STATE OF MICHIGAN
CIRCUIT COURT FOR THE 3RD JUDICIAL CIRCUIT
WAYNE COUNTY

HON. KWAME M. KILPATRICK,

Plaintiff,

v.

HON. JENNIFER M. GRANHOLM, in her official capacity as Governor of the State of Michigan,

Defendant.

Case No. 08-122051-CZ

HON. ROBERT L. ZIOLKOWSKI

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GOVERNOR'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

INTRODUCTION

On May 20, 2008, the Detroit City Council submitted written charges to the Governor asking for the removal of Plaintiff Kwame M. Kilpatrick from the office of Mayor of the City of Detroit pursuant to Article 7, Section 33 of the Michigan Constitution of 1963 and Section 327 of the Michigan Election Law., MCL 168.327. As required by that statute, the charges

were verified by the affidavit of Kenneth V. Cockrel, Jr., President of the Council, and personally served on Respondent. In response to that request, the Governor established a briefing schedule permitting the parties to raise and seek resolution of any preliminary legal issues and advised the parties that a hearing would be held on the petition commencing on September 3, 2008. Now, at the eleventh hour, just days before the scheduled start of that hearing, Plaintiff seeks to have this Court enjoin the Governor from carrying out her constitutionally and statutorily mandated duty to determine whether the charges contained in the City Council's petition require the removal of Mr. Kilpatrick from office. For the reasons set forth below, the motion is entirely without merit and, indeed, frivolous. The Governor therefore respectfully asks this Court not only to deny that motion but to award costs pursuant to MCR 2.114(F) and 2.625(A)(2).

ARGUMENT

I. The Court lacks jurisdiction to enjoin or interfere with the Governor's exercise of her constitutional and statutory authority.

The People of the State of Michigan have vested the power to remove elected city officials exclusively in the Governor of the State of Michigan under Const 1963, art 7, § 33, which provides that "[a]ny elected officer of a political subdivision may be removed from office in the manner and for the causes provided by law," and MCL 168.327.

The removal of local elected officials from office has been constitutionally authorized since before Michigan became a state. When recommending language that would become Const 1963, art 7 § 33, the Committee on the Executive Branch explained:

> The 1835 constitution gave the legislature power to provide by law for the removal of justices of the peace and other county and township officers. The 1850 constitution made the same provision "for the removal of any officer elected by a county, township or school district."
>
> The 1908 provision kept the 1850 specification of elected officers, but broadened the language to include those of cities and villages.
>
> In addition to provisions for removal of local officers by local authority through laws and charters, statutes pursuant to this section have given the governor general power to remove the following elected local government officers for cause with notice of specific charges and hearing: county officers, MSA 6.1207, including auditors, MSA 6.1238, and road commissioners, MSA 6.1268; city officers, MSA 6.1327; justices of the peace and township officers, MSA 6.1369; and village officers, MSA 6.1383. Removal of elective local officers "in such manner and for such cause as shall be prescribed by law," as presently provided in section 8, appears to be reasonably flexible. The legislature by statute has vested power in the governor to remove such officers for cause.

1 Official Record, Constitutional Convention 1961, p 838.

Because the People of the State of Michigan have vested this removal power exclusively in the Governor, head of the executive branch, the judicial branch has long been reluctant to interfere with the Governor's exercise of that power. Under Const 1963, art 5, § 1, the executive power of this state is vested in the Governor. The judicial power is vested in Michigan's one court of justice under Const 1963, art 6, § 1. In 1927, the Michigan Supreme Court opined:

> The provision of the Constitution, basic law made by the people themselves, constitutes the Governor the sole tribunal in such cases. No right of appeal or review is given. If he acts within the law his decision is final. But if the right of a faithful officer to hold office has been violated arbitrarily or capriciously by the head of the executive department, he is entitled to redress. To the judiciary in such case attaches 'the delicate and ungrateful duty of inquiring whether the executive had infringed the law.'

* * *

> The Governor holds an exalted office. To him and to him alone, a sovereign people has committed the power and the right to determine the facts in the proceeding before us. His decision of disputed questions of fact is final. His finding of fact if it has evidence to support it, is conclusive on this court. It would be unbecoming in us to impugn his motives, and unseemly and unlawful to invade his discretion.

People ex rel Johnson v Coffey, 237 Mich 591, 598, 602; 213 NW 460 (1927) (citations omitted).

In the case of *Germaine v Governor*, 176 Mich 585, 592-593; 142 NW 738, the petition sought judicial review of the gubernatorial removal of the Mayor of Traverse City. Denying review, the Court focused on the limited ability of the courts to interfere with gubernatorial action:

> The reasoning in this case seems to us to establish the rule in this state that no process of the court can be issued against the Governor of this state in any proceeding seeking to review any action performed by him as Governor under power conferred upon him either by the Constitution or legislative enactment. In the case of Ayres v. State Auditors, this court said: 'It has also been held that we cannot interfere with the discretion of the chief executive of the state or subordinate him to our process.' [Citations omitted.]

More recently, in *Buback v Governor*, 380 Mich 209; 156 NW2d 549, the Michigan Supreme Court expressed its reluctance to interfere removal of a county sheriff:

> Where the removal power has been assigned to the Governor or to a State agency, this Court has refused directly to interfere with the exercise of that power.
>
> * * *
>
> The reasons why the role of the courts in removal proceedings is an exceedingly limited one and why a court should avoid involvement were examined in *Koeper v. Detroit Street* Railway *Commission* (1923), 22 Mich. 464, 193 N.W. 221; and again in *In re Fredericks*, *supra*, in which this Court said (285 Mich. p. 265, 280 N.W. p. 465):

> 'The act of removing for cause * * * (is) primarily administrative and, although judicial in a sense, not an act of such a nature that it requires performance by the judicial branch of the government or permits an appeal thereto.'
>
> The removal power here under consideration was assigned by the legislature to the executive branch of State government.

In *Buback, supra*, the Supreme Court upheld a Court of Appeals decision rejecting the Wayne County Sheriff's efforts to enjoin a removal proceeding against him by Governor George W. Romney while criminal charges arising from the same circumstances were pending against the Sheriff. The court rejected the Sheriff's claim that the removal proceeding would violate his privilege against self-incrimination and deprive him of procedural due process. *Id.*, p 213.

Based on the foregoing, the court should be extremely reluctant to interfere with the actions of the state's chief executive exercising constitutional powers as the Plaintiff requests. Under Const 1963, art 5, sec 8, the Governor is charged with the faithful execution of the law, not the Plaintiff, nor this court. The Governor has no less a solemn obligation than does the judiciary to consider the constitutionality of her every action. *Lucas v Wayne Co Bd of Road Comm'rs*, 131 Mich App 642, 663; 348 NW2d 660 (1984)

Plaintiff would have this court apply rules applicable to judicial proceedings. But a removal proceeding under MCL 168.327 is not a judicial proceeding. Plaintiff also incorrectly ignores the rights of the public of which Defendant is constitutionally charged with protecting in removal proceedings:

> [T]he weight of authority, including in Michigan cases, is to the effect that a public office is a trust; that the public interest and rights are paramount; and that all offices not constitutional are taken subject to the vicissitudes of legislative action, among which are removals by the appointing authority among which are removals by the appointing power, whether such power may be

> exercised arbitrarily or upon investigation and discovery of adequate cause.

Fuller v Attorney Gen, 98 Mich 96, 105; 57 NW 33 (1893), citing *Frey v Michie*, 68 Mich 323, 328; 36 NW 184 (1884).

Essentially, Plaintiff seeks to so restrict Defendant from exercising constitutional duties by imposing restrictions on the removal proceeding requiring Defendant to proceed in the same manner as court conducting a trial. Such a restrictive view of the Governor's removal authority has long been rejected by Michigan courts:

> It is no new doctrine that the exigencies of government require prompt removal of incompetent or unfaithful officers, and we cannot discredit the intelligence of the framers of the constitution by supposing them ignorant of negligent of it. [*Fuller v Attorney Gen*, 98 Mich 96, 103; 57 NW 33 (1893).]

For these reasons, Plaintiff's complaint must be dismissed.

II. Plaintiff has failed to meet the standards required for injunctive relief.

The standards governing the award of injunctive relief are well-established under Michigan Law:

> In determining whether to issue a preliminary injunction, a court must consider four factors: (1) harm to the public interest if the injunction issues; (2) whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted; (3) the likelihood that the applicant will prevail on the merits; and (4) a demonstration that the applicant will suffer irreparable injury if the relief is not granted. ...

Thermatool Corp. v. Borzym, 227 Mich App. 366, 376; 575 NW2d 334 (1998). See also, *Michigan State AFL-CIO v. Secretary of State*, 230 Mich App. 1, 583NW2d 701 (1998).

A. The public interest weighs strongly against the issuance of a preliminary injunction.

The sole *argument made* by Plaintiff with regard to the public interest is the assertion that, in the event the Governor were to determine that his removal from office was required by the statute, this result would disenfranchise the citizens who elected him. . However, the only case cited by Plaintiff for this proposition, *Metevier v Therrien*, 890 Mich 187; 45 NW 78 (1890), certainly does not support this assertion. There, the court set aside a removal determination made by the Governor on the grounds that the Governor had failed to comply with specific procedural requirements imposed by the statute (specifically, failure to provide the officer with notice of the specific acts of misconduct alleged and failure to do so eight days before conducting a hearing). While the court certainly did express its concern to protect the interests of the public, this concern centered on the necessity that the statutory process be followed; the court in no way suggested that removal *per se* amounts to an impermissible disenfranchisement of the voters where that power is properly exercised in accordance with law.

Moreover, Plaintiff's disenfranchisement theory has been flatly rejected by the Michigan Supreme Court in the analogous context of a removal or vacation of office through operation of law. In *Attorney General v Moreland*, 112 Mich 145; 70 NW 450 (1897), the court held that, when the incumbent Mayor of Detroit ran for, won, and assumed the office of Governor, he had vacated the office of Mayor. Rejecting the Governor's assertion that he should be

permitted to hold both offices, the court firmly dismissed the argument that his ouster as Mayor would disenfranchise the city's voters:

> [I]it is intimated that a result which ousts him from the office of mayor will have the effect to disfranchise the people, and that such result is fraught with dangerous consequences. Were it not for the eminence of counsel who present these considerations of this court, we should hesitate about adverting to such elementary principles as furnish an answer to these suggestions and demonstrate their impropriety as well. *Even the power of majorities may be, and often is, restrained by the written constitution*; and where the majority assumes to do what is forbidden, or to do what is permitted in a mode forbidden by the constitution, the duty of the court to protect the rights of minorities is too manifest to require, at this day, either apology for its exercise or an elucidation of its source of authority."

Id, at 173; 70 NW 450 (1897). (Emphasis added.)

More importantly, Plaintiff's *analysis* entirely overlooks the compelling public interest in the removal authority vested in the Governor. As the Michigan Supreme Court observed in *Attorney General v. Jochim*, 99 Mich. 358, 377-378; 58 NW 611 (1894):

> [I]it is not for the general public good that responsible public offices shall be confided to, or remain in, the custody of those whose duties and responsibilities rest so lightly upon them as to permit the public interests to be injured or endangered through neglect; and when such neglect, from the gravity of the case, or the frequency of the instances, becomes so serious in its character as to endanger or threaten the public welfare, it is gross, within the meaning of the law, and justifies the interference of the executive, upon whom is placed, by this amendment, the responsibility of keeping the affairs of state in a proper condition.

