

Remarks of Senator Art Haywood in Support of Vote
Special Committee on Senate Address
(November 25, 2015)

After a thorough and thoughtful examination and deliberation on testimony and evidence presented to the Special Committee on Senate Address, I find that there is not sufficient basis for the Senate to move forward with due notice to Pennsylvania Attorney General Kathleen Kane and a hearing pursuant to Article 6, Section 7 of the Pennsylvania Constitution.

On October 26, 2015, the Special Committee on Senate Address was established “to pursue possible address under Article 6, Section 7 of the Pennsylvania Constitution relating to Attorney General Kathleen Kane and to submit a preliminary report to the Senate no more than 30 days following the appointment of the members of the Committee.”

Specifically, the committee examined whether or not Attorney General Kane can serve as Pennsylvania Attorney General with a temporarily suspended law license. Upon first convening, the committee reviewed relevant constitutional and statutory law related to the Attorney General’s qualifications and responsibilities. Thereafter, the committee received documents from the Disciplinary Board of the Supreme Court of Pennsylvania, as well as a letter dated September 25, 2015 from the first deputy Attorney General and executive deputies to the Disciplinary Board seeking guidance on the interpretation of the Rules of Professional Conduct and Rules of Disciplinary Enforcement. The committee is also in receipt of correspondence from Attorney General Kane, including a memorandum dated October 22, 2015 authored by her first deputy and executive deputies outlining suggested operating procedure for Office of Attorney General while Attorney General Kane is subject to the suspension order.

Additionally, the committee received testimony from a panel of three district attorneys at a public hearing held on November 9; a panel of three constitutional and legal disciplinary experts on the disciplinary process and Article 6, Section 7 at a public hearing held on November 17; and a panel consisting of the first deputy Attorney General and three executive deputies of each of the three major legal divisions within the Office of Attorney General. They provided testimony regarding the functioning of the office at a public hearing held November 18.

Based on the facts presented in the aforementioned documentation and testimony, I make the following findings:

It is clear that the Attorney General must be a “member of the bar” of the Supreme Court in accordance with Article 4, Section 5 of the Pennsylvania Constitution. On September 21, 2015, the Supreme Court issued an order placing Attorney General Kane on temporary suspension, subject to Rule 217 of the Pennsylvania Rules of Disciplinary Enforcement for “formerly admitted attorneys,” which became effective on October 22. The order stated that it “should not be construed as removing Respondent [Kane] from elected office and is limited to the temporary suspension of her license to practice law.” According to disciplinary law expert Beth Weisser’s testimony at the November 17, 2015 hearing, there is distinction in the Pennsylvania Rules of Disciplinary Enforcement between a suspension and disbarment.

Attorney General Kane is currently considered a “formerly admitted attorney” under Rule 217 of the Rules of Disciplinary Enforcement. According to the testimony received at the November 18 public hearing, an attorney who is disbarred is no longer a “member of the bar,” while a suspended attorney or “formerly admitted attorney” could potentially still be a “member of the bar.” Given that the Attorney General has not been disbarred, it follows that a suspended attorney may be in compliance with constitutional prerequisites of the office. Thus, she is not disqualified on this point.

Furthermore, after careful consideration of the written documentation and testimony of the first deputy and executive deputies at the November 18 public hearing, I find that the position of Attorney General is occupied and the Office of Attorney General continues to operate under authority existing before and after the suspension order was issued. As previously stated, the Supreme Court’s order temporarily suspending Attorney General Kane states that the order should not be construed as removing her from office. The court’s order was explicit. The office was not vacated. Moreover, evidence presented demonstrated that the office continues to execute statutory duties pursuant to its historical authority to do so and through the delegation from the Attorney General.

According to the testimony of the first deputy Attorney General and executive deputies, the Attorney General delegated her legal responsibilities under the Commonwealth Attorneys Act. Executive Deputy Robert Mulle testified that legal review of proposed rules and regulations, which is currently an Attorney General duty under the Commonwealth Attorneys Act, is routinely conducted by section-level attorneys and not the Attorney General. Additionally, the executive deputies testified that they routinely delegate to the office’s 800 plus employees (one-third of whom are attorneys) in order to fulfill statutory duties. Executive Deputy Lawrence Cherba further testified that the Attorney General may maintain the ability to delegate those legal responsibilities while subject to the temporary suspension order. The testimony of the executive deputies offered no information before the Special Committee on Senate Address suggesting that the Attorney General has attempted to assume the delegated legal responsibilities of her executive deputies.

Regarding the office’s ability to function while Attorney General Kane’s law license is temporarily suspended, I find that there was no evidence presented before the committee demonstrating that the Office of Attorney General is not functioning; rather, the first deputy Attorney General and executive deputies testified that the office is still functioning, including accepting and participating in cases.

In addition, an issue was raised regarding potential future challenges to the office’s authority and future impact with regard to Attorney General Kane’s suspension order. The committee heard directly about this issue with testimony presented at the November 18 public hearing. The testimony referenced one case, now under seal, in which opposing counsel filed a motion challenging the office’s authority based on an interpretation of the Commonwealth Attorneys Act that requires the Attorney General to personally proceed in certain cases. However, no information was provided to the Special Committee that sufficiently demonstrates that the Office of Attorney General is not currently functioning or that a court has granted a motion which prohibits the office from proceeding in a case.

Although I have concerns in regard to future legal challenges to the office's authority to perform the duties under the Commonwealth Attorneys Act, especially in regard to initiating criminal prosecutions, the testimony of the first deputy Attorney General and executive deputies demonstrates that the office continues to function and fully perform the duties as prescribed under the Commonwealth Attorneys Act.

Further, in its order the Supreme Court did not provide any guidance as to the proper statutory interpretation of the Commonwealth Attorneys Act in regard to the operation of this office once Attorney General Kane's license was suspended. Without clear directive from the court, the issue reverts to whether the office is operational and fulfilling its duties under law. Again, the testimony of the executive deputies indicated that the office was operational.

Moreover, the view of the executive deputies, offered at the November 18 public hearing, is that the statute was never meant to apply to the Attorney General personally. Rather, the General Assembly intended such duties to fall upon the office as a whole. As such, there is no evidence before the Special Committee on Senate Address demonstrating that the Office of Attorney General does not have the authority to perform the Attorney General's statutory responsibilities.

As a result of my careful consideration of all testimony and evidence presented to the Special Committee, I find that the Special Committee did not receive sufficient evidence to recommend that the Senate move forward with due notice and a full hearing pursuant to Article 6, Section 7 on the subject whether or not Attorney General Kane can serve as Pennsylvania Attorney General with a temporarily suspended law license.