myers* and confine any exceptions. *See, e.g., Seila L. LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2187 (2020).

Collison at 840 (quoting *Myers*, 272 U.S. at 293 (Brandeis, J., dissenting)). *See also* John Murdoch Dawley, *The Governors' Constitutional Powers of Appointment and Removal*, 22 Minn. L. Rev. 451, 476 (1938) (As to removal of officers, "the governor of a state is not a chief executive to the same extent that the President of the United States is a chief executive"); Eric R. Daleo, *The Scope and Limits of the New Jersey Governor's Authority to Remove the Attorney General and Others "For Cause"*, 39 Rutgers L.J. 393, 458, n. 2 (2008) ("Consistent with this 'more restricted position,' governors have been viewed historically as not possessing inherent removal powers like the President."); Note, *Constitutional Law-Governor's Removal Power*, 39 Yale L.J. 1060 (1930) ("It is now well settled that the power of appointing administrative officers granted the President of the United States includes an unrestricted power to remove. . . But a state governor, as chief executive, has no such power of removal unless it is conferred by the state constitution or provided for by statute.").

II. THE AUTHORITY UNDER SECTION 13 TO REMOVE SHOULD NOT BE CONSTRUED TO AUTHORIZE A LESSER ACTION SUCH AS SUPSENSION.

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?

STANDARD OF REVIEW

Not applicable because this matter arises under the Court's original jurisdiction.

MERITS OF THE ARGUMENT

Nothing in the text of §13 references any sanction other than removal. Nor do the Proceedings of the Convention contain any mention of discretion by either the Governor to impose or the General Assembly to recommend any lesser sanction. Notwithstanding the lack of any textual support or support in the history of the Proceedings for imposition of a lesser sanction, the question posed is whether the greater power to remove should be understood as implicitly including the lesser power to suspend.

Analysis of the "lesser sanction" issue posed by Question II cannot be hermitically sealed from analysis of the "indictment issue" posed by Question I.

If the "lesser sanction" contemplated were *suspension pending outcome of a pending criminal proceeding*, the imposition of such a suspension would effectively undermine the analysis advanced in this Amicus Brief as to the indictment question. If it takes *conviction* and not a mere *indictment* to warrant removal for alleged criminality, it should not be constitutionally permissible to effectively subvert that principle through the expedient of suspension. So too, suspension pending either exoneration or conviction following an indictment is in manifest tension with the presumption of innocence.

The most important case bearing on the issue is *Matter of Rowe*, 566 A.2d 1001 (Del. Ct. on Jud. 1989). In *Rowe,* the Delaware Court on the Judiciary interpreted Article IV, § 37 of the Delaware Constitution. Article IV creates and defines the judicial branch of government in Delaware. Section 37 creates a special "Court on the Judiciary" and empowers that Court to supervise and regulate the conduct of members of the Delaware judiciary. The *Rowe* case arose from judicial disciplinary proceedings against Judge William Rowe. As salient here, the critical question in *Rowe* was whether the Court on the Judiciary could impose on Judge Rowe the sanction that he be suspended without compensation for six months. Article IV, § 37 authorizes the Court on the Judiciary to "censure, remove or retire"

any judicial officer, but does not explicitly provide for the lesser sanction of suspension. *Id.* at 1009.

The Court in *Rowe* nonetheless held that a lesser sanction was constitutionally permissible. The key passage in *Rowe* explained:

> The purpose of art. IV, § 37 of our constitution is the regulation of the conduct of those persons charged with the administration of justice. The aim of proceedings pursuant to this section is to assure the integrity of justice administered in the State by providing for: a) an examination of specific complaints of judicial misconduct, b) the determination of their relation to a judge's fitness for office, and c) remedial acts as to any deficiencies. The constitution provides a system of judicial discipline which is designed to deal with all cases which might arise in any varied factual context. We cannot accept the argument that the drafters of this important amendment to the constitution intended to limit the disciplinary action to "censure, removal, or retirement" with no sanctions available short of retirement or removal except a mere censure.

Id. at 1010.

It might be thought that *Rowe* is authority for permitting a lesser sanction than removal in the context of a Bill of Address. The better view, however, is that *Rowe* is distinguishable. *Rowe* is based on the premise that Article IV, § 37 is a specific provision relating to the judiciary, an integral part of the overall scheme of Article IV, which contemplates that the leaders of the judicial branch of government should exercise principal superintendence over the conduct of other members of the judicial branch. The Court on the Judiciary is the special instrument through which the

Framers accomplished this intra-branch self-regulation, leaving to the Court on the Judiciary the overarching authority to supervise the conduct of members of the judiciary. It makes perfect sense that the special Court on the Judiciary would have the agility and flexibility to regulate the conduct of the judicial branch through multiple disciplinary or remedial options, not limited to "censure, removal, or retirement." That is the central learning of *Rowe*.

