IN THE COURT OF APPEALS OF MARYLAND

KENNETH D. SCHISLER, INDVIDUALLY, AS CHAIRMAN OF THE PUBLIC SERVICE COMMISSION AND ON BEHALF OF THOSE MEMBERS OF THE PUBLIC SERVICE COMMISSION SIMILARLY SITUATED	*	No. 140
and	*	September Term, 2005
PUBLIC SERVICE COMMISSION OF MARYLAND	*	
Appellants	*	
v.	*	
STATE OF MARYLAND	*	
Appellee	*	

* * * * * * * * * * * *

APPELLANTS' BRIEF

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STATEMENT OF THE CASE

Appellants, Kenneth Schisler, individually, as the Chairman of the Public Service Commission of Maryland and on behalf of those members of the Public Service Commission similarly situated ("Commissioners"), and the Public Service Commission of Maryland ("PSC")(collectively the "Commission"), appeal to this Court from the June 28, 2006 Order of the Circuit Court of Baltimore City denying the Commission's Motion for a Temporary Restraining Order ("June 28 Order").

The Commission filed a Motion for Temporary Restraining Order and a Preliminary Injunction pursuant to Maryland Rule 15-501, *et seq*, ("TRO Motion") to prevent Sections 12 and 22 of Senate Bill 1 from taking effect. TRO Motion at Exhibit 1[1]. More specifically, the Commission requested that the court below expressly order that the current incumbent Commissioners remain in office during the pendency of this proceeding. TRO Motion. Furthermore, the Commission requested that the court below enter an order prohibiting the appointment of new Commissioners as contemplated by Sections 12 and 22 of Senate Bill 1, pending a final determination on the merits of the Commission's Verified Complaint for Declaratory Judgment

[1] Given the Court's approval to hear this case expeditiously and allowing for less formal briefing by the parties, the Commission will refer directly to the documents in the record which are simultaneously being produced as separate documents in the Commission's record extract. *See*, July 3, 2006 Order of the Court of Appeals.

and for a Temporary Restraining Order and Preliminary and Permanent Injunctive Relief ("Complaint")[2]. *Id.; See*, Complaint.

Senate Bill 1, a so-called "emergency bill" is nothing more than a politically motivated attempt by the General Assembly to circumvent the express provisions of the Maryland Constitution, which only permits the removal of the incumbent Commissioners for cause by the Governor. The Act would end the terms of the current sitting Commissioners and replace them with newly designated Commissioners no later than July 15, 2006 in violation of the incumbent Commissioners' vested rights to their respective appointments. Sections 12 and 22 of Senate Bill 1 would have the effect of unconstitutionally removing the current Commissioners from office without due process, in violation of the Maryland Declaration of Rights and Article II, Section 15 of the Maryland Constitution.

Earlier this year, the General Assembly made a virtually identical attempt to unconstitutionally and unlawfully terminate the terms of the sitting Commissioners in Senate Bill 1102. TRO Motion at Exhibit 2. Pursuant to Section 2 of Senate Bill 1102, the terms of the sitting Commissioners would have terminated April 9, 2006. *Id.* On April 6, 2006,

[2] In addition to providing a verified complaint in support of the TRO Motion, Chairman Schisler provided the Circuit Court with two affidavits affirming the facts outlined in the TRO Motion ("Schisler Affidavit 1") and stating that a majority of the Commissioners were polled and approved the institution and prosecution of the instant litigation ("Schisler Affidavit 2").

the Commission sought injunctive and declaratory relief in pleadings very similar to those filed before the Circuit Court.[3] TRO Motion. On April 7, 2006, the Circuit Court for Talbot County granted temporary injunctive relief, ordering that "the implementation of Senate Bill 1102 is stayed until further ordered of this Court." *Id.;* Schisler Affidavit 1 at ¶ 12.

The State immediately noted an appeal and sought to stay the lower court's temporary restraining order. On April 10, 2006, argument was heard before a three judge panel of the Court of Special Appeals which upheld the lower court's issuance of the retraining order. TRO Motion at Exhibit 3, April 13, 2006 Court of Special Appeals Order. In upholding the temporary restraining order, Chief Judge Murphy, writing for the Court, determined that the temporary restraining order should remain in effect until "**a full and complete showing that, if called into special session, the current General Assembly does not have the authority to reconsider and override the Governor's veto of Senate Bill 1102**." TRO Motion at Exhibit 4, April 12, 2006 Court of Special Appeals Order [emphasis added]. Later that evening,

[3] SB 1102 was challenged prior to the legislation being vetoed by the Governor. The matter was ripe for review because the legislation was declared emergency legislation and the commissioner removal provisions were retroactive. SB 1 is also an emergency bill, and was enacted upon a veto override on June 23, 2006. Under SB 1, the commissioner terms ended on June 30, 2006.

the General Assembly adjourned without acting on Senate Bill 1102 and the issue became moot.[4]

On June 14, 2006, Maryland's General Assembly convened in Special Session to consider and pass Senate Bill 1. Following the Governor's veto of Senate Bill 1, the General Assembly voted to override the veto on June 23, 2006.

On June 28, 2006 the Circuit Court of Baltimore City denied the Commission's TRO Motion. June 28, 2006 Order of the Circuit Court of Baltimore City ("June 28 Order"). The June 28 Order, after an extended discussion of the nature of the parties to the case, plainly concluded that legislature's actions in passing Sections 12 and 22 of Senate Bill 1 were

> "…not beyond its constitutional authority and does not run afoul of the federal constitution's dictates on separation of powers[5] or bills of attainder. Nor does it violate Maryland law."

June 28 Order at 4. The Circuit Court thereafter cited cases almost exclusively from the State's Response to the TRO Motion. *Id.*

[4] SB 1102 could not be considered for a veto override in the recent special session of the General Assembly. That bill was passed prior to the eighty-third day of the regular session (known as Presentment Day) and the legislature could only override a veto prior to adjournment of the regular session. *See*, Art. II § 17 of the Maryland Constitution. The Talbot County case has now been dismissed as moot.