The court in *Jochim* further noted that while "many cases can be found that speak of the disgrace of removals and the right to hold an office under election," the vesting of constitutional removal authority in the Governor "recognizes the power of the people over public offices, and sustains the authority of the governor . . . to remove for cause." *Id.*, pp

369-370. Accord, *People ex rel Clardy v Balch*, 268 Mich 196, 207-208; 255 NW 762 (1934). As the court underscored in *Balch*, the object of the Governor's removal authority is "not to punish the plaintiff, but to improve the public service." *Id.*

B. The potential harm to Plaintiff does not outweigh the public interest

Plaintiff's assertion of the harm he faces is similarly flawed. His principal contentions are that his potential loss of his office and his claim that his ability to defend against his pending criminal charges may be adversely affected if he is forced to defend a removal proceeding at this time.

These claims were raised and briefed by the Plaintiff in a motion filed with the Governor on August 8, 2008 and in subsequent briefs filed by Plaintiff on August 20 and August 25, 2008. Those claims were thoroughly discussed and rejected by the Governor in a lengthy written opinion and order issued on August 25, 2008. A copy of that opinion and order is attached to this memorandum of law and is adopted and incorporated herein by reference.

It is well settled in Michigan that an elected official has no property right in the office held:

> *A public office cannot be called 'property,' within the meaning of these constitutional provisions.* If it could be, it would follow that every public officer, no matter how insignificant the office, would have a vested right to hold his office until the expiration of the term. Public offices are created for the purposes of government. *They are delegations of portions of the sovereign power for the welfare of the public. They are not the subjects of contract, but they are agencies for the state, revocable at pleasure by the authority creating them, unless such authority be limited by the power which conferred it.*

Jeffries v Wayne Co Election *Comm*, 294 Mich 255, 258; 295 NW 546 (1940), quoting *Attorney Gen ex rel Governor v Jochim*, 99 Mich 358, 367; 58 NW 611 (1894). (Emphasis added.)

It is also well-established that an accused officer does not have the right to suspend a removal proceeding merely because criminal charges are pending, even when those *charges* are based on the same facts and circumstances. The two proceedings are inherently different in their nature and purpose. In *Thangavelu v Dep't of Licensing & Regulation*, 149 Mich App 546, 555-556; 386 NW 2d 584 (1986), the court explained this distinction in the analogous context of a license revocation proceeding:

> In addition to the difference in the degrees of proof required, although the issues involved in the administrative hearing and the criminal proceeding may overlap, the purpose of a revocation proceeding substantially differs from a criminal proceeding.
>
> * * *
>
> The practice of medicine, in addition to skill and knowledge, requires honesty and integrity of the highest degree, and inherent in the State's power is the right to revoke the license of those who violate the standards it sets. This revocation proceeding is not a second criminal proceeding placing the physician in double jeopardy. Rather, the purpose is to maintain sound, professional standards of conduct for the purpose of protecting the public and the standing of the medical profession in the eye of the public.

In *People v* Artman, 218 Mich App 236, 245-246; 553 NW 2d 673 (1996), the court similarly ruled that a defendant's disbarment from the law profession after his prosecution for the same conduct did not violate the prohibition against double jeopardy because the civil penalty of disbarment serves a purpose distinct from any punitive purpose. In so concluding, the Michigan Court of Appeals relied in part on a United States Supreme Court decision holding that an in rem civil forfeiture did not constitute "punishment" for purposes of the

double jeopardy clause because, among other things, the statutes on which they are based serve important non-punitive and remedial goals. *United States v Ursery*, 518 US 267, 290; 116 S Ct 2135; 135 L Ed 2d 549 (1996).

Nor will Plaintiff be unlawfully compelled to give testimony or produce evidence at the removal proceeding that may later be used against him in a criminal proceeding. On this point, the Governor, in her opinion, found persuasive the court's rationale in *Governor v Senate President*, 156 Ariz 297; 751 P2d 957 (1988). In that case, Arizona Governor Evan Mecham objected to an impeachment trial pending before the Arizona Senate while he also was facing a criminal prosecution based upon the same facts. Concluding that Governor Mecham could refuse to testify before the Senate, and that neither the Senate nor a prosecutor could later use his refusal to testify against him, the court allowed the impeachment trial to proceed. The court noted, *id* at p 303:

> In the final analysis, we must recognize, however, that the rights of a person accused of crime are not co-extensive with the privilege of remaining in public office.

Plaintiff may similarly refuse to testify or decline to answer specific questions in the removal proceeding if his testimony would incriminate him in his pending criminal prosecution. "Although the choice facing him is difficult, that does not make it unconstitutional." Hart v Ferris State College, 557 F Supp 1379, 1385 (WD Mich, 1983), quoting Gabrilowitz v Newman, 582 F2d 100, 104 (CA 1, 1978). Should Plaintiff refuse to testify in the removal proceeding, the Governor has ruled that she will not use that refusal against him.

Accordingly, the alleged harm that Plaintiff has asserted is at most minimal and does not outweigh the strong public interest in having the Governor proceed with the pending removal

request especially since the purpose of the removal proceeding is remedial in nature and serves important, non-punitive goals, namely, the protection of the public interest. *Balch, supra*, p 268.

C. Plaintiff has no likelihood of success on the merits.

As best as can be determined from Plaintiff's brief, he is asserted two separate theories that he claims entitle him to relief. He alleges first that the Governor has demonstrated bias against him and that the procedural process being followed by the Governor is flawed; these alleged flaws, he asserts, violate the fair and just treatment clause of Const 1963, art 1 § 17. Secondly, he attacks the statute itself. MCL 168.327 provides that the Governor must remove him from office if "the governor is satisfied from *sufficient evidence* submitted to the governor" that he "has been guilty of official misconduct," or other specified offenses. He asserts that the statute is void for vagueness because it fails to define either the "sufficient evidence" standard or the term "official misconduct." Both of these claims are utterly without merit.

1. Plaintiff has not been denied fair and just treatment under Const 1963, art 1, § 17.

Plaintiff seeks to block the Governor from exercising constitutional and statutory removal authority by alleging a violation of the "Fair and Just Treatment Clause" of Mich Const 1963, art 1, § 17. This provision was mentioned in the context of a removal proceeding in opinion issued by four of eight members of Michigan Supreme Court sitting in *Buback v Governor*, 380 Mich 209, 217-218; 156 NW2d 549 (1968):

> It may be noted that the second sentence of Article I, s 17, the due process section of the 1963 Constitution, reads:

> 'The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.'

The Convention comment on this sentence in the Address to the People states:

> 'The second sentence incorporates a new guarantee of fair and just treatment in legislative and executive investigations. This recognizes the extent to which such investigations have tended to assume a quasi-judicial character. The language proposed in the second sentence does not impose categorically the guarantees of procedural due process upon such investigations. Instead, It leaves to the legislature, the executive and finally to the courts, the task of developing fair rules of procedure appropriate to such investigations. It does, however, guarantee fair and just treatment in such matters.'

However, the Plaintiff inappropriately relies upon this constitutional provision. The Fair and Just Treatment Clause is not self-executing and was intended to protect against specific forms of conduct not at issue in the removal proceeding pending before the Defendant.

The cardinal rule of interpreting a constitutional provision such as the Fair and Just Treatment Clause requires that the constitutional provision be given a meaning consistent with the common understanding of the people that adopted the provision. *Traverse City School Dist v Attorney Gen*, 384 Mich 390, 405; 185 NW2d 9 (1971). To do so, courts may consider the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished. *Id.* In ascertaining the common understanding of a constitutional provision, it is the "meaning which the ordinary citizens who ratified the Constitution would attach to the words under consideration" not the meaning that lawyers and legislators may attach to the constitutional provision. *Kuhn v Dep't of Treasury*, 384 Mich 378, 384; 183 NW2d 796 (1971).

When attempting to discern that meaning, there are two tools within the constitutional interpretation toolbox. First, convention floor debates have been found most instructive in discerning the circumstances surrounding the adoption of a constitutional provision. *House Speaker v Governor*, 443 Mich 560, 580-581; 506 NW2d 190 (1993). Second, the Address to the People adopted by the 1961 Constitutional Convention can be used to help ascertain the intent of a constitutional provision. *Advisory Opinion on 1978 PA 426*, 403 Mich 631, 641; 272 NW2d 495 (1978). "[T]he circumstances surrounding the adoption of a constitutional provision and the purpose sought to be accomplished" by the provision often are relevant to determining the meaning of the provision. *Comm for Constitutional Reform v Secretary of State*, 425 Mich 336, 340; 389 NW2d 430 (1986), quoting *Traverse City School Dist v Attorney Gen*, 384 Mich 390, 405; 185 NW2d 9 (1971), citing *Kearney v Bd of State Auditors*, 189 Mich 666, 673; 155 NW 510 (1915).

The Address to the People, explains that the Fair and Just Treatment *Clause* was a new provision aimed at quasi-judicial investigations and hearings and intended to guarantee fair and just treatment in such proceedings:

> This is a revision of Sec. 16, Article II, of the present constitution. The second sentence incorporates a new guarantee of fair and just treatment in legislative and executive investigations. This recognizes the extent to which such investigations have tended to assume a quasi judicial-character.
>
> **The language proposed in the second sentence does not impose** categorically **the guarantees of procedural due process** upon **such investigations. Instead, it leaves to the Legislature, the Executive, and finally to the courts, the task of developing fair rules of procedure appropriate to such investigations**. It does, however, guarantee fair and just treatment in such matters.

2 Official Record, Constitutional Convention 1961, p 3364. (Emphasis added.)

As the Address to the People suggests, the Fair and Just Treatment Clause, is not necessarily self-executing. Because the legislative power of this state is vested in the Michigan Senate and the Michigan House of Representatives under Const 1963 art 4, § 1, a historical rule provided that constitutional provisions were not self-executing and legislative action was required to implement those provisions. See, *Hamilton v Deland*, 227 Mich 111, 115-116; 198 NW 843 (1927). But as time progressed, constitutional provisions of a "statutory character" evolved and were deemed to be self-executing. *Id.*, p 116. The Michigan Supreme Court has ruled that a constitutional provision is not self executing if it merely sets forth general principles:

> 'one of the recognized rules is that a constitutional provision is not self-executing when it merely lays down general principles, and that it is self-executing if it supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced, without the aid of a legislative enactment.' 6 R. C. L. § 55.

Detroit *v Oakland Co Cir Judge*, 237 Mich 446, 450; 212 NW 207 (1927).

Considering specifically whether the Fair and Just Treatment Clause is self-executing, one panel of the Michigan Court of Appeals, in an unpublished opinion, has answered in the negative. See, *People v Morris*, 1992 WL 258804, unpublished opinion of the Court of Appeals entered October 6, 1992 (Docket No. 12377), withdrawn on other grounds *People v Morris*, 490 NW2d 91 (1992) (*"Morris I")*on the basis of *People v Wright*, 441 Mich 140; 490 NW2d 35 (1992) (providing no discussion of whether Clause is self-executing), lv den *People v Morris,* 443 Mich 853, 505 NW2d 580 (1993) (*"Morris II"*). *Morris I*[1] is the only

[1] Note, however, that both *Morris I* and *Jo-Dan, Ltd v Detroit Bd of Ed*, 2000 WL 33416896, unpublished opinion of the Court of Appeals entered July 14, 2000 (Docket No. 201406), app den 486 Mich 983 (2001), which is relied upon by the Plaintiff, are unpublished opinions, which under MCR 7.215(C)(1) are not precedentially binding under the rule of stare decisis.

opinion expressly considering whether the Clause is self-executing. In concluding that the Clause is not self-executing, the Morris panel stated:

> [T]he convention comments [Address to the People] that follows this section expressly states that this part of § 17 is not self executing.