Entirely different considerations apply, however, as to a Bill of Address. Article IV, § 37 empowers the judicial branch to police the judicial branch. In contrast, a Bill of Address involves the participation of the Legislative and Executive Branches exerting authority over public officials across a wide expanse of government, and in the case of certain constitutional officials, exerting authority over public officials that are elected at large and have their own constitutional grants of independence as constitutional officers.

On this score, the nature of the office held by the official facing a Bill of Address is also germane to the proper interpretation of Article III, § 13. Section 21 of Article III states:

> "The terms of the Office of the Attorney General, the Insurance Commissioner, the Auditor of Accounts and the State Treasurer shall be 4 years. These officers shall be chosen by the qualified electors of the State at general elections, and be commissioned by the Governor."

Delaware Constitution, Article III, §21.

Imagine that the lesser sanctions recommended by the General Assembly or imposed by the Governor were to impose the placement of conditions on the officer's continued holding of office, such as reparations or submission to counseling for alcoholism or anger management. If such lesser sanctions were to impose such conditions on the officer's retention of office, serious concerns regarding separation of powers and incursions on the independence of democratically elected constitutional officers would be implicated. To the extent that the Governor or the General Assembly were to impose conditions short of removal upon these constitutional officers, the Governor or General Assembly would be assuming a form of supervisory authority over those officers, in palpable tension with the independence contemplated by Constitution for the holders of those offices, who were elected directly by the people for fixed terms.

The issue here may also be framed as a contest between two familiar legal formulations. On the one hand, there is the often used notion that the "greater power includes the lesser."[4] On the other hand, there is the maxim: *Expressio Unius Est*

[4] Christopher M. Kieser, *What We Have Here Is A Failure to Compensate: The Case for A Federal Damages Remedy in Koontz "Failed Exactions"*, 40 Wm. & Mary Envtl. L. & Pol'y Rev. 163, 198 (2015) ("The 'greater-includes-the-lesser' argument-namely, the idea that if government has the power to entirely prohibit an activity, it necessarily may place any restriction on that activity-has strong intuitive appeal. Indeed, one commentator, explaining the tension between it and the unconstitutional conditions doctrine, noted that 'each statement-'no unconstitutional conditions' and 'the greater includes the lesser'-seems so self-evidently correct that it appears to follow, with mathematical certainty, that one's conclusion is correct."), quoting Brooks R. Funderberg, *Unconstitutional Conditions and Greater Powers: A Separability Approach*, 43 UCLA L. Rev. 371, 376-78 (1995).

Exclusio Alterius (the expression of one thing excludes the others). The Superior Court in *Collison* relied on the *Expressio Unius* maxim in its explication of the removal provisions of the Delaware Constitution. The decision of the Superior Court would be reversed by this Court, which held that the Delaware Constitution did not prevent the creation of *statutory* public offices in which the Governor could remove the officer with or without cause. *Collison*, 39 Del. 460, 2 A.2d at 100.

When dealing with a *constitutional* office, however, this Court's decision in *Collison* does not control. To the contrary, when dealing with constitutional offices, the specific and unique process created for the judiciary's superintendence of the judiciary set forth in Article IV, § 37, stands in contrast to the Bill of Address procedure set forth in Article III, § 13. The Framers in Article IV, § 37 invested in the Court on the Judiciary a supervisory power over judicial officers that they deliberately chose *not* to invest in the General Assembly or the Governor in Article III, § 13. *Expressio Unius* appropriately applies. For purposes of § 13, it is all or nothing at all. In the spirit of *Hamlet*,[5] the choice is to remove or not to remove—that is question.

[5] William Shakespeare, *Hamlet*, act III, sc. I.

III. A HEARING IS REQUIRED; THE HEARING MAY BE A JOINT HEARING OF BOTH HOUSES BUT FOLLOWED BY SEPARATE VOTES IN EACH HOUSE; IN CONDUCTING THE HEARING THE GENERAL ASSEMBLY IS WELL ADVISED TO ADOPT BASIC ELEMENTS OF DUE PROCESS OF THE SORT CUSTOMARY FOR ADVERSARIAL PROCEEDINGS.