[5] As outlined herein, the Commission argued before the Circuit Court that the separation of powers issue dealt with the Maryland Constitution not the United States constitution. The June 28 Order makes no specific reference to this contention other than the conclusory language cited above. June 28 Order at 4.

On June 29, 2006, the Commission noted its appeal directly to this Court. Notice of Appeal. The Commission has authority to appeal directly to this Court as provided in Section 19(3) & (4) of Senate Bill 1, Maryland Rule 8-301 (a)(1) & (b)(2) and Md. Ann. Code, Courts and Judicial Proceedings § 12-303 (3)(iii).

The unconscionable actions of the General Assembly are an unprecedented abuse of power, violate separation of powers principles, and are a blatant attempt to deny the opportunity for fair and timely judicial review of an unconstitutional legislative enactment. The General Assembly engineered the process to give itself the opportunity to empanel a new Commission before the incumbent Commissioners could have a chance to seek judicial review of this unconstitutional law without the need to pursue extraordinary remedies. This Court should not tolerate the General Assembly's *ultra vires,* illegal attempt to deny a thorough and considered review of its legislative enactments.

As discussed more fully below, Sections 12 and 22 of Senate Bill 1 violate Art. II, §15 of the Maryland Constitution and Article 24 of the Maryland Declaration of Rights. The Commission respectfully requests that the Court enjoin the implementation of Sections 12 and 22 of Senate Bill 1

until the Commission's declaratory judgment action can be fully considered by the Court.

QUESTION PRESENTED

DID THE CIRCUIT COURT OF BALTIMORE CITY ERR BY ENTERING ITS JUNE 28, 2006 ORDER DENYING APPELLANTS' MOTION FOR A TEMPORARY RESTRAINING ORDER?

STATEMENT OF THE FACTS

The PSC is an independent unit in the Executive Branch of the state government with statutorily conferred duties and powers. MD. CODE ANN., PUBLIC UTILITY COMPANIES ARTICLE ("PUC Article") §§2-101 and 2-112.

In addition to establishing the jurisdiction of the PSC, the PUC Article sets forth the basic structure of the PSC. Under the PUC Article, the five Commissioners are appointed by the Governor with the advice and consent of the Senate and serve staggered five-year terms. PUC Article §§2-102 and 2-103.

All four incumbent Commissioners[6] were duly appointed by the Governor and confirmed by the Senate and were current civil officers of the

[6] Upon information and belief, Commissioner Karen Smith resigned her position on June 29, 2006, a day prior to the date her term was to expire both under the previous PUC Article and Section 12 of Senate Bill 1. Commissioner Harold Williams informed undersigned counsel that he wished to have no participation in the instant case.

State serving a term of years. The Commissioners, as a result of the provisions of Senate Bill 1, are now in a holdover position.

The Constitution of Maryland expressly provides that "The Governor…may remove for incompetence, or misconduct, all civil officers who received appointment from the Executive for a term of years." MD. CODE ANN., CONSTITUTIONS, Constitution of Maryland, Art. II, §15. PUC Article §2-102(f) further provides that a Commissioner may only be removed from his or her position by the Governor for misconduct or incompetence in accordance with the due process provisions afforded under MD. CODE ANN., STATE GOVERNMENT §3-307.

Senate Bill 1 entitled "Public Service Commission - Electric Industry Restructuring" is denominated as an "emergency bill," and was passed during a special session of the General Assembly on June 14, 2006. On June 22, 2006, the Governor vetoed Senate Bill 1. On June 23, 2006, the General Assembly reconvened and overrode the Governor's veto to enact Senate Bill 1.

Since Senate Bill 1 is labeled as an "emergency bill", it became effective when enacted. MD. CODE ANN., CONSTITUTIONS, Constitution of Maryland, Art. II, §17. By its express terms, Sections 12 and 22 of Senate Bill 1 removed the incumbent Commissioners as of June 30, 2006, and

provides for their replacement on or after July 1, 2006. TRO Motion at Exhibit 1, Section 12.

As discussed in detail below, Sections 12 and 22 of Senate Bill 1 violate the Maryland Constitution, Art. II, § 15. Only the Governor can remove duly appointed and confirmed Commissioners. Furthermore, a Commissioner can only be removed for misconduct or incompetence. Sections 12 and 22 of Senate Bill 1 also violate Article 24 of the Maryland Declaration of Rights which prevents the removal of Commissioners without due process of law, and contravenes the due process procedures for removing Commissioners set forth in MD. CODE ANN., STATE GOVERNMENT §3-307. Finally, as enacted, Sections 12 and 22 of Senate Bill 1 are an unconstitutional Bill of Attainder prohibited under Article I, §10 of the Constitution of the United States. MD. CODE ANN., CONSTITUTIONS, Constitution of the United States, Art. I, §10.

ARGUMENT

I. The Standard For Granting A Temporary Restraining Order

The granting of a temporary restraining order is governed by Maryland Rule 15-504. The standard for granting a temporary restraining order is the same as the standard for granting a preliminary injunction, with the following additional requirement:

> A temporary restraining order may be granted only if it clearly appears from specific facts shown by affidavit or other statement under oath that immediate, substantial, and irreparable harm will result to the person seeking the order before a full adversary hearing can be held on the propriety of a preliminary or final injunction.

Id., at 15-504(a). The four factors to be considered in reviewing an application for a temporary restraining order are: (1) likelihood of success on the merits; (2) the "balance of convenience;" (3) irreparable injury; and (4) where appropriate, the public interest. *State Dept. of Health & Mental Hygiene v. Baltimore County*, 281 Md. 548, 554 (1977). If those factors are present, under Maryland Rule 15-505, the Court may, following a hearing, convert a temporary restraining order into a preliminary injunction. As the facts of this case demonstrate, consideration of each of the factors militates strongly in favor of granting the Commission both a temporary restraining order and a preliminary injunction.