Morris I, supra.

Buttressing this conclusion in *Morris I*, are comments from delegates serving at the 1961 Constitutional Convention. For example, Delegate Harold Norris (D-Detroit), the Second Vice Chairman of the Committee on Declaration of Rights, Suffrage and Elections, the committee that drafted the Fair and Just Treatment Clause, clearly intended that the provision not be self-executing:

> And, if this were passed, it would be a duty in the first instance upon the legislature to evolve codes and statutes, it would be a duty on the part of the executive department to promulgate such rules for the conduct of executive investigations as would comport with fair and just treatment and also the court would review this and evolve the fair and just rules.

1 Official Record, Constitutional Convention 1961, p 548.

Similarly, Delegate William P. Pellow (D-Bessemer) concluded that the language of the fair and just treatment clause "is mandatory on the legislature to act." *Id.*, p 550.

In asserting that constitutionally and statutory authorized removal proceedings violate the Fair and Just Treatment Clause, Plaintiff cites *Jo-Dan, Ltd v Detroit Bd of Ed*, 2000 WL 33416896, unpublished opinion of the Court of Appeals entered July 14, 2000 (Docket No. 201406), app den 486 Mich 983 (2001). In that case, the Detroit Board of Education conducted an investigation regarding the plaintiffs' ability to secure a contract with the Board. The investigation was initiated by the Board President who accused the plaintiffs of

being involved in a bribery scheme. The Court concluded that the Board's sham investigation harassed, demeaned, and impugned the integrity of the Plaintiff. No similar allegations are made here. The plaintiffs in *Jo-Dan* never allege a violation of the Fair and Just Treatment Clause. The court nevertheless reviewed the case under the Clause. Furthermore, the Court of Appeals affirmed the jury verdict against the plaintiffs.

Because the Fair and Just Treatment Clause is not self-executing, it does not this action brought by the Plaintiff. MCL 168.327 provides that in the removal proceeding currently pending before the Defendant, Plaintiff is entitled to notice of the charges against him and an opportunity to be heard in his defense. No further rights are vested in the Plaintiff or other individuals by this provision. Accordingly, Plaintiff has failed to state a claim for which relief can be granted and Defendant is entitled to summary disposition pursuant to MCR 2.116(C)(8).

Alternatively, assuming for the sake of argument that the Fair and Just Treatment Clause is self-executing, the Clause does not apply to the few facts alleged by the Plaintiff, compelling the conclusion that the Plaintiff has failed to state a claim for which relief may be granted. When interpreting a constitutional provision, the Michigan Supreme Court has directed that the circumstances surrounding the adoption of the constitutional provision and the purpose sought to be accomplished must be considered. *Traverse City School Dist*, *supra*, p 405. Thus, "constitutional provisions must be interpreted within the context of the times. . . ." *People v Neumayer*, 405 Mich 341, 365; 275 NW2d 230 (1979). Further, the floor debates of the Constitutional Convention record are the most instructive tool for discerning the circumstances surrounding the adoption of a constitutional provision. *House Speaker*, *supra*, pp 580-581.

Recall that 1961 Constitutional Convention was convened in tumultuous times where McCarthyism was slowing, and the abuses of the House Un-American Activities Committee lingered. As noted in *Jo-Dan, Ltd, supra*, the Michigan Constitution of 1963 is a product of times during which legislative investigations and hearings, particularly those centered on alleged "subversives" negatively affected citizens even in the absence of proof of illegal conduct by those citizens. As the convention convened in 1961, the era of McCarthyism was fresh in their minds and memories of the abuses of the House Un-American Activities Committee lingered. During the preceding decade in Michigan, laws had been enacted with the claimed purpose of protecting government from "subversive" individuals and to create "security investigation" and "subversive activities investigation" divisions within the Department of State Police. See 1950 PA (Ex Sess) 38-51; and 1952 PA 117 as amended by 1953 PA 37 (the "Michigan Communist Control Law" commonly known as the "Trucks Law"). Additionally, the Michigan Communist Party had recently been successful in challenging the Trucks Law, with major provisions of the law declared unconstitutional by the Supreme Court in *Albertson v Attorney General*, 345 Mich 519, 77 NW2d 104 (1956).

Like these generally known circumstances of the times, the floor debates of the Constitutional Convention demonstrate that the Fair and Just Treatment Clause was designed for much different purposes than those being asserted by Plaintiff. Debates at the 1961 Constitutional Convention reference Congressional inquisitions which exposed the private affairs of individuals without justification. See, 1 Official Record, Constitutional Convention 1961, p 545. During these times, there was a substantial concern over the abuses of Congressional investigations, *Id.*, p 546, and specific reference to concerns at the state level

as well.[2] Next, the debates reveal that investigators assumed the right to ridicule, expose, demean, deprecate, and intimidate witnesses with impunity. *Id.* Third, this provision was designed with an eye on witnesses to investigations and hearings. *Id.*, pp 546-547. Specifically, the debates reflect that persons who were summoned to appear before a legislative committee were otherwise afforded no constitutional rights. Id., p 546, . In the words of Delegate J. Harold Stevens the First Vice Chairman of the committee on Declaration of Rights, Suffrage and Elections:

> We simply thought a person called by subpoena or certainly one who appears voluntarily should be treated with courtesy and fairness, that his personal reputation should not be impugned if he is there merely to make statements to the committee—certainly so long as he voluntarily cooperates with the committee.

Id., p 549. Fourth, and as reflected above, one of the main purposes of the provision was to protect persons from defamation of character and imputations and charges made under the auspices of investigations. *Id.*, p 546. Finally, abuses have arisen through various committee investigations and some hearings have become oppressive. *Id.*, p 547.

It must be concluded, therefore, that the Fair and Just Treatment Clause applies to situations where governmental bodies have used their powers in an abusive and *oppressive* manner. Indeed, the gravity of inquisitions before the House Un-American Activities Committee concerning alleged members of the Communist Party is in a *different* universe than the instant Plaintiff who is challenging a constitutional process for the removal of elected officials under in place since this state's inception.

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[2] Delegate Harold Norris (D-Detroit), who was the attorney that had filed an amicus brief in *Albertson*, *supra*, on behalf of the Citizens' Committee Against Trucks Law, told the convention: "I am sure we could recite instances which would indicate this is a Michigan concern as well as a federal concern." 1 Official Record, Constitutional Convention 1961, p 547.

Plaintiff asks that the court apply the Fair and Just Treatment Clause in a manner similar to the Due Process Clause protecting individual rights without regard to *the* context in which the provision was adopted. The Constitutional Convention debates suggest otherwise. For example, Delegate Norris noted that application of due process principles to legislative and executive investigations and hearings in some circumstances would be unwise:

> Now, we have to understand that we are not talking about due process for a very important reason. We do not wish to encourage the trend of regarding legislative hearings as quasi criminal trials. We want to get away from that and get them to think in terms of the purpose of the investigation or the hearing, which is to get facts upon which to predicate remedial legislation. That's why we do not use the words due process. We're talking in terms of fair and just treatment and we recognize a rather tender and sensitive area in the separation of powers doctrine.

1 Official Record, Constitutional Convention 1961, p 548. Delegate Stevens commented:

> [W]e hoped that the constitution, as we changed it, would be a guide not only to the courts but to the legislature and administrative bodies to be fair and just. It is not expected that due process of law in the sense which it would apply in a court would necessarily apply in an administrative hearing or in a legislative hearing. It never has and it isn't intended that it should.

1 Official Record, Constitutional Convention 1961, p 547. Delegate Norris compared and contrasted the protections provided in a criminal trial and absent in legislative and executive hearings and investigations, but did not conclude that an absence of those protections would constitute fair or unjust treatment. Similarly, Delegate Ostrow described the Clause as a "rule of ordinary decent human conduct". *Id.*, p 550.

Thus, Plaintiff's ostensible, and vague, claim that that his that the Fair and Just Treatment Clause somehow creates an individual constitutional right to continue to hold office in this state without regard to the requirements of Michigan Election Law is outside of the realm of that which was contemplated by the framers, in drafting, and the People, in ratifying the Fair

and Just Treatment Clause. Plaintiff has, therefore, failed to state a claim for which relief can be granted.

Moreover, even assuming for the sake of argument that Plaintiff could validly assert a right under the Fair and Just Treatment clause, he has utterly failed to demonstrate that he has been denied fair and just treatment.

His claim that the Governor has demonstrated bias is patently false. Despite frequent requests for comment on this matter, the Governor has consistently and repeatedly refused to express any opinion on the merits of the Mayor's pending criminal charges or on the merits of the removal proceeding before her, indicating that any such expression would be inappropriate given her role in the removal process. Plaintiff's exhibits, such as they are, in no way contradict this position. The purported news articles attached by the Plaintiff as Exhibits (which are at best of dubious evidentiary value) merely demonstrate that the Governor, like many in the State, has expressed concern over the potential damage that the controversy may do to the City and the State and that she hopes that it can be resolved quickly. The Governor is not reported as expressing any opinion whatever on the merits of the pending charges; to the contrary, she is quoted as saying that "[w]e have to let the legal system take its course." Plaintiff's Exhibit C. Similarly, Paragraphs 15 of the Complaint, incorporated by reference into Mr. Thomas' affidavit, does no more than to portray the Governor doing precisely what many judges commonly do with litigants appearing before them: encouraging the opposing parties to talk; asking *both* parties to consider the likelihood and consequences of an adverse decision; and pressing *both* parties to consider possible compromises -- even painful compromises – that may lead to a mutually agreeable

settlement. Taken as a whole, these exhibits and allegations simply do not establish bias on the part of the Governor.[3]

Likewise, Plaintiff's assertion that the procedure being followed by the Governor is so flawed that it denies him fair and just treatment is also without merit. In contrast to the *Metevier* case cited by Plaintiff, *supra*, Plaintiff has been scrupulously provided with all of the rights and protections afforded by the removal statute. He was served with a petition containing a comprehensive statement of the specific charges of misconduct asserted against him. Although the charges were filed on May 20, the hearing on the charges was set for September 3, providing him with months to prepare. He was given a generous opportunity to file briefs and motions raising legal issues in advance of the hearing. And he was provided with over a month's notice of the date of the hearing, far in excess of the 8 days that would have been considered sufficient in *Metevier*. (See attached letter of Kelly G. Keenan, dated July 28, 2008 and subsequent Notice of Hearing, dated August 7, 2008.) While MCL 168.327 requires only that Plaintiff be provided with an opportunity to be heard in his defense, the Governor has proposed an extensive hearing in which Plaintiff will have the

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[3] Plaintiff's bias argument is ineffective of another reason. Under MCL 168.327, the Governor is the sole judge as to the merits of the removal request. This responsibility cannot be delegated by the Governor. Cf, *Buback v Governor*, 380 Mich 209, 228-229; 156 NW2d 549 (1968). Hence, disqualification of the Governor would preclude the exercise of the removal power even if Plaintiff's conduct in office were determined to compel that result. In these circumstances, the common law rule of necessity applies:

> [A]lthough a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise.