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?

STANDARD OF REVIEW

Not applicable because this matter arises under the Court's original jurisdiction.

MERITS OF THE ARGUMENT

A. A Hearing is Required.

While the text of § 13 makes no explicit reference to a hearing, the Proceedings make it clear that the Framers contemplated that a hearing would occur. Indeed, the Proceedings refer to the hearing as a "trial." *Debates* 1943, 1944. Thus a hearing should be deemed mandatory.

B. A Joint Hearing with Separate Votes is Contemplated.

The Proceedings make it clear that a joint hearing before both Houses in Joint Assembly was contemplated, to be followed by separate votes in each House. Martin Burris thus raised the question, "Why not a trial upon joint assembly" *Debates* 1944. Cooper responded, "That is exactly what I mean." *Id.* William Saulsbury reinforced the notion of a joint trial but insisted on separate votes, supporting the notion "to let the trial be in joint Assembly," while adding, "but I would require when the vote is taken that there shall be a separate vote." *Id.*

C. The Elements of the Hearing.

Neither the constitutional text nor the Proceedings provide any explicit guidance as to the elements of the hearing. The Proceedings do provide evidence, however, that the Framers contemplated that robust "due process" would be provided to the person against whom the General Assembly is proceeding.

First, as already noted, the Framers repeatedly referred to the proceeding as a "trial." While this does not necessarily connote a full-dress trial equivalent to that of a criminal prosecution, following all norms of criminal procedure and rules of evidence, it surely does contemplate some form of a "trial" incorporating some elements of adversarial due process.

Second, the Framers plainly saw the Bill of Address procedure as a grave and extraordinary exercise of power to be rarely used. Spruance referred to the Bill of Address as a "tremendous exercise of power." *Id.* Cooper affirmed that characterization, observing: "It is such a tremendous exercise of power. . . I do not think . . . you will get a Legislature in the next fifty years to issue an address for the removal of an officer . . ." *Id.*

The analysis is rendered more complicated, however, by this Court's decision in *Slawik v. State*, 480 A.2d 636 (Del. 1984) ("*Slawik II*"). In the second appeal arising from this dispute, following a remand, Melvin A. Slawik brought a claim against the Governor and the State, arguing, among other things, that his procedural due process rights were violated when he was removed by the Governor pursuant to Article XV, § 6, following a conviction in the United States District Court for the District of Delaware, which was subsequently reversed by the United States Court of Appeals for the Third Circuit. *Id*. at 638.

The decision in *Slawik II* contains some mixed messages. On the one hand, the Court held that Slawik's removal did not constitute the sort of deprivation of a "property interest" that would trigger procedural due process rights. The Court held that "a public officer in this State takes his position under the aegis and for the benefit of the public, subject to suspension or removal by any constitutionally permissible means." *Id.* at 644.

Yet relying on the United States Supreme Court's decision in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), the Court went on to hold that "[a]lthough we here decide that an officer's interest in his elected post is not 'property' in the constitutional sense, we acknowledge the Supreme Court's pronouncement in *Roth* that procedural due process extends to anything to which a person may assert a legitimate claim of entitlement." *Id* at 645. This Court then proceeded to apply the procedural due process formula set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Applying *Mathews*, the Court in *Slawik II* recited:

> Whether in this case the traditional remedy for premature removal constitutes due process of law hinges on a consideration of three distinct factors: *first*, the private interest that will be affected; *second*, the risk of an erroneous deprivation of such interest and the probable value, if any, of additional or substitute procedural safeguards; and *finally*, the State interest, including the function involved, and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Slawik II, 480 A.2d at 645 (citing *Mathews*, 424 U.S. at 335-36). Applying this calculus, the Court held that Slawik had not been denied procedural due process.

It is important to note that in *Slawik II* there had been a criminal trial in the United States District Court. This Court observed that Slawik did not contend "that his removal was improper due to 'unfairness' in the trial proceeding before the District Court." *Slawik II*, 480 A.2d at 646. Rather, Slawik's argument was that the Governor should not have removed him without first getting an advisory opinion on the legality of removal from this Court. *Id*. This Court, applying the *Mathews* factors, rejected the claim.