In reviewing the denial of a motion for a temporary restraining order, where the issue is one ultimately of statutory construction, this Court will review the trial court's actions *de novo*. *Gleneagles, Inc., et al. v. Hanks*, 385 Md. 492, 496 (2005).

II. The Commission Is Likely To Succeed On The Merits

At the very heart of this action lie the "checks and balances" protections afforded every citizen though the separation of powers provisions of the Maryland Constitution. These cornerstone protections are encapsulated in Article 8 of Maryland's Declaration of Rights which states ***"[t]hat the Legislative, Executive and Judicial powers of the Government ought to be forever separate and distinct from each other***; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other." (emphasis added). MD. CODE ANN., CONSTITUTIONS, Declaration of Rights, Art. 8. No division of Maryland's government can be allowed to usurp the province of the other.[7]

[7] This Court has long recognized the principle of "expressio unius est exclusion alterius" (the expression of one thing is the exclusion of another). *See*, *Gay Investment Co. v. Comi*, 230 Md. 433, 438, 187 A.2d 463, 466 (1963); *Johns v. Hodges,* 62 Md. 525, 538 (1884); *See also, Clark v. O'Malley*, 2006 WL 1789064, *14 (Court of Special Appeals, June 30, 1996)(applying the principle to Art. II, § 15 of the Maryland Constitution).

A. Sections 12 and 22 of Senate Bill 1 Violate The Maryland Constitution Art. II, § 15 That Solely Empowers The Governor With The Right To Remove The Commissioners For Good Cause

The Maryland Constitution expressly provides that:

> The Governor may suspend or arrest any military officer of the State for disobedience of orders, or other military offense; and may remove him in pursuance of the sentence of a Court-Martial; and ***may remove for incompetency, or misconduct, all civil officers who receive appointments from the Executive for a term of years.*** (emphasis added).

MD. CODE ANN., CONSTITUTIONS, Constitution of Maryland, Art. II, §15. Clearly, only the Governor can remove a civil officer who was appointed to a term of years. Furthermore, even the Governor is constitutionally constrained to only removing a civil officer for misconduct or incompetency. The General Assembly is granted no power to remove a civil officer prior to the completion of that officer's term. Once appointed by the Governor with the advice and consent of the Senate, each Commissioner has a vested legal right to their respective appointment, and can only be removed by the Governor for cause.

In this case, the Commissioners were lawfully appointed to terms of five years with the advice and consent of the Senate and, under the Maryland Constitution, can **only** be removed by the **Governor** – not the General

Assembly – for "incompetency or misconduct." Maryland Constitution, Article II, 15. Sections 12 and 22 of Senate Bill 1 are a specious attempt to usurp the Governor's constitutional authority by directly removing the Commissioners without any regard whatsoever for the Constitutional requirements of Article II, § 15. Sections 12 and 22 of Senate Bill 1 violate the separation of powers by usurping the Governor's exclusive ability to remove the Commissioners for cause.

In essence, Sections 12 and 22 of Senate Bill 1 have the effect of "voiding" the appointments of the Commissioners. Under the Maryland Constitution, the General Assembly has no authority to void the lawful appointments of the incumbents. To permit Sections 12 and 22 of Senate Bill 1 to stand would be to nullify their Constitutional rights to the appointment unless the Governor removes them for cause. Sections 12 and 22 of Senate Bill 1 are invalid, unlawful sections of the new law which fly in the face of Article II, § 15.

Before the Circuit Court, the State attempted to characterize the actions of the legislature in passing Sections 12 and 22 of Senate Bill 1 as something other than the removal of the Commissioners. Transcript of June 28, 2006 Hearing before the Circuit Court of Baltimore City ("Tr.") at 58-9 . The plain language of Sections 12 and 22 of Senate Bill 1, however, belie

the State's argument. Chairman Schisler had a term of office running through June 30, 2008 without Section 12 of Senate Bill 1 ending his term on June 30, 2006. Commissioner Freifeld had a term of office running through June 30, 2009 and Commissioner Boutin had a term of office running through June 30, 2010 without Section 12 of Senate Bill 1 ending their terms on June 30, 2006.

The State cannot assert that the legislation merely **shortened** the terms of the Commissioners. This is pointless sophistry. The structure of Section 12 of Senate Bill 1 demonstrates that the Commissioners are being removed. While the newly appointed commissioners receive staggered terms of one to five years, once these specially created terms end, the subsequent term is set by the old statute at 5 years. Thus, only the terms of the current commissioners are being altered. The intent of the legislation is to remove these commissioners, not to create a new term which will be used in the future. In sum, Section 12 of Senate Bill 1 removes all of the sitting Commissioners from office before the expiration of their term and does so in complete disregard of the constitutional protections afforded these civil officers.

Shortening the terms of the sitting Commissioners has the effect of removing them from office before their terms have expired. Thus, Sections

12 and 22 of Senate Bill 1 are an unconstitutional removal of sitting Commissioners, depriving them of the term of office to which they are constitutionally entitled.

B. Sections 12 and 22 of Senate Bill 1 Violate Each Commissioner's Vested Rights In Their Appointment

The designation, in Art. II, § 15, of the two causes which would authorize the use of the power to remove, is a denial of the right to remove for any other or different causes. *See eg. Miles v. Stevenson,* 80 Md. 358, 364 (1894). The Commissioners, having been duly appointed, have the right not to be deprived of the office prior to the legal expiration of their term. *Id.*

In *Miles*, members of the Somerset County Commission sought to remove one of the supervisor of roads because they found a cheaper vendor for services than Commissioner Miles. *Id.*, 80 Md. at 358. The removal was attempted without any formal notice or hearing and was not based upon any charge of incompetence, neglect of duty or misconduct. *Id.*

As stated by this Court in *Miles,* ***"[I]t is the utmost stretch of arbitrary power and a despotic denial of justice to strip an incumbent of his public office and deprive him of its emoluments and income, before its prescribed term has elapsed, except for legal cause alleged and proved upon an impartial investigation after due notice***." *Id.,* 80 Md. at 366 (emphasis added). The Commissioners have a vested legal right in their

respective appointments, and under the Constitution of Maryland, they can only be removed by the Governor for incompetency or misconduct.