United States v Will, 449 US 200, 213 (1980), quoting F. Pollack, *A First Book of Jurisprudence*, 270 (6th Ed, 1929). See also, *Evans v Gore*, 253 US 245, 247-248 (1920).

right to challenge the allegations and supporting documents contained in the removal petition, present witnesses and evidence in defense of his conduct, and cross-examine any witnesses who appear to testify against him. (See attached Prehearing Order dated August 11, 2008.) Taken collectively, these procedures more than adequately protect Plaintiff's and exceed the specific requirements imposed by the statute.[4]

2. MCL 168.327 is not void for vagueness.

All statutes are presumed to be constitutional and are construed as such unless their unconstitutionality is clearly apparent. *Shepherd Montessori Center Milan v. Ann Arbor Charter Twp,* 259 Mich.App 315, 341-342; 675 NW2d 271 (2003). The party challenging the statute has the burden of rebutting the presumption. *STC, Inc v. Dep't of Treasury,* 257 Mich.App 528, 539; 669 NW2d 594 (2003). "The 'void for vagueness' doctrine is derived from the constitutional guarantee that a state may not deprive a person of life, liberty, or property without due process of law." *Proctor v. White Lake Twp Police Dep't,* 248 Mich.App 457, 467; 639 NW2d 332 (2001). A statute may be challenged for vagueness on three grounds: 1) it is overbroad and impinges on First Amendment freedoms; 2) it does not provide fair notice of the conduct proscribed; or 3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the statute or ordinance has been violated. In evaluating a statute challenged as unconstitutionally vague, the entire text of the statute should be examined and the words of the statute should be given

[4] Compare, for example *Attorney Gen v Bairley*, 209 Mich 120; 176 NW 403 (1920). There, the former Sheriff of Monroe County challenged his removal by Governor Sleeper in part on the basis that it was unjust and inequitable to force the respondent to go the Lansing and produce and keep witnesses there for examination; consequently, the Sheriff produced no witnesses at a hearing conducted by the Governor. The removal was upheld by the Supreme Court.

their ordinary meanings. *Dep't of State Compliance & Rules Division v. Michigan Education Association-NEA,* 251 Mich.App 110, 116; 650 NW2d 120 (2002).

Here, Plaintiff argues that the phrase "official misconduct" does not give fair notice of the conduct proscribed. To give fair notice, a statute must give "a person of ordinary intelligence a reasonable opportunity to know what is prohibited or required." *English v Blue Cross Blue Shield of Michigan,* 263 Mich.App 449, 469; 688 NW2d 523 (2004). But, Michigan courts have been interpreting the term "official misconduct" in the context of removal proceedings for nearly a century. See, *McLauglin v Wayne Co Prosecuting Attorney*, 90 Mich 311, 51 NW 283 (1892); *People ex rel Metevier v Therrien*, 80 Mich 187; 45 NW 78 (1890); *People ex rel Clay v Stuart*, 74 Mich 411; 41 NW 1091 (1889); *Germaine v Governor*, 176 Mich 585; 142 NW 738 (1913); *Attonney General v Bairley*, 209 Mich 120; 176 NW 403 (1920); *People ex rel Johnson v Coffey*, 237 Mich 591; 213 NW 460 (1927); *Carroll v Grand Rapids Comm*, 265 Mich 51, 58; 251 NW 381 (1933); *Wilson v Highland Park Council*, 284 Mich 96, 98; 278 NW 778 (1938). And, in *Krajewski v Royal Oak,* 126 Mich App 695, 697; 337 NW2d 635 (1983), the court interpreted the phrase in the context of a state law limiting the ability of governmental entities to remove veterans serving as public officials. In so doing, the court determined that the phrase "official misconduct" has a peculiar and appropriate meaning in the law under MCL 8.3a and looked to its definition in Black's Law Dictionary (4th ed.), p. 1236, which, provides:

> "Official misconduct" includes any "unlawful behavior by a *public officer* in relation to the duties of his office, willful in its character, including any willful or corrupt failure, refusal, or neglect of an officer to perform any duty enjoined on him by law." [Emphasis added by court.]

More recently, in *People v* Coutu *(On Remand)*, 235 Mich App 695; 599 NW 2d 556 (1999), the same court described "official misconduct" as follows:

> The term, "misconduct in office" or "official misconduct" is broad enough to include any willful malfeasance, misfeasance, or nonfeasance in office. The term may, indeed in its common acceptation does, imply any act, either of omission or commission, on the part of an officer, by which the legal duties imposed by law have not been properly and faithfully discharged. Likewise, misconduct in office is corrupt misbehavior by an officer in the exercise of the duties of his office or while acting under color of his office, and criminal intent is an essential element of the crime.

Id. at 706, quoting 67 CJS, Officers, § 256, pp 789-790.

Giving the words of the statute their ordinary meanings, a person of ordinary intelligence would conclude that in prohibiting "official misconduct", Section 327 of the Michigan Election Law prohibits an an elected city official from engaging in "unlawful behavior in relation to the duties of his office, willful in its character, including any willful or corrupt failure, refusal, or neglect of an officer to perform any duty enjoined on him by law." The statute does not inadvertently proscribe a wide range of conduct. Indeed, the statutory language is reasonably precise in prohibiting certain behavior. For the same reason, Plaintiff's claim that the phrase "sufficient evidence" is vague is equally disingenuous.

Accordingly, the statute is not void for vagueness and Plaintiff's assertion to the contrary is without merit.

CONCLUSION

WHEREFORE, the Governor respectfully asks this Court to deny the injunctive relief requested by Plaintiff; to dismiss Plaintiff's Complaint with prejudice; and to award costs pursuant to MCR 2.114(F) and 2.625(A)(2).

Respectfully submitted,

Kelly G. Keenan
Legal Counsel

John Wernet
Deputy Legal Counsel
Office of the Governor
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111 South Capitol Avenue
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517-335-6847

Dated: August 29, 2008

PROOF OF SERVICE

The undersigned certifies that a copy of the above document was personally served upon the attorneys of record in the above cause, on the 29th day of August, 2008.

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 3RD JUDICIAL CIRCUIT
WAYNE COUNTY

HON. KWAME M. KILPATRICK,

Plaintiff,

v.

HON. JENNIFER M. GRANHOLM, in her official capacity as Governor of the State of Michigan,

Defendant.

Case No. 08-122051-CZ

HON. ROBERT L. ZIOLKOWSKI

James C. Thomas (P23801)
Attorney for Plaintiff

Kelly G. Keenan (P36129)
John C. Wernet (P31037)
Attorneys for Defendant
Office of Legal Counsel
Office of the Governor

GOVERNOR'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

ATTACHMENTS TO GOVERNOR'S MEMORANDUM OF LAW

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR

In the Matter of the Request for the Removal of Kwame M. Kilpatrick from the Office of Mayor of the City of Detroit

No. EO-2008-004-LO
Hon. Jennifer M. Granholm

OPINION AND ORDER (1) DENYING RESPONDENT'S MOTION TO DISMISS PETITION OR STAY PROCEEDINGS AND (2) GRANTING PETITIONER'S MOTION FOR HEARING ON THE MERITS

I. Introduction

On May 20, 2008, the Detroit City Council, Petitioner, submitted written charges to the Governor asking for the removal of Respondent, Kwame M. Kilpatrick, from the office of Mayor of the City of Detroit pursuant to Article 7, Section 33 of the Michigan Constitution of 1963 and Section 327 of the Michigan Election Law.[1] As required by that statute, the charges were verified by the affidavit of Kenneth V. Cockrel, Jr., President of the Council, and personally served on Respondent.

On July 1 and July 31, 2008, the Governor established a briefing schedule for the resolution of preliminary legal issues. Specifically, the Governor instructed the parties to raise any relevant legal issues in writing by August 6, 2008. Responses were due on August 20, 2008, and replies to the responses were due on August 25, 2008.

On August 6, 2008, Respondent filed a motion and supporting brief requesting the dismissal of Petitioner's charges or a stay in the proceedings, asserting that:

(1) MCL 168.327 does not require removal because there is insufficient evidence of official misconduct by Respondent;

(2) the affidavit of the Council President is insufficient as a matter of law to support the petition for removal;

(3) the petition was made by a simple majority of the Council in violation of its own rules;

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[1] Michigan Election Law, 1954 PA 116, § 327, as amended by 1982 PA 505 ("MCL 168.327").

(4) the removal proceedings are based on facts identical to those alleged in Respondent's pending criminal prosecution and therefore require Respondent to submit evidence undermining his defense and infringing upon his right against self-incrimination;

(5) the Detroit Charter does not provide for removal of an elected official for the reasons asserted by Petitioner;

(6) the rules subjecting an elected official to removal were not promulgated by ordinance in advance of the conduct and, thus, "ex post facto" application of those rules violates due process;

(7) Petitioner's investigation of the facts upon which the removal request is based was flawed and therefore may not be used as evidence against Respondent;

(8) the Stored Communications Act, 18 USC 2701 *et seq.*, prohibits the disclosure of the contents of text messages, without which the prosecutor has insufficient proof to establish guilt beyond a reasonable doubt; and

(9) the perjury statute, MCL 750.423, is void for vagueness because it gives no notice that an immaterial or irrelevant misstatement of fact constitutes a violation of the perjury statute.

On August 6, 2008, Petitioner filed a motion and supporting brief requesting a hearing on the merits of the removal request, asserting that: (1) the petition is properly before the Governor; (2) a stay of the proceedings is inappropriate; and (3) the charges submitted are sufficient to warrant a hearing on the merits. Because the outcome of Respondent's motion will determine that of Petitioner's motion, the motions will be reviewed and disposed of in that order.

II. Removal Authority

The removal of local public officers in this state is governed by Const 1963, art 7, § 33, which provides that "[a]ny elected officer of a political subdivision may be removed from office in the manner and for the causes provided by law."[2]

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[2] The removal of local elected officials from office has been constitutionally authorized since before Michigan became a state. When recommending language that would become Const 1963, art 7 § 33, the Committee on the Executive Branch explained:

> The 1835 constitution gave the legislature power to provide by law for the removal of justices of the peace and other county and township officers. The 1850 constitution made the same provision "for the removal of any officer elected by a county, township or school district."
>
> The 1908 provision kept the 1850 specification of elected officers, but broadened the language to include those of cities and villages.

The statute implementing Const 1963 art 7, § 33 and governing the removal process for elected city officials is MCL 168.327, which provides:

> The governor shall remove all city officers chosen by the electors of a city or any ward or voting district of a city, when the governor is satisfied from sufficient evidence submitted to the governor that the officer has been guilty of official misconduct, wilful neglect of duty, extortion, or habitual drunkenness, or has been convicted of being drunk, or whenever it appears by a certified copy of the judgment of a court of record of this state that a city officer, after the officer's election or appointment, has been convicted of a felony. The governor shall not take action upon any charges made to the governor against a city officer until the charges have been exhibited to the governor in writing, verified by the affidavit of the party making them, that he or she believes the charges to be true. But a city officer shall not be removed for misconduct or neglect until charges of misconduct or neglect have been exhibited to the governor as provided in this section and a copy of

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> In addition to provisions for removal of local officers by local authority through laws and charters, statutes pursuant to this section have given the governor general power to remove the following elected local government officers for cause with notice of specific charges and hearing: county officers, MSA 6.1207, including auditors, MSA 6.1238, and road commissioners, MSA 6.1268; city officers, MSA 6.1327; justices of the peace and township officers, MSA 6.1369; and village officers, MSA 6.1383.
>
> Removal of elective local officers "in such manner and for such cause as shall be prescribed by law," as presently provided in section 8, appears to be reasonably flexible. The legislature by statute has vested power in the governor to remove such officers for cause. [1 Official Record, Constitutional Convention 1961, p 838.]