When removal is based on a conviction of crime under Article XV, § 6, there are no factual accuracy issues of the sort that procedural due process safeguards are designed to protect—the issue is more straightforward, essentially a question of law—which is whether a "conviction" did or did not occur. As this Court held, "Appellant premises his argument on an issue of law; yet, 'due process does not require an evidentiary hearing as a prerequisite to a valid determination of a question of law.'" *Id*. (quoting *N.L.R.B. v. Sun Drug Co*., 359 F.2d 408, 415 (3rd Cir. 1966)).

Against this backdrop, the recommendation of this Amicus Brief is that the most prudent course, when the General Assembly is conducting a "trial" in a Bill of Address proceeding, is to err on the side of ample due process and fairness. Speaking specifically to the questions posed, the prudent course is to permit the person against

whom the proceeding is undertaken to attend the hearing, to be represented at the hearing by counsel, to testify at the hearing, to call witnesses, or to introduce evidence.

IV. ONLY ONE TEN-DAY NOTICE IS REQUIRED.

QUESTION PRESENTED

Does Section 13 require a ten-day notice for only the first House to take action, or are separate notices required for each House? If Section 13 requires separate ten-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?

STANDARD OF REVIEW

Not applicable because this matter arises under the Court's original jurisdiction.

MERITS OF THE ARGUMENT

One ten-day notice is all that is required. It must come prior to the commencement of proceedings in either House, or in the case of a joint hearing, before the commencement of that joint hearing. *Debates* 1942. ("The complaint might be made before both houses at the same time. That does not say that it shall be given by both houses, but that either house shall proceed.") (Spruance).

V. THERE IS NO MECHAMISM FOR APPEAL OF A REMOVAL DECISION BY THE GOVERNOR UNDER SECTION 13.

QUESTION PRESENTED

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

STANDARD OF REVIEW

Not applicable because this matter arises under the Court's original jurisdiction.

MERITS OF THE ARGUMENT

There is no mechanism set forth in the Constitution for an appeal of a decision by the Governor to remove a public officer pursuant to § 13.

Section 13 does not require a Governor to remove an officer who has been presented to the Governor. Section 13 states that the Governor *may* remove, thereby rendering removal a discretionary act. *See Debates* 3188. ("Another method or condition under which a man may be removed from office is on the address of two-thirds of the General Assembly to the Governor. The Governor may then remove a man from office—not that he 'shall' but he 'may.'") (Spruance).

American jurisprudence, state and federal, is generally skeptical of judicial review of discretionary executive acts. The American tradition dates most famously to the pronouncements of Chief Justice Marshall in *Marbury v. Madison*, where he

observed that "[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions ... which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury*, 5 U.S. at 170. Following this dictum, Delaware courts have recognized the "presumption of non-reviewability . . . first articulated in the seminal decision of the United States Supreme Court, [in] *Marbury v. Madison*." *O'Neill v. Town of Middletown*, No. CIV.A. 1069-N, 2006 WL 205071, at *10 (Del. Ch. Jan. 18, 2006).

The line separating the exercise of "ministerial" executive authority from "discretionary" executive authority is undoubtedly often nebulous. *Sussex County, Delaware v. Morris*, 610 A.2d 1354, 1358 (Del. 1992). Yet once having been presented with a Bill of Address by the General Assembly, the Governor's ultimate decision to either remove or not remove cannot in any plausible sense be deemed "ministerial."

The "political question doctrine" stands as an alternative articulation of what is essentially the same principle. Decisions by a chief executive, such as a decision by the President of the United States to recognize or not recognize a foreign government, are deemed "political questions" outside the purview of judicial review. *Jimenez v. Palacios*, 250 A.3d 814, 837 (Del. Ch. 2019), *aff'd*, 237 A.3d 68 (Del. 2020), (citing *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 137,

(1938)). A Governor's decision to exercise the removal power upon a Bill of Address should similarly be deemed outside the compass of judicial review. To allow judicial review on the merits of a decision to remove or not remove an officer pursuant to a Bill of Address would place this Court, and not the Governor and General Assembly, in the position of finally determining who should and should not remain in office. That is not the scheme adopted by the Framers.

CONCLUSION

Amicus Rodney Smolla thanks the Court for the opportunity to present the foregoing argument.

Respectfully submitted,

/s/ Rodney A. Smolla February 10, 2022

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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

CERTIFICATE OF COMPLIANCE

The foregoing Brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Times New Roman 14-point typeface using Microsoft Word. The Brief complies with the 7,500 word length limitations set forth in the Court's Order of January 26, 2022, in that it consists of 7,365 words as measured by Microsoft Word count.

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