The constitutional principles implicated by the General Assembly's actions have been upheld by the United States Supreme Court since *Marbury v. Madison*, 5 U.S. 137, 2 L.Ed. 60 (1803). The facts of this historic case are worth reiterating. On the eve of leaving office, the outgoing President of the United States, John Adams, nominated Mr. Marbury and other applicants as justices of the peace for the District of Columbia. By statute, justices of the peace were appointed for five year terms. Once appointed by the President, with advice and consent of the Senate, they were not removable at will by the President. In this case, after the Senate gave its advice and consent to the appointments, President Adams signed the commissions appointing Mr. Marbury and the other applicants to five year terms as justices of the peace. The commissions were delivered to James Madison, the Secretary of State, who was required by statute to deliver the commissions to Mr. Marbury and the other appointees. At the direction of the new President, Thomas Jefferson, Secretary Madison refused to deliver the commissions after John Adams' term as President expired. Mr. Marbury and the other applicants filed a mandamus action, requesting that the

Supreme Court order Secretary Madison to carry out his duty and deliver the commissions.

The Supreme Court issued the mandamus, and ordered Secretary Madison to deliver the commissions. The Supreme Court noted that once the commission was issued by the outgoing President, the appointment was made, and the commission was complete. The Court held that:

> Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. ***But when the officer is not removable at the will of the executive, the appointment is not revocable and cannot be annulled. It has conferred legal rights which cannot be resumed.***

Marbury, 5 U.S. at 162 (emphasis added). The Court held that the outgoing President Adams had the absolute power to make the appointments, and once appointed, the law gave Mr. Marbury "a right to hold, for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of his country. ***To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right***." *Id*. (emphasis added); *See also Little v. Schul*, 118 Md. 454 (1912) (holding that where an appointment to public office is made in pursuance of the provisions of the Constitution which fix the term of office, the appointment cannot be revoked

or annulled, or the term of office abridged or extended by the legislature, unless so authorized by the Constitution. "If the appointing power was lawfully exercised…in the manner prescribed by law, the appointment vested in the appellee legal rights which could not be disturbed by the legislature").

By contrast, the crux of the argument advanced by the State before the trial court in this case would result in the conclusion that the Commissioners are at will employees of the General Assembly. This argument is wholly without merit and is belied by various constitutional provisions. These constitutional rights act as a limit upon the General Assembly's scope of action.

The clear purpose behind giving the Commissioners a term of years, subject only to removal by the Governor for cause, is to immunize the Commission from political considerations in exercising its quasi-judicial responsibilities. If Sections 12 and 22 of Senate Bill 1 are upheld, no civil officer will be safe from the political whims of the General Assembly. The floodgates will be opened for the legislature to terminate the terms of appointees to agencies such as the Parole Commission, Worker's Compensation Commission, State Board of Contract Appeals and others. These agencies, all of whom make quasi-judicial decisions, will lose the independence which allows them to function in a fair, unbiased manner.

The Constitution reflects the strong public policy that civil officers should be insulated from political retaliation by the General Assembly and the Governor alike so that these individuals can responsibly make appropriate decisions in accordance with their statutory mandates without concerns about political retribution. Legislative enactments such as Sections 12 and 22 of Senate Bill 1, if allowed to stand, will make all civil officers subject to the political whims of the General Assembly and deny these officers the ability to make independent decisions when interpreting state law.

C. Sections 12 and 22 of Senate Bill 1 Violate Article 24 Of The Maryland Declaration Of Rights And Unconstitutionally Remove The Vested Legal Rights Of Each Commissioner In His Or Her Appointment

In language which was based on the Magna Carta, Article 24 of the Maryland Declaration of Rights provides "that no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or in any manner, destroyed or deprived of his life, liberty or property, but by the judgment of his peers or by the law of the land."

The due process requirements of Article 24 function to "protect interests in life, liberty and property from deprivation or infringement by government without appropriate procedural safeguards." *Coleman v. Anne*

Arundel Police, 369 Md. 108, 141-42 (2002). In *Motor Vehicle Administration v. Lytle*, 374 Md. 37 (2003), this Court held:

> "to establish a violation of due process, the aggrieved party must show that state action resulted in a deprivation of a property interest protected by . . . Article 24 of the Maryland Declaration of Rights. If a property interest is established then the court must determine what procedures are required constitutionally before an individual may be so deprived."

The Supreme Court of the United States has determined that whether a public employee has a property interest in his continued employment is a function of whether the employee has a legitimate claim of entitlement to that employment derived from a statutory or contractual provision.[8] *Cleveland v. Loudermill*, 470 US 532, 538 (1985). Where dismissal may only be for cause, a property interest in that employment is created. *Board of Regents v. Roth*, 408 US 564 (1972).

As noted previously, several provisions address how the Commissioners can be removed from office. First, the Maryland Constitution, Art. II, § 15 provides that the "Governor . . . may remove for incompetency or misconduct, all civil officers who receive appointments from the Executive for a term of years." The Constitution does not provide that right to the Legislature. The term of a Commissioner is five years. *See*

[8] Supreme Court decisions interpreting the Due Process Clause of the Fourteenth Amendment "are practically direct authority for the meaning of [Article 24]." *Garnett v. State*, 332 Md. 571, 613 n. 20 (1993).

PUC Article § 2-102(d). Section 2-102(f) specifically provides that the Governor may remove a Commissioner for incompetence or misconduct in accordance with MD. CODE ANN., STATE GOVERNMENT §3-307. This Section of the State Government Article carefully prescribes the method by which the Governor is required to exercise this delicate and important power. The Governor is required to provide notice to the party complained against, an opportunity for defense, the examination of witnesses and a full hearing of the case. None of the these due process guarantees are afforded the Commissioners under Sections 12 and 22 of Senate Bill 1.