Reported cases indicate that the constitutional authority to remove local elected officials was exercised a number of times prior to the adoption of the Michigan Constitution of 1963. See, e.g., *Attorney General v Bairley*, 209 Mich 120; 176 NW 403 (1920) (upholding removal of Monroe County Sheriff); *Germaine v Governor*, 176 Mich 585; 142 NW 738 (1913) (upholding removal of Traverse City Mayor); *People ex rel Clay v Stuart*, 74 Mich 411; 41 NW 1091 (1889) (upholding removal of Kent County Prosecutor); *McLauglin v Wayne Co Prosecuting Attorney*, 90 Mich 311, 51 NW 283 (1892) (refusing to issue court order to compel officials to proceed with removal of Detroit alderman); *People ex rel Metevier v Therrien*, 80 Mich 187; 45 NW 78 (1890) (invalidating removal of Mackinac County Sheriff for failure to provide notice and lack of specific charges). After the 1963 Constitution took effect, in *Buback v Governor*, 380 Mich 209; 156 NW2d 549 (1968), the Supreme Court upheld a Court of Appeals decision rejecting the Wayne County Sheriff's efforts to enjoin a removal proceeding against him by Governor George W. Romney while criminal charges arising from the same circumstances were pending against the Sheriff. The court rejected the Sheriff's claim that the removal proceeding would violate his privilege against self-incrimination and deprive him of procedural due process. *Id.*, p 213. And, in 1982, Governor William G. Milliken found the elected West Bloomfield Township Treasurer "guilty of official misconduct which constitutes a sufficient basis for his removal from office." Executive Order No. 1982-17.

> the charges served on the officer and an opportunity given the officer of being heard in his or her defense. The service of the charges upon the officer complained against shall be made by personal service to the officer of a copy of the charges, together with all affidavits or exhibits which may be attached to the original petition, if the officer can be found; and if not, by leaving a copy at the last known place of residence of the officer, with a person of suitable age, if a person of suitable age can be found; and if not, by posting the copy of the charges in a conspicuous place at the officer's last known place of residence. An officer who has been removed from office pursuant to this section shall not be eligible for election or appointment to any office for a period of 3 years from the date of the removal. A person who has been convicted of a violation of section 12a(1) of Act No. 370 of the Public Acts of 1941, being section 38.412a of the Michigan Compiled Laws, shall not be eligible for election or appointment to an elective or appointive city office for a period of 20 years after conviction.

This statute requires the Governor to remove an elective city officer when the Governor is convinced, based on sufficient evidence, that the accused officer is guilty of "official misconduct," "wilful neglect of duty," or other specified offenses.

III. Discussion of Motions

A. Respondent's motion to dismiss or stay the proceedings.

1. Does the petition set forth sufficient evidence of official misconduct to warrant a hearing?

Respondent asserts in his motion for dismissal that the Governor's standard of review when determining whether to hold a hearing is based on the sufficiency of the evidence in the removal request. This assertion is incorrect. The "sufficient evidence" standard described in the statute expressly applies to the Governor's final decision whether to remove an elected city official, which is made only after Respondent has been heard and all submitted evidence evaluated. At this initial stage, however, the standard is whether the allegations and materials submitted, if true, would establish an offense warranting a hearing on the merits.[3]

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[3] A removal request under MCL 168.327 must allege specific charges and the date and place of their occurrence. OAG, 1932-1934, p 408 (December 11, 1933), citing *People ex rel Metevier v Therrien*, 80 Mich 187; 45 NW 78 (1890). In that opinion, Attorney General Patrick O'Brien advised Governor William A. Comstock on an unverified petition relating to conditions in beer gardens in Detroit and seeking removal of the city's acting mayor, the Wayne County Prosecutor, and certain Detroit police officers. The Attorney General advised that the petition did not comply with the requirements of the law as it was not verified by the affidavit of the petition signers and because most of the charges were of a general nature. *Id.*, p 409. The Governor's constitutional and statutory authority to remove the Mayor of the City of Detroit was also explicitly recognized in *Attorney Gen ex rel Moreland v Detroit Common Council*, 112 Mich 145, 170-171, 173; 70 NW 450 (1897).

In this matter, Petitioner claims that Respondent used his public office for private gain. Specifically, Petitioner claims that Respondent utilized his office and public resources, including the services of Detroit's law department, to enter into settlement agreements in the matters of *Brown v Detroit Mayor*, Wayne Circuit Court (Docket No. 03-317557-NZ) and *Harris v Detroit Mayor*, Wayne Circuit Court (Docket No. 03-337670-NZ), and that he did so for personal gain, including to avoid personal embarrassment and possible criminal prosecution.

Petitioner also claims that Respondent concealed from or failed to disclose to the Council information material to the Council's review and approval of the settlement agreements. Petitioner alleges that Respondent's concealment efforts were carried out through an elaborate scheme that included, among other actions: (1) Respondent's execution, as a condition of the settlements, of one or more confidentiality agreements; (2) Respondent's rejection of the settlements including the confidentiality provisions after the city received a Freedom of Information Act[4] request for all documents related to the settlements; (3) Respondent's subsequent approval of a revised settlement agreement that excluded any reference to the confidentiality provisions; and (4) Respondent's execution of a separate confidentiality agreement that was kept secret. Petitioner further asserts that, by failing to inform the Council of the confidentiality agreement negotiated as part of these settlements, Respondent failed to disclose material terms or conditions of the settlements and therefore failed to obtain the Council's informed consent in authorizing the settlements, the combined total of which amounted to $ 8.4 million in public funds.

Petitioner has submitted approximately 29 documents as exhibits in support of the petition and charges. Petitioner also has verified the charges with the signed, dated, and notarized affidavit of Kenneth V. Cockrel, Jr. Petitioner asserts that these exhibits show that Respondent's alleged conduct violates Detroit Charter, §§ 2-106 and 6-403, and constitutes "official misconduct" under MCL 168.327.

a. Detroit Charter, § 2-106.

Detroit Charter, § 2-106, governs the standards of conduct to be adhered to by city officers and employees, including the Mayor, provides part:

> ***The use of public office for private gain is prohibited. The city council shall implement this prohibition by ordinance, consistent with state law.*** The ordinance shall contain appropriate penalties for violations of its provisions. The ordinance shall provide for the reasonable disclosure of substantial financial interests held by any elective officer, appointee, or employee who regularly exercises significant authority over the solicitation, negotiation, approval,

[4] 1976 PA 442, as amended, MCL 15.231 *et seq*.

> amendment, performance or renewal of city contracts, and in real property which is the subject of a governmental decision by the city or any agency of the city. ***The ordinance shall prohibit actions by elective officers***, appointees, or employees ***which create the appearance of impropriety***. [Emphasis added.]

This Charter provision prohibiting the use of public office in the City of Detroit for private gain has been implemented by ordinance. When adopting that implementing ordinance in 2000, the Council included a statement of purpose now codified at Detroit Ordinance, § 2-6-1:

> Public service is a public trust. A position of public trust should never be used for private gain as defined in section 2-6-3 of this Code. In order to promote public confidence in public servants, to preserve the integrity of city government, and to establish clear disclosure requirements and standards of conduct for all public servants of the City of Detroit, the City of Detroit enacts this article which shall be liberally construed so as to avoid even the appearance of impropriety by its public servants so that the public interest is protected.

The official commentary on this ordinance is codified as part of the Detroit City Code and provides detailed guidance regarding the intent of this provision. Additionally, Detroit Ordinance, §§ 2-6-1 to 2-6-130, must be "liberally construed" to fully protect the public interest. The official commentary provides, in relevant part:

> The integrity of city government and public trust and confidence in public officers and employees require that public servants be independent, impartial and responsible to the People; that government decisions and policy be made within the proper channels of the governmental system; and that public office not be used for personal gain. The purpose of this article is to establish guidelines for ethical standards of conduct for all City government officials and employees by defining those acts or actions that are incompatible with the best interests of the City and by mandating disclosure by public servants of private financial or other interests in matters affecting the City. [Detroit Ordinance, § 2-6-1, Commentary.]

The ordinance defining "private gain" also includes specific commentary on that term and its use:

> In the interest of maintaining honesty, integrity and impartiality in government, the goal of this provision is to ensure that public servants conduct government business in a manner that enhances public confidence and respect for city government, and places paramount importance on the public interest, rather than a public servant's own

> personal interest or the private interest of a third-party. [Detroit Ordinance, § 2-6-101, Commentary.]

b. Detroit Charter, § 6-403.

> Detroit Charter, § 6-403, provides:
>
> The corporation counsel shall defend all actions or proceedings against the city.
>
> The corporation counsel shall prosecute all actions or proceedings to which the city is a party or in which the city is a party or in which the city has a legal interest, ***when directed to do so by the mayor***.
>
> Upon request, the corporation counsel may represent any officer or employee of the city in any action or proceeding involving official duties.
>
> ***No civil litigation of the city may be settled without the consent of the city council***. [Emphasis added.]

Unlike Detroit Charter, § 2-106, Detroit Charter, § 6-403 is self-executing, and does not require enactment of an implementing ordinance. The corporation counsel referenced in Detroit Charter, § 6-403 is part of the city's executive branch.[5] Under Detroit Charter, § 5-101, "[t]he mayor is the chief executive of the city and, as provided by this Charter, has control of and is accountable for the executive branch of city government." Therefore, ultimate responsibility for the law department and the corporation counsel are vested by the people of the City of Detroit in the Mayor.

c. Official misconduct under MCL 168.327.

Michigan courts have been interpreting the term "official misconduct" in the context of removal proceedings for nearly a century. In *People ex rel Johnson v Coffey*, 237 Mich 591; 213 NW 460 (1927), the court upheld Governor Alex Groesbeck's removal of Thomas Johnson from the elected office of Superintendent of Public Instruction based upon charges that he unlawfully received $1,500.00. The court concluded that the unlawful receipt constituted malfeasance regardless of his good faith belief and intentions and legal advice from his attorney that his conduct was lawful. In so concluding, the court warned that "courts frown on the taking of moneys from the public treasury unlawfully . . . and deal more severely with such official misconduct than with many other acts of official misbehavior." *Id.*, p 602. In *Carroll v Grand Rapids Comm*, 265 Mich 51, 58; 251 NW 381 (1933), the court further observed that the justification for removing one from office for cause "must be something which in a material way affects the rights of the public." And, in

[5] "Except as otherwise provided by law or this Charter, executive and administrative authority for the implementation of programs, services and activities of city government is vested exclusively in the executive branch." Detroit Charter, § 5-102.