This legislation violates the individual rights of the Commissioners in three distinct ways. First, only the Governor can remove a Commissioner. Both the Maryland Constitution, Art. II, § 15, and the PUC Article § 2-102(f) clearly establish that ***only*** the Governor can remove a Commissioner. Through Sections 12 and 22 of Senate Bill 1, the General Assembly has unconstitutionally attempted to usurp this authority.

Second, a Commissioner can only be removed for incompetency or misconduct, not because of partisan political expediency. Under Maryland Constitution, Art. II, § 15, the Commissioners clearly are not at-will employees. They have a constitutionally protected vested right in their appointment, and can only be removed by the Governor for "incompetency

or misconduct". Article II, § 15. *Harmon v. Harwood*, 58 Md. 1, 15 (1881). Sections 12 and 22 of Senate Bill 1 expressly provide for the removal of the Commissioners without any regard to the constitutional protections and rights of the Commissioners. The effect of Sections 12 and 22 of Senate Bill 1 is to nullify the "for cause" requirement embodied in the Constitution.

Additionally, the Commissioners cannot be removed without notice and an evidentiary hearing. The Commissioners have significant pre-termination rights which are violated by Sections 12 and 22 of Senate Bill 1. As noted previously, the Commissioners are entitled to notice, the opportunity for defense, the examination of witnesses and a full hearing regarding the allegations supporting termination pursuant to MD. CODE ANN., STATE GOVERNMENT §3-307.

In instances where the officer's term is prescribed by statute and a statute or constitutional provision provides that the individual can only be removed for misconduct or incompetency, the designation of these two causes is a denial of the right to remove for any other reason or different cause. *See Miles*, 80 Md. at 364. Furthermore, an incumbent civil officer is entitled to an opportunity to be heard and to make a defense before he can be legally removed. The act of removing a civil officer without these safeguards is a nullity. *Id*.

The Supreme Court of the United States and a number of other states have considered the question of legislative removal of executive officers, like the one in this case, and found them to be improper. *See*, *Humphrey's Executor v. United States,* 295 U.S. 602, 632 (1935)("we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute"); *Ahearn v. Bailey*, 451 P.2d 30, 35-36 (Ariz. 1969); *Commonwealth ex rel. Kelly v. Clark*, 193 A. 634 (Penn. 1937); *Malone v. Williams*, 103 S.W. 798, 818-22 (Tenn. 1907)(surveying cases from throughout the country supporting the proposition that when a legislature abolishes an office and puts in its place another by the same name with substantially the same duties, it will be considered a device to unseat the incumbent, thereby encroaching upon the authority of the executive); *State ex. rel. Hammond v. Maxfield*, 132 P.2d 660 (Utah 1942)("the legislature cannot use its power to create or abolish in such a way to encroach on the power to remove").

In *Ahearn*, the Supreme Court of Arizona found that the legislature's efforts to remove members of the Industrial Commission was illegal and ordered the ouster of the newly appointed members. *Ahearn*, 132 P.2d at 36. The defendants argued that the legislature was merely abolishing and reconstituting the commission and that "the legislative power to abolish an

office is supreme". *Id.,* 132 P.2d at 34. The court rejected this argument finding

> "In examining House Bill No. 1 it is apparent that [the provision] shortening the terms of the existing Commissioners has no discernible relationship to the objects accomplished in the remainder of the enactment. Indeed, just the opposite appears, for the Legislature made provisions for immediate appointments to the same offices just terminated, thereby recognizing the need for a continuation of the officers rather than their abolishment."

Id., 132 P.2d at 35. As such, the court found the enactment an impermissible encroachment on the executive's power to remove officers. *Id.*, 132 P.2d at 36.

In *Kelly*, the Pennsylvania Supreme Court considered changes to the Civil Service Commission of the City of Philadelphia which consisted of three Commissioners elected by the City Council for a term of four years but was amended by the legislature so that the Mayor would appoint two Commissioners, the City Controller would appoint two Commissioners and the four would elect a fifth Commissioner. *Kelly, supra,* 193 A. at 635. It was also provided that the Act would become immediately effective. *Id.* The court said:

> "The acts considered together, as they must be, make it plain that the intention was to oust the

> commissioners elected by the city council and put in their places commissioners appointed by the mayor, the controller, and their appointees. There was no intention to abolish the office; language in the Act of May 19, 1937, that it is abolished is mere subterfuge. The intention to the contrary is too obvious. The best that can be said is that the Legislature attempted to abolish and continue the office at one and the same time, an impossible thing. **Such a device cannot succeed, and, while the question is a new one for this court, various other courts have so declared**."

Id., 193 A. 634, at 636.[emphasis added].

As the cases cited found with regard to their own state constitutions, Sections 12 and 22 of Senate Bill 1 attempt to circumvent all the legal requirements established by the Maryland Declaration of Rights, the Maryland Constitution, the PUC Article and MD. CODE ANN., STATE GOVERNMENT §3-307. Through Sections 12 and 22 of Senate Bill 1, the General Assembly usurps the constitutional authority of the Governor, removes civil officers without cause and denies those officers their due process rights. Accordingly, the Commission requests that the Court determine that the actions by the General Assembly are unconstitutional and declare Sections 12 and 22 of Senate Bill 1 invalid.

D. Sections 12 and 22 of Senate Bill 1 Are An Unconstitutional Bill of Attainder Under The Constitution of the United States, Article I, Section 10

The Constitution of the United States prohibits both Congress (in Article I, Section 9) and the States (in Article I, Section 10) from enacting Bills of Attainder. Sections 12 and 22 of Senate Bill 1 constitute a Bill of Attainder and are unconstitutional.

A Bill of Attainder is a legislative form of punishment, requiring three elements. One, the legislative act must determine "guilt" and "inflict punishment." Two, it must be directed "upon an individual or easily ascertainable members of a group." Three, it must occur "without the provision of the protections of a judicial trial." *United States v. Lovett,* 328 U.S. 303, 315-6 (1946); *Consolidated Edison Co. of New York v. Pataki*, 292 F.3d 338, 346 (2nd Cir.) *cert. denied*, 537 U.S. 1045 (2002) (The New York Legislature was found to have enacted a Bill of Attainder because it sought to punish an electric utility by depriving it of power replacement costs for a plant shutdown).

Clearly, as to the first element, there can be no dispute that the removal from office before the expiration of their terms constitutes in effect a finding of guilt and a form of punishment of the current Commissioners for their past regulatory, quasi-judicial actions. As this Court is no doubt aware,

members of the General Assembly have been quite explicit regarding their intent to punish the Commissioners for their regulatory decisions.[9] As the Supreme Court of the United States has noted the "proscription from any opportunity to serve the Government is punishment, and of a most severe type." *Lovett*, 328 U.S. at 316.

Second, the legislation at issue is clearly directed at the current Commissioners. Section 12 of Senate Bill 1 provides for the removal of "the chairman and each commissioner of the Public Service Commission serving on the effective date of this Act…" TRO Motion at Exhibit 1, Section 12(1). There is no question that Section 12 of Senate Bill 1 when enacted referred

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[9] The Commission presented a sampling of these statements to the Circuit Court of Baltimore City as part of the argument of its TRO Motion and asked the court to take judicial notice of them, pursuant to Maryland Rule 5-201. Tr. at 41. The June 28 Order reflects that the Circuit Court did not consider this evidence in denying the Commission's TRO Motion. June 28 Order at fn 1.

This Court discussed the proper use of newspaper accounts in determining legislative history in *In re: Jason W.*, 378 Md. 596, 610 (2003)(Harrell, J. concurring). Justice Harrell wrote, "A number of State courts have treated newspaper articles similarly. In Fox v. Bd. of Ed. of the Township of West Milford, 93 N.J. Super. 544, 226 A.2d 471 (N.J. Super. Ct. Law Div. 1967), the court stated that 'the legislative language is undoubtedly ambiguous, and requires resort to legislative history, contemporaneous construction and administrative interpretation to shed light on the true meaning and intent of the statute.' 226 A.2d at 480 (citing favorably to a newspaper article issued contemporaneous to the statute in question). The Supreme Court of Arizona, after determining that the plain meaning rule of statutory interpretation was inapplicable, opined that 'to find legislative intent, we consider the context of the statute, the language used, the subject matter, the historical background, the effects and consequences, and the spirit and purpose of the law.' Arizona Newspapers Association v. Superior Court, 694 P.2d 1174, 1176 (Ariz. 1985) (relying on newspaper accounts to show information was published)." *In re: Jason W.*, 378 Md. at 610.

to the sitting Commissioners. *See*, *Selective Service System v. Minnesota Public Interest Research*, 468 U.S. 841, 847 (1984)("[t]he singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons.")[citations omitted].

Finally, Sections 12 and 22 of Senate Bill 1 would remove the Commissioners from office without any provision of the protections of a judicial trial. Rather, Sections 12 and 22 of Senate Bill 1 terminate the Commissioners "because the legislature thinks them guilty of conduct which deserves punishment." *Lovett,* 328 U.S. at 317.

The State argued before the Circuit Court that Sections 12 and 22 of Senate Bill 1 were not a bill of attainder because (1) the Commissioners could be reappointed; (2) the General Assembly had the power to shorten the terms of the Commissioners and (3) the General Assembly merely had a "policy difference" with the Commissioners. Tr. 36-7. These arguments have been expressly rejected by the Supreme Court of the United States in the *Lovett* decision.

In *Lovett*, three executive appointees were excluded by Congress from receiving any "salary or compensation" from the treasury "unless they were

prior to November 15, 1943 appointed to jobs by the President with the advice and consent of the Senate." *Id.,* 328 U.S. at 305. Congress took this action because the "views and philosophies" of Lovett and others were "subversive" and made them "unfit for the present to continue in Government employment." *Id.,* 328 U.S. at 312.

The Supreme Court found this act a bill of attainder concluding that

> "the effect [of the Act] was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule.' The Constitution declares that that cannot be done either by a state or by the United States.

Id., 328 U.S. at 316-7. That Lovett or the others could have been reappointed to Government posts, that there was no dispute that Congress had the power to control expenditures from the Treasury or that Congress' actions emanated from a "policy dispute" were of no consequence to the court.

Likewise, the Commissioners' potential to be reappointed is of no consequence to the Court's consideration of the Commissions likelihood to succeed on the merits of its Bill of Attainder claim. Nor should the claim that the General Assembly acted within its constitutional authority affect the evaluation of Sections 12 and 22 of Senate Bill 1 as a Bill of Attainder.

Finally, the "mere policy difference" asserted by the State cannot avoid the conclusion that Sections 12 and 22 of Senate Bill 1 are an unlawful Bill of Attainder and violate Article I, Section 10 of the United States Constitution.

E. Section 22 Of Senate Bill 1, That Eliminates The Term Of The Commissioners And Authorizes The Attorney General To Appoint Successors, Is Unconstitutional

In what appears to be foreshadowing a judicial determination of the unconstitutionality of Section 12 of Senate Bill 1, the General Assembly included Section 22 to provide for the termination of the sitting Commissioners and appointment of new Commissioners if Section 12 was determined to be invalid. However, for the very same reasons that Maryland's legislature cannot terminate the terms of the Commissioners in Section 12, it cannot create a "fall back" provision that terminates the terms of the Commissioners if the earlier provision is found to be invalid. As set forth above, the General Assembly cannot constitutionally draft legislation that removes the sitting Commissioners regardless of whether it is in Section 12 or Section 22 of Senate Bill 1. *See*, A-D, *supra*.