Wilson v Highland Park Council, 284 Mich 96, 98; 278 NW 778 (1938), the court reiterated:

> It is well settled the misconduct, misfeasance, or malfeasance, under our law to warrant plaintiff's removal from office, must have direct relation to and be connected with the performance of official duties and amount either to maladministration or to willful and intentional neglect and failure to discharge the duties of the office at all. . . . The misconduct charged and established must be something which plaintiff did, or did not do, in his official capacity.

In *Krajewski v Royal Oak,* 126 Mich App 695, 697; 337 NW2d 635 (1983), the court interpreted "official misconduct" in the context of a state law limiting the ability of governmental entities to remove veterans serving as public officials. The court determined that the phrase has a peculiar and appropriate meaning in the law under MCL 8.3a and looked to its definition in Black's Law Dictionary (4th ed.), p 1236, which provides:

> "Official misconduct" includes any "unlawful behavior by a *public officer* in relation to the duties of his office, willful in its character, including any willful or corrupt failure, refusal, or neglect of an officer to perform any duty enjoined on him by law." [Emphasis added by court.]

More recently, in *People v Coutu (On Remand)*, 235 Mich App 695; 599 NW 2d 556 (1999), the court described "official misconduct" as follows:

> The term, "misconduct in office" or "official misconduct" is broad enough to include any willful malfeasance, misfeasance, or nonfeasance in office. The term may, indeed in its common acceptation does, imply any act, either of omission or commission, on the part of an officer, by which the legal duties imposed by law have not been properly and faithfully discharged. Likewise, misconduct in office is corrupt misbehavior by an officer in the exercise of the duties of his office or while acting under color of his office, and criminal intent is an essential element of the crime. [*Id.*, p 706, quoting 67 CJS, Officers, § 256, pp 789-790.]

The court further noted that the "corrupt intent" element of the offense of official misconduct can be shown "where there is intentional or purposeful misbehavior pertaining to the requirements and duties of office by an officer." *Id.*, p 706. Finally, the court noted that official misconduct does not necessarily involve money "but as a common-law offense is much more inclusive" and "is supported if there is an injury to the public or the individual." *Id.*, p 707.

In *People v Perkins*, 468 Mich 448; 662 NW 2d 727 (2003), the court held that the following elements constitute official misconduct: (1) the accused is a public

officer; (2) the accused engaged in corrupt behavior, either by committing an unlawful act (malfeasance) or a lawful act in a wrongful manner (misfeasance); (3) the wrongdoing resulted from or directly affected the performance of the officer's official duties; and (4) the officer acted with corrupt intent, i.e., with a sense of depravity, perversion, or taint. *Id.*, pp 445-446.[6]

Significantly, the requisite "taint" identified by the court in *Perkins* for purposes of official misconduct is established when a public officer engages in activities in his official capacity for personal gain and conceals information about those activities. In *People v Redmond*, unpublished opinion of the Michigan Court of Appeals issued November 14, 2006 (Docket No. 261458), lv den 480 Mich 883 (2007), the court upheld the prosecution of the former superintendent of the Oakland Intermediate School District ("OISD") for official misconduct. The prosecution had alleged six separate factual theories under which it asserted that the defendant was guilty of official misconduct.[7] The court sustained the defendant's official misconduct conviction on all grounds. In doing so, the court concluded that the defendant committed acts of malfeasance or misfeasance under the color of his position, and that "this conduct was bad or offensive" and therefore "tainted" and corrupt. *Id.*

Against the backdrop of the foregoing authority, the Governor concludes that the removal request adequately sets forth specific charges that, if true, violate Detroit Charter, §§ 2-106 and 6-403, and constitute official misconduct under MCL 168.327. Therefore, a hearing on the merits is warranted and Respondent's assertion to the contrary is without merit.

2. Is the affidavit of Kenneth V. Cockrel, Jr. insufficient as a matter of law to support the petition?

MCL 168.327 prohibits the Governor from taking "action upon any charges made to the governor against a city officer until the charges have been exhibited to the governor in writing, verified by the affidavit of the party making them, that he or she believes the charges to be true." The Petitioner's charges in this matter were exhibited in writing and signed by Kenneth V. Cockrel, Jr. individually and in his

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[6] The court further determined that if the accused public officer failed to perform an act that the duties of the office required, and wrongdoing resulted from or directly affected the performance of the officer's official duties, the officer has engaged in willful neglect of duty, or nonfeasance. *Perkins, supra*, p 456.

[7] As in this matter, the charges against Redmond included both allegations of personal gain and concealment of information. Specifically, the charges were that Redmond: (1) unethically received additional monies for a vacation payout; (2) entered into severance agreements with OISD employees without the approval of the OISD board; (3) made factual misrepresentations in an affidavit in response to an inquiry by the Michigan Department of Education; (4) engaged in official misconduct by entering into a contract on behalf of the OISD with the MINDS Institute while chairman of the Institute's board; (5) failed to reveal his position as chairman of that board to the OISD board; and (6) authorized an additional payment to the Institute without a contract modification.

capacity as President of the Council. President Cockrel verified the petition with an affidavit, which states in pertinent part:

> I have reviewed the document entitled "In Re: Charges of the Detroit City Council Against Honorable Kwame M. Kilpatrick Seeking his Removal for Acts of Official Misconduct."
>
> Based upon my direct experience, personal knowledge and information and belief, I represent that the statements contained therein are true.

Because President Cockrel's affidavit complies with the requirements of MCL 168.327, Respondent's argument to the contrary is without merit.

3. If the decision to file the petition was made by a simple majority of the Detroit City Council in violation of its own rules, is that a basis to dismiss the petition?

Respondent asserts that the procedural rules adopted by the Council govern the filing of Petitioner's removal request and that the request was improperly submitted under those rules. Specifically, Respondent asserts that the Council's decision to file the request should have been approved by two-thirds of the Council instead of by a "simple majority," and is therefore invalid.

Neither the Charter nor the Council's rules contain specific authority governing the removal of a city official. Were such authority to exist, however, it would conflict with MCL 168.327. Section 36 of The Home Rule City Act, 1909 PA 279, MCL 117.36, states that "[n]o provision of any city charter shall conflict with or contravene the provisions of any general law of the state." The people of the City of Detroit have expressly recognized this principle in Detroit Charter, § 1-102, which provides in pertinent part:

> The city has the comprehensive home rule power conferred upon it by the Michigan Constitution, subject only to the limitations on the exercise of that power contained in the Constitution or this Charter or imposed by statute.

Because MCL 168.327 expressly provides that a removal request be "verified by the affidavit of the party making them, that he or she believes the charges to be true," the statute recognizes that such a request may be made by an entity or an individual. But even if the filing of Petitioner's removal request was governed by the Council's parliamentary rules and not by MCL 168.327, it has long been established that a legislative body has complete control and discretion over whether the body observes its own rules of procedure and a violation of such rules does not void legislative action.[8] Municipal legislative bodies like the Council often adopt

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[8] See *Baker v Carr*, 369 US 186, 214-215; 82 S Ct 691; 7 L Ed 2d 663 (1962); *Anderson v Sec of State*, 273 Mich 316, 319; 262 NW 922 (1935); *Hughes v House Speaker*, 152 NH 276, 284; 876 A2d 736 (2005); *Des Moines Register & Tribune Co v Dwyer*, 542 NW2d 491, 496 (Iowa, 1996); *Abood v Alaska*

Roberts' Rules of Order as a parliamentary guide to expedite the transaction of affairs in an orderly manner. Because such rules are procedural, strict observance is not mandatory and failure to observe a parliamentary rule does not invalidate action otherwise conforming with charter requirements.[9]

Petitioner's removal request complies with MCL 168.327, the controlling authority for such requests. Even if Petitioner's request required but lacked the backing of two-thirds of the Council and violated the Council's procedural rules, Respondent's assertion that the petition is invalid is without merit.

4. **Will a removal proceeding require Respondent to submit evidence that will undermine his defense and infringe upon his right against self-incrimination in a pending criminal proceeding?**

Respondent asserts that his due process rights and his right against self-incrimination require that a hearing on the merits be delayed until resolution of the criminal charges pending against him. The due process clause under the Michigan Declaration of Rights,[10] and its federal counterpart under the Fourteenth Amendment,[11] provides both substantive and procedural protections by enforcing delineated constitutional rights, establishing procedural safeguards, and prohibiting laws that lack a legitimate public purpose or rational relationship between a permissible aim and statutory requirements.[12] But, courts have restricted application of the due process clause to situations affecting a person's life, liberty or property.[13]

League of Women Voters, 743 P2d 333, 338 (Alas, 1987); *Moffitt v Willis*, 459 So 2d 1018, 1022 (Fla, 1984); *State ex rel LaFollete v Stitt*, 114 Wis 2d 358, 365; 338 NW2d 684 (1983); *State ex rel Todd v Essling*, 268 Minn 151, 165-166; 128 NW2d 307 (1964).

[9] See *Pasadena v Paine*, 126 Cal App 2d 93, 95-96; 271 P2d 577 (1954), citing *Rutherford v Nashville*, 168 Tenn 499; 79 SW2d 581 (1935); *Winninger v Waupun*, 183 Wis 32; 197 NW 249 (1934); *South Georgia Power Co v Baumann*, 169 Ga 649, 151 SE 513 (1929); *McGraw v Whitson*, 69 Iowa 348; 28 NW 632 (1886). See also, *Whitney v Hudson Common Council*, 69 Mich 189, 201-202; 37 NW 184 (1888) (holding parliamentary rules should not be applied in a way that invalidates substantial results even when results are founded on irregular methods of procedure).

[10] Const 1963, art 1, § 17, provides in pertinent part: "No person shall . . . be deprived of life, liberty or property, without due process of law."

[11] US Const, amend 14, provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

[12] See *Daniels v Williams*, 474 US 327, 337; 106 S Ct 677; 88 L Ed 2d 662 (1986) (Stevens, J., concurring); *Mudge v Macomb Co*, 458 Mich 87, 180, n 10; 580 NW2d 845 (1998) (Boyle, J., concurring in part and dissenting in part); *People v Sierb*, 456 Mich 519, 523; 581 NW2d 219 (1998) (holding protection under state and federal constitutions coextensive); *Electro-Tech, Inc v HF Campbell Co*, 433 Mich 57, 66, n 9; 445 NW2d 61 (1989).

[13] See, e.g., *Bundo v Walled Lake*, 395 Mich 679, 692; 238 NW2d 154 (1976), quoting *Board of Regents v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972) (holding licensee has property interest in renewal of liquor license).

In Michigan, it is well settled that an elected official has no property right in the office held:

> ***A public office cannot be called 'property,'*** within the meaning of these constitutional provisions. If it could be, it would follow that every public officer, no matter how insignificant the office, would have a vested right to hold his office until the expiration of the term. ***Public offices are created for the purposes of government. They are delegations of portions of the sovereign power for the welfare of the public.*** They are not the subjects of contract, but they are agencies for the state, revocable at pleasure by the authority creating them, unless such authority be limited by the power which conferred it. [*Jeffries v Wayne Co Election Comm*, 294 Mich 255, 258; 295 NW 546 (1940), quoting *Attorney Gen ex rel Governor v Jochim*, 99 Mich 358, 367; 58 NW 611 (1894). (Emphasis added.)[14]]

A public officer in Michigan also holds no contractual rights to his or her position. "Nothing seems better settled than that an appointment or election to a public office does not establish contract relations between the person appointed or elected and the public." *Jochim*, *supra*, p 368.