Section 22 of Senate Bill 1 is also unconstitutional for a second and wholly independent reason. Section 22 provides that if Section 12 is held invalid, then the terms of the current commissioners are terminated and commissioners become at will employees of the Attorney General. TRO

Motion at Exhibit 1, Secton 22. It cannot be overstated how Section 22, if allowed to stand, would frustrate the utility regulatory process and would operate as a *per se* denial of due process to virtually all parties with important business before the Commission. It is common for the Attorney General to participate as a party in proceedings before the Public Service Commission. Indeed, pursuant to Senate Bill 1, the Attorney General is directed to intervene and participate in a proceeding to consider a proposed merger between Constellation Energy and FPL Group that is pending. *Id*. at Section 15. Section 22 of Senate Bill 1 purports to end the terms of current Commissioners and provides that they "serve at the pleasure of the Attorney General, who is authorized to terminate their service and appoint their successors." *Id.* at Section 22(b). Members of the Public Service Commission could not possibly maintain the necessary objectivity and independence to exercise the Commission's quasi-judicial functions if they were at will employees of a party in its proceedings. In addition, Section 13 of Senate Bill 1 provides that the People's Counsel serves at the pleasure of the Attorney General." *Id.* at Section 13. This legislation creates an untenable conflict of interest and destroys any impartiality between the Commissioners, People's Counsel and the Attorney General. Again, these provisions underscore the General Assembly's unprecedented abuse of

power, violation of separation of power principles, and complete disregard for an independent Public Service Commission. Sections 12 and 22 of Senate Bill 1 are blatantly unconstitutional and must be enjoined by this Court.

F. The Authority Relied Upon By The State And The Circuit Court Is Clearly Distinguishable From The Case At Bar.

The June 28 Order relied upon a handful of cases cited by the State in support of the Circuit Court's conclusion that the General Assembly's passage of Sections 12 and 22 of Senate Bill 1were within its "constitutional authority" and "did not run afoul of the federal constitution's dictates on separation of powers or bills of attainder" or "violate Maryland law." June 28 Order at 4. The cases principally relied upon, however, are clearly distinguishable from the case at bar.

The case of *Town of Glenarden v. Bromery*, 257 Md. 19 (1970) is completely inapposite. In *Glenarden*, municipal voters had enacted changes to the town charter which terminated the terms of the current mayor and councilmen. *Id.,* 257 Md. at 21. In other words, the town constitution itself had been changed to allow for the election of new officers. *Id.* In the case at bar, we merely have a legislative enactment which, as cited above, was in derivation of, not pursuant to, clear constitutional provisions to the contrary.

In *Anderson v. Baker,* 23 Md. 531 (1965), this Court dealt with the denial of the right to vote to individuals determined to have been for Confederate sympathizers. *Id.* This Court determined that this action was not a Bill of Attainder because the denial of the right to vote was simply a disqualification not a punishment. *Id.* The case did not deal with the removal of constitutional officers or the clear punishment such a removal would mean. *See, Lovett,* 328 U.S. at 316.

III. The Commission Will Suffer Irreparable Harm In The Absence Of A Temporary Restraining Order

Irreparable harm can be demonstrated by the necessity to maintain the *status quo*. *Lerner v. Lerner*, 306 Md. 771, 776 (1986). The unwarranted disruption to the daily functioning of the PSC caused by the uncertainty regarding the constitutionality of Sections 12 and 22 of Senate Bill 1 cannot be overstated. Essentially, any order issued by the "new" Commissioners will be void, *de facto* if not *de jure*, if their appointment is subsequently found to be unconstitutional. The PSC cannot be subjected to this form of "legal paralysis" during the pendency of this proceeding. Litigants will not know if orders issued by the "new" Commission during the pendency of this litigation will ultimately be valid or subsequently reversed. The resulting uncertainty is harmful to the PSC itself and to the parties appearing before the PSC.

Furthermore, a complete change in membership of the PSC will disrupt the entire staff of the PSC and its work. Once Sections 12 and 22 of Senate Bill 1 are found to be unconstitutional, the return of the Commissioners will put staff through a second complete change of leadership. The effect on morale, productivity and the work of the PSC will be devastating.

There is also harm to the Commissioners who not only lose the economic benefit and security of their appointments but suffer the damage to their reputation and careers as a result of the Legislature's *de facto* termination. This Court noted the harm to an officer so removed in the *Miles* case, "is the utmost stretch of arbitrary power and a despotic denial of justice to strip an incumbent of his public office and deprive him of its emoluments and income, before its prescribed term has elapsed." *Miles,* 80 Md. at 366. Such harm to one's reputation and future career prospects is irreparable.

Much of the irreparable harm to the Commission also constitutes harm to the citizens of Maryland as well. In addition to that mentioned herein, this harm is set forth below in the discussion addressing why granting the temporary restraining order is in the public interest.

IV. Granting The Temporary Restraining Order Is In The Public Interest.

This case is one of extreme importance to the citizens of Maryland. The PSC has significant on-going cases in progress. These cases affect the lives and livelihood of thousands of citizens. The PSC's significant on-going cases require decision in a relatively short period of time. If the temporary restraining order is not granted, new members of the PSC with no familiarity with the record or the issues in these cases will essentially be forced to start these proceedings over. The delays associated with new review of pending cases will harm not only the litigants awaiting PSC decisions but, more importantly, will harm the public in general who ultimately bear the costs of any delay.

Furthermore, if new members of the PSC are seated while the constitutionality of Sections 12 and 22 of Senate Bill 1 are challenged, the result will be chaotic for the financial markets which support utility infrastructure investments in Maryland and depend upon regulatory stability in order to provide capital. Customers pay the costs of utility capital investments (both debt and equity costs) through utility rates. Destabilizing the PSC while this litigation is ongoing will unnecessarily increase investment risks and costs that customers will have to pay for utility service.

As noted previously, the effectiveness of any orders issued by the "new" members of the PSC while the litigation proceeds will certainly be, at a minimum, subject to serious doubt. The fact that PSC orders may not long remain in effect will inject an unprecedented degree of doubt regarding utility rates, utility finances and the rights and responsibilities of all parties to Commission proceedings. This chaos clearly is not in the public interest.