Under the rule established in *Jochim*[15], a public office cannot be called "property" and the official holds no contractual rights in the office. "Offices are created for the public good, at the will of the legislative power, with such powers, privileges, and emoluments attached as are believed to be necessary or important to make them accomplish the purposes designed." *Id.* The court further noted that while "many cases can be found that speak of the disgrace of removals and the right to hold an office under election," the vesting of constitutional removal authority in the Governor "recognizes the power of the people over public offices, and sustains the authority of the governor . . . to remove for cause." *Id.*, pp 369-370.

While a city officer subject to removal under MCL 168.327 holds no property or contractual rights protected by the due process clause, *Buback v Governor*, 380 Mich 209, 217-218; 156 NW2d 549 (1968) ("*Buback I*"), suggests that the officer may still be entitled to fair and just treatment in a removal hearing or investigation

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[14] See also, *Robbins v Wayne Co Bd of Auditors*, 357 Mich 663, 667; 99 NW2d 591 (1959); *Molinaro v Driver*, 364 Mich 341, 350; 111 NW2d 50 (1962).

[15] The United States Supreme Court cited *Jochim* in *Taylor v Beckham*, 178 US 548, 577, n 4; 20 S Ct 890; 44 L Ed 1187 (1900), when the high court announced that "public offices are mere agencies or trusts, and not property as such . . . . In short, generally speaking, the nature of the relation of a public officer to the public is inconsistent with either a property or a contract right." See also, *Kulak v Birmingham*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued July 19, 2005 (Docket No. 04-1510) (determining city planning board member lacked property interest in public office subject to due process protections). Additionally, the Michigan Supreme Court has affirmed its holding in *Jochim* in subsequent decisions. See, *Robbins*, *supra*, p 667; *Jeffries*, *supra*, p 258.

under Const 1963, art 1, § 17.[16] However, the constitutional rights identified in this fair and just treatment clause are distinct from due process rights. The framers of this provision recognized the distinction:

> It may be asked, does not the due process clause protect the individual against unfair and unjust treatment? Yes, but not in executive or legislative investigations. The fact is that the due process safeguards of a criminal trial have not been interpreted to apply to legislative or executive investigations. While many investigations have unfairly and unjustly assumed the character of a criminal trial and abused the prestige of government, the rights of individuals, and our concept of separation of powers in so doing, the normal rights of an accused have not been judicially accorded to a witness in an investigation. [1 Official Record, Constitutional Convention 1961, p 546.]

The provision was not intended to "impose categorically the guarantees of procedural due process upon such investigations." 2 Official Record, Constitutional Convention 1961, p 3364.[17]

Nothing in the record of the 1961 Constitutional Convention suggests that the fair and just treatment clause was intended as a grant of substantive rights. One convention delegate commented:

> "We simply thought a person called by subpoena or certainly one who appears voluntarily should be treated with courtesy and fairness, that his personal reputation should not be impugned if he is there merely to make statements to the committee—certainly so long as he voluntarily cooperates with the committee. [1 Official Record, Constitutional Convention 1961, p 549.]

Another delegate described the clause as a "rule of ordinary decent human conduct." *Id.*, p 550.

In removal cases, courts have been reluctant to acknowledge more than minimal protections to individual officeholders and instead have emphasized the responsibilities of the Governor. The Governor is the sole tribunal in removal

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[16] Const 1963, art 1, § 17, provides in part that "[t]he right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."

[17] See also a statement by Delegate J. Harold Stevens, the First Vice Chairman of the Committee on Declaration of Rights, Suffrage and Elections at the 1961 Constitutional Convention:

> [W]e hoped that the constitution, as we changed it, would be a guide not only to the courts but to the legislature and administrative bodies to be fair and just. It is not expected that due process of law in the sense which it would apply in a court would necessarily apply in an administrative hearing or in a legislative hearing. It never has and it isn't intended that it should. [1 Official Record, Constitutional Convention 1961, p 547.]

proceedings, with no right of appeal or review afforded the accused. "Where the removal power has been assigned to the Governor or to a state agency, this court has refused to interfere with the exercise of that power." *Buback I, supra*, p 217. Under MCL 168.327 the Governor can impose no greater or lesser penalty than removal and can impose no criminal punishment. If the Governor acts within the law, the Governor's decision is final. *People ex rel Clardy v Balch,* 268 Mich 196, 207, 201-201; 255 NW 762 (1934).

Moreover, the protections afforded an accused officer do not include the right to suspend a removal proceeding while criminal charges are pending, even when those charges are based on the same facts and circumstances. This is so because the two proceedings are inherently different in their nature and purpose such that the onset of one proceeding before, during, or after the other neither deprives the individual of due process nor violates the constitutional prohibitions against self-incrimination and double jeopardy. In *Thangavelu v Dep't of Licensing & Regulation,* 149 Mich App 546, 555-556; 386 NW 2d 584 (1986), the court explained this difference in the analogous context of a license revocation proceeding:

> In addition to the difference in the degrees of proof required, although the issues involved in the administrative hearing and the criminal proceeding may overlap, the purpose of a revocation proceeding substantially differs from a criminal proceeding.
>
> * * *
>
> The practice of medicine, in addition to skill and knowledge, requires honesty and integrity of the highest degree, and inherent in the State's power is the right to revoke the license of those who violate the standards it sets. This revocation proceeding is not a second criminal proceeding placing the physician in double jeopardy. Rather, the purpose is to maintain sound, professional standards of conduct for the purpose of protecting the public and the standing of the medical profession in the eye of the public.

In *People v Artman*, 218 Mich App 236, 245-246; 553 NW 2d 673 (1996), the court similarly ruled that the defendant's disbarment from the law profession after his prosecution for the same conduct did not violate the prohibition against double jeopardy because the civil penalty of disbarment serves a purpose distinct from any punitive purpose. In so concluding, the Michigan Court of Appeals relied in part on a United States Supreme Court decision holding that an *in rem* civil forfeiture did not constitute "punishment" for purposes of the double jeopardy clause because, among other things, the statutes on which they are based serve important non-punitive and remedial goals. *United States v Ursery,* 518 US 267, 290; 116 S Ct

2135; 135 L Ed 2d 549 (1996).[18]

The same analysis applies here. The pendency of Respondent's criminal prosecution on eight felony counts, some of which may involve overlapping facts upon which Petitioner's removal request is based, is not a basis to delay a removal proceeding since the purpose of the proceeding is remedial in nature and serves important, non-punitive goals, namely, the protection of the public interest.[19] *Balch, supra*, p 268.

This conclusion does not, however, mean that Respondent will be unlawfully compelled to give testimony or produce evidence at the removal proceeding that may later be used against him in a criminal proceeding. On this point, the Governor finds persuasive the court's rationale in *Governor v Senate President*, 156 Ariz 297; 751 P2d 957 (1988). In that case, Arizona Governor Evan Mecham objected to an impeachment trial pending before the Arizona Senate while he also was facing a criminal prosecution based upon the same facts. Concluding that Governor Mecham could refuse to testify before the Senate, and that neither the Senate nor a prosecutor could later use his refusal to testify against him, the court allowed the impeachment trial to proceed. The court noted:

> In the final analysis, we must recognize, however, that the rights of a person accused of crime are not co-extensive with the privilege of remaining in public office. [*Id.*, p 303.]

In this matter, Respondent may similarly refuse to testify or decline to answer specific questions if his testimony would incriminate him in his pending criminal prosecution. "Although the choice facing him is difficult, that does not make it unconstitutional." *Hart v Ferris State College*, 557 F Supp 1379, 1385 (WD Mich, 1983), quoting *Gabrilowitz v Newman*, 582 F2d 100, 104 (CA 1, 1978). Should Respondent refuse to testify, the Governor will not use that refusal against

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[18] Similarly, in *Buback I, supra*, Governor Romney was asked to remove Wayne County Sheriff Peter L. Buback from office. The Sheriff had been charged with seven misdemeanor counts of willful neglect of duty. *Buback v Wayne Co Circuit Judge*, 380 Mich 235, 236; 156 NW2d 528 (1968) ("*Buback II*"). The Sheriff sought to block the removal proceeding pending completion of the prosecution, claiming that the removal proceeding would violate his privilege against self-incrimination and deprive him of procedural due process. However, the Supreme Court affirmed the lower court's denial of his motion for injunctive and other relief. *Buback I, supra*, p 558.

[19] Petitioner has cited several federal cases suggesting that while there is no general right to a stay of a civil proceeding while criminal charges are pending, a stay of a civil proceeding may be granted as a matter of discretion if the party seeking the stay alleges and demonstrates with precision "special circumstances" to justify the stay. *US v Certain Real Property*, 986 F2d 990, 996-997 (CA 6, 1993). A pending parallel criminal proceeding alone does not justify the exercise of this discretion. *Id.* See also, *US v Little Al*, 712 F2d 133 (CA 5, 1983). Further, delay of the civil proceeding must not "seriously injure the public interest." *Securities and Exch Comm v Dresser Industries, Inc*, 628 F2d 1368, 1376 (CA DC, 1980), cert den 449 US 993 (1980). Even if such discretion is applicable here, its exercise is not warranted given the non-punitive objective of MCL 168.327, which is to protect important public interests.

Respondent. For these reasons, Respondent's request that the removal proceeding be dismissed or delayed is without merit.

5. Must the removal request be dismissed because the Detroit Charter does not provide for removal of an elected official for the reasons asserted by Petitioner?

This matter is before the Governor under MCL 168.327, not the Detroit Charter. Respondent's assertion to the contrary is irrelevant and without merit.

6. Were the rules and regulations establishing conduct, the violation of which would subject an elected official to removal, required to be promulgated by ordinance in advance of the conduct?

Respondent asserts that forfeiture provisions under Detroit Charter, § 2-107, do not authorize Petitioner's removal request because the grounds for forfeiture of an elective office under the Charter do not include official misconduct. Again, regardless of when or whether the Council adopted procedures for forfeiture of office under the Charter, this matter is before the Governor under MCL 168.327, not the Charter. Respondent's assertion to the contrary is irrelevant and without merit.

7. May Petitioner's investigation be used as evidence against Respondent if that investigation was flawed?

The information submitted to the Governor on May 20, 2008 constitutes the charges against Respondent under MCL 168.327. The statute requires that the charges be served "upon the officer complained against," "exhibited to the Governor in writing," and "verified [as true] by the affidavit of party making them." The charges submitted to the Governor on May 20, 2008 satisfy these statutory requirements. Furthermore, Respondent is being provided an opportunity to challenge and rebut the investigation and other evidence submitted by Petitioner. Respondent's assertion regarding Petitioner's investigation is therefore without merit.

8. If the Stored Communications Act, 18 USC § 2701, *et seq.*, prohibits the disclosure of the contents of text messages, does the prosecutor have insufficient proof to establish guilt beyond a reasonable doubt?

Respondent asserts that he has a reasonable expectation of privacy in the contents of communications transmitted using his city-issued text messaging device under the Stored Communications Act ("SCA"), 18 USC 2701.[20] Respondent further asserts that because the SCA prohibits the disclosure of those messages, the

[20] This statute was enacted as Title II of the Electronic Communications Privacy Act of 1986, Pub. L. No. 88-508, 100 Stat. 1848.

"prosecutor" has insufficient proof to establish Respondent's guilt "beyond a reasonable doubt." Respondent apparently mistakes this removal proceeding with Respondent's pending criminal prosecution.

Regardless, a federal court has expressly rejected Respondent's privacy argument. Among other things, the court determined that Respondent has no reasonable expectation of privacy since he personally authorized an electronic communications policy for all city employees that advised, in part, "that any electronic communication created, received, transmitted, or stored on the City's electronic communication system is public information, and may be read by anyone." *Flagg v Detroit,* ___ F Supp 2d ___ (ED Mich, 2008), unpublished opinion of United States District Court for the Eastern District of Michigan issued August 22, 2008 (Docket No. 2:05-cv-74253-GERE-RSW).

Moreover, Respondent's assertion relates not to the adequacy of the petition and charges but to the sufficiency of the evidence supporting the charges. Respondent's assertion is therefore irrelevant and without merit.

9. Is the perjury statute, MCL 750.423, void for vagueness because it gives no notice that an immaterial or irrelevant misstatement of fact constitutes a violation of the perjury statute?

Petitioner's removal request is not based on an allegation that Respondent committed perjury in violation of MCL 750.423. Respondent's assertion that the perjury statute is void for vagueness is therefore irrelevant and without merit.

B. Petitioner's motion for a hearing on the merits.

For the above reasons, the Governor finds Petitioner's removal request has been submitted and is before the Governor in compliance with the requirements of MCL 168.327. The charges submitted are sufficient to warrant a hearing on the merits, and a stay of the proceedings is inappropriate.

IV. Conclusion

The Governor, having reviewed the parties' arguments and applicable law, orders:

1. Respondent's motion to dismiss the petition is denied.

2. Respondent's motion for a stay is denied.

3. Petitioner's motion for a hearing on the merits is granted.

4. The hearing in this matter will proceed as previously specified, beginning at 9:00 a.m. on Wednesday, September 3, 2008.

5. The testimony taken and evidence submitted at the hearing will be limited to resolution of the following specific questions:

a. Did Respondent, in his official capacity as Mayor, authorize settlements in the matters of *Brown v Detroit Mayor*, Wayne Circuit Court (Docket No. 03-317557-NZ) and *Harris v Detroit Mayor*, Wayne Circuit Court (Docket No. 03-337670-NZ) in furtherance of his personal and private interests?

b. Did Respondent, in his official capacity as Mayor, conceal from or fail to disclose to the Council information material to its review and approval of the settlements?

IT IS SO ORDERED.

JENNIFER M. GRANHOLM
GOVERNOR

Dated: August 25, 2008

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR

In the Matter of the Request for the Removal of Kwame M. Kilpatrick from the Office of Mayor of the City of Detroit	**No. EO-2008-004-LO** **Hon. Jennifer M. Granholm**

PREHEARING ORDER

WHEREAS, pursuant to Section 327 of the Michigan Election Law, 116 PA 1954, MCL 168.327, the parties, through their counsel, have been notified that a hearing is scheduled to begin in this matter on September 3, 2008 at 9:00 a.m. in the Cadillac Place State Office Building in Detroit;

WHEREAS, it is necessary and appropriate to establish rules of practice and procedure for that hearing in order to assure both the fairness and efficiency of the hearing process;

IT IS THERFORE ORDERED that the hearing on September 3, 2008 will proceed in the following manner:

1. Schedule: The parties shall be prepared to appear at 9:00 a.m. on September 3, 2008 and proceed until conclusion, with extended evening and weekend hours if necessary.

2. Pending Motions: Both parties filed preliminary motions and briefs on August 6, 2008. Response briefs are due on or before August 20, 2008, and final reply briefs are due on or before August 25, 2008. As the Governor recognizes that some of the preliminary issues may be dispositive, she intends to rule on any such issues promptly and before the hearing on September 3, 2008. Until a decision is issued, the parties shall proceed and shall prepare on the assumption that the hearing will commence at the scheduled date, time, and place.

3. Witnesses and Exhibits: On or before August 15, 2008, the Petitioner shall file and serve a list containing the names of all witnesses the Petitioner expects to call at the hearing on September 3, 2008 and a copy of each proposed exhibit Petitioner intends to introduce. On or before August 25, 2008, the Respondent shall file and serve a list containing the names of all witnesses the Respondent expects to call and a copy of each proposed exhibit Respondent intends to introduce. Proposed exhibits filed and served by each party shall be individually tabbed and identified and shall be contained in one or more three-ring binder(s) or other suitable device(s) to assure convenient reference and access.

4. Opening Statements: Each party may, but is not required to, offer an opening statement not to exceed a maximum of 15 minutes in duration, beginning with the Petitioner and followed by the Respondent who may reserve doing so until after the Petitioner has rested.

5. Witnesses: The Petitioner shall present any identified witnesses first and they shall be subject to cross-examination by the Respondent and, if applicable, redirect by the Petitioner. The Respondent shall present any identified witnesses after the Petitioner has rested and they shall be subject to cross-examination by the Petitioner and, if applicable, redirect by the Respondent. If multiple attorneys appear on behalf of a party, only one attorney may question or cross-examine a particular witness and only that attorney may object during that witness's testimony. All witnesses may be subject to questioning or cross examination by the Governor. All witnesses shall be sworn.

6. Evidentiary Issues:

A. Subpoenas: Each party is responsible for securing the attendance of the witnesses it intends to call. The Governor is without authority under Section 327 of the Michigan Election Law, 116 PA 1954, MCL 168.327, to issue and enforce subpoenas and therefore all subpoena requests shall be denied.

B. Stipulations: The parties may and are encouraged to agree to any undisputed facts.

C. Admissibility: The rules of evidence as applied in a nonjury civil case in circuit court shall be utilized as a guideline but the Governor will ultimately determine the admissibility of any evidence and may admit and give probative effect to evidence of a type commonly relied upon by

reasonably prudent persons in the conduct of their affairs. The Governor may exclude irrelevant, immaterial or unduly repetitious evidence. Objections to offers of evidence may be made and shall be noted in the record.

D. Burden of Proof: Section 327 of the Michigan Election Law, 116 PA 1954, MCL 168.327, requires that the Petitioner submit sufficient evidence to the Governor establishing grounds for the Respondent's removal from office.

7. Closing Arguments: Each party may, but is not required to, offer a closing argument not to exceed 15 minutes in duration, beginning with the Petitioner and followed by the Respondent. Following the conclusion of closing arguments, the hearing record shall be considered closed.

8. Decision: After the conclusion of the hearing, the Governor shall make a final determination on whether Petitioner's charges are supported by and in accordance with the sufficient evidence in the record so as to warrant Respondent's removal from office.

JENNIFER M. GRANHOLM
GOVERNOR

Dated: August 11, 2008

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR

In the Matter of the Request for the Removal of Kwame M. Kilpatrick from the Office of Mayor of the City of Detroit	**No. EO-2008-004-LO** **Hon. Jennifer M. Granholm**

William H. Goodman (P14173) Attorney at Law Goodman & Hurwitz, P.C. 1394 E. Jefferson Ave. Detroit, MI 48207	Sharon McPhail (P26922) General Counsel, City of Detroit Coleman A. Young Municipal Center 2 Woodward Ave., 11th Floor Detroit, MI 48226
David D. Whitaker (P40299) City Council, City of Detroit Coleman A. Young Municipal Center 2 Woodward Ave., Suite 216 Detroit, MI 48826	James C. Thomas (P23801) Attorney at Law 535 Griswold St., Suite 263 Detroit, MI 48226
Attorneys for Petitioner	**Attorneys for Respondent**

NOTICE OF HEARING

TAKE NOTICE that pursuant to Section 327 of the Michigan Election Law, 1954 PA 116, MCL 168.327, the Respondent will be granted an opportunity to be heard in his defense in response to the charges exhibited by the Petitioner at a hearing conducted by the Governor on **Wednesday, September 3, 2008** at 9:00 a.m. at the following location:

Administrative Hearing Room
Cadillac Place State Office Building
3062 West Grand Blvd., L-700
Detroit, MI 48202-6062

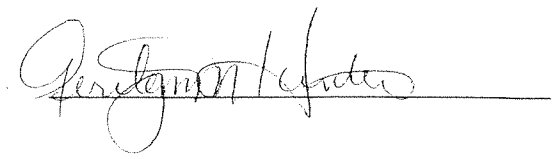
The Petitioner is directed to appear and offer proofs related to the charges exhibited in its submission dated May 20, 2008. The Respondent will be afforded an opportunity to respond.

JENNIFER M. GRANHOLM
GOVERNOR

Dated: August 7, 2008

PROOF OF SERVICE

The undersigned certifies that a copy of the above document(s) was served upon the attorneys of record in the above matter by mailing the same to them at their respective addresses, with first class postage fully prepaid thereon, on the 7th day of August, 2008.



JENNIFER M. GRANHOLM
GOVERNOR

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

JOHN D. CHERRY, JR.
LT. GOVERNOR

July 28, 2008

VIA MAIL AND FACSIMILE

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Re: ***In the Matter of the Request for the Removal of Kwame M. Kilpatrick from the Office of Mayor of the City of Detroit*, No. EO-2008-004-LO**

Dear Counsel:

The Governor has concluded that it is in the public interest to accelerate the briefing schedule in this matter and to set a definite date for a hearing should one be determined necessary. She has therefore instructed me to advise you of the following changes to the previously announced schedule:

1. A party seeking to raise and seek resolution of a relevant legal issue prior to a hearing on the merits of the removal request may do so in a written motion accompanied by a brief citing the authority on which it is based; any such motion and brief shall be served and filed on or before **August 1, 2008**.

2. A party may respond to another party's motion and brief by filing a response brief on or before **August 15, 2008**.

3. A moving party may serve and file a reply brief only to address any new matters raised in the opposing party's response brief on or before **August 22, 2008**.

4. Should the Governor determine that a hearing is warranted in this matter, that hearing will commence at 9:00 a.m. on Wednesday, **September 3, 2008**.

If you have any questions regarding this letter, please contact me at (517) 335-6847.

Sincerely,

Kelly G. Keenan
Legal Counsel to the Governor

c: Governor Jennifer M. Granholm

STATE OF MICHIGAN
CIRCUIT COURT FOR THE 3RD JUDICIAL CIRCUIT
WAYNE COUNTY

HON. KWAME M. KILPATRICK,

Plaintiff,

v.

HON. JENNIFER M. GRANHOLM, in her official capacity as Governor of the State of Michigan,

Defendant.

Case No. 08-122051-CZ

HON. ROBERT L. ZIOLKOWSKI

James C. Thomas (P23801)
Attorney for Plaintiff

Kelly G. Keenan (P36129)
John C. Wernet (P31037)
Attorneys for Defendant
Office of Legal Counsel
Office of the Governor

APPEARANCE

Kelly G. Keenan and John Wernet, enter their appearance pursuant to MCR 2.117(B) as counsel for Governor Jennifer M. Granholm in the above action.

Respectfully submitted,

Kelly G. Keenan
Legal Counsel

John Wernet
Deputy Legal Counsel
Office of the Governor
P.O. Box 30013
111 South Capitol Avenue
Lansing, Michigan
517-335-6847

Dated: August 29, 2008

PROOF OF SERVICE

The undersigned certifies that a copy of the above document was personally served upon the attorneys of record in the above cause, on the 29th day of August, 2008.