The citizens of Maryland are entitled to have their State agencies operated in an efficient and effective manner. The premature implementation of Sections 12 and 22 of Senate Bill 1 clearly will have a highly disruptive effect on the PSC and by extension on the utilities which the PSC regulates and the public who depends upon those utilities for essential services.

V. The Balance of Convenience Favors Granting The Temporary Restraining Order

The "balance of convenience" favors the grant of the Commission's Motion because great injury will be done to the Commission by denying the injunction and no injury will be done to the Defendant by granting it. *Teferi v. Dupont Plaza Assoc*., 77 Md. App. 566, 578, 579, n. 5 (1989).

As discussed above, the Commission has made a strong showing that it will suffer irreparable harm unless the request for injunction is granted.

Granting the temporary restraining order and allowing this case to proceed at an orderly pace will not cause any injury to the State.

The State argued before the Circuit Court that it was this litigation and any restraining order that would be disruptive to the public interest rather than the illegal and unconstitutional acts of the General Assembly. As discussed above, however, the precedent set by allowing the General Assembly unfettered power to remove civil officers in contravention of the Maryland constitution would do far more harm than this Court's preservation of the *status quo* until the constitutionality of Sections 12 and 22 of Senate Bill 1 are determined.

VI. The Controversy Is Ripe for Judicial Review And The Commission Has Standing To Challenge Sections 12 and 22 of Senate Bill 1

In conjunction with this request for an injunction, the Commission has filed a complaint seeking declaratory relief. The primary purpose of the Uniform Declaratory Judgment Act is to relieve litigants of the rule of common law that no declaration of rights may be judicially determined unless a right has been violated and to render practical help in ending controversies which have not reached the stage where other legal relief is immediately available. *Davis v. Maryland,* 183 Md. 385, 388-389 (1944); *State Attorney General v. Burning Tree Club, Inc.,* 301 Md. 9, 19-26

(1984)(discussing the standing of an official to challenge the constitutionality of statutes which affect his "security and livelihood")[citations omitted]. This Court has held that a person directly affected by a statute should be permitted to obtain a judicial declaration that the statute is unconstitutional. *Davis,* 183 Md. at 389.

For all these reasons, the Circuit Court erred by issuing its June 28, 2006 Order denying the Commission's TRO motion.

CONCLUSION

WHEREFORE, the Appellants respectfully request that this Court issue a mandate (1) vacating the Circuit Court of Baltimore City's June 28, 2006 Order denying Appellants' request for a temporary restraining order and (2) remand the case to the Circuit Court of Baltimore City with instructions to enter a temporary restraining order providing: (a) That the implementation of Sections 12 and 22 of Senate Bill 1 are stayed; and (b) That Chairman Schisler and Commissioners Freifeld, Boutin and Williams shall remain in office with all the duties, rights and responsibilities of their respective positions, as provided by statute prior to the enactment of Sections 12 and 22 of Senate Bill 1, or, in the alternative, issue an injunction staying the implementation of Sections 12 and 22 of Senate Bill 1 and that

Chairman Schisler and Commissioners Freifeld, Boutin and Williams shall remain in office with all the duties, rights and responsibilities of their respective positions, as provided by statute prior to the enactment of Sections 12 and 22 of Senate Bill 1, pending a final determination of the merits of the Commission's claims or other Order of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT on this 5th day of July, 2006, a copy of the foregoing Appellants' Brief was delivered via electronic mail and hand-delivered to Michael D. Berman, Deputy Chief of Civil Litigation for the State of Maryland, Office of the Attorney General, 200 St. Paul Place, Baltimore, Maryland 21201.

/s/
Andrew Radding

STATEMENT AS PER MARYLAND RULE 8-504(a)(8)

The foregoing brief was prepared with proportionally spaced type, Times New Roman, 14 point, and conforms with the requirements of Maryland Rule 8-112.

/s/
Andrew Radding

CITATION AND TEXT OF PERTINENT AUTHORITIES

U.S. Constitution Art., I, § 10 Limits on States

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

Maryland Declaration of Rights Art. 8 Separation of powers

That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

MD Constitution, Declaration of Rights, Art. 24 Due Process

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

MD Constitution, Art. 2, § 15 Removal of Officers

The Governor may suspend or arrest any military officer of the State for disobedience of orders, or other military offense; and may remove him in pursuance of the sentence of a Court-Martial; and may remove for incompetency, or misconduct, all civil officers who received appointment from the Executive for a term of years.

MD Constitution, Art. 2, § 17. Consideration by Governor of bills passed by legislature

(d) Any Bill vetoed by the Governor shall be returned to the House in which it originated immediately after the House has organized at the next regular or special session of the General Assembly. The Bill may then be reconsidered according to the procedure specified in this section. Any Bill enacted over the veto of the Governor, or any Bill which shall become law as the result of the failure of the Governor to act within the time specified, shall take effect 30 days after the Governor's veto is over-ridden, or on the date specified in the Bill, whichever is later. If the Bill is an emergency measure, it shall take effect when enacted. No such vetoed Bill shall be returned to the Legislature when a new General Assembly of Maryland has been elected and sworn since the passage of the vetoed Bill.

MD Code, Public Utility Companies, § 2-101 Established; purpose

(a) There is a Public Service Commission.
(b) The Commission is an independent unit in the Executive Branch of State government.
(c) The Commission shall carry out the functions assigned to it by law.

MD Code, Public Utility Companies, § 2-102 Membership (d)

(d)
(1) The term of a commissioner is 5 years and begins on July 1.
(2) The terms of commissioners are staggered as required by the terms in effect for commissioners on October 1, 1998.

(3) At the end of a term, a commissioner continues to serve until a successor qualifies.
(4) A commissioner who is appointed after a term has begun serves for the rest of the term and until a successor qualifies.

MD Code, Public Utility Companies, § 2-102 Membership (f)

(f) The Governor may remove a commissioner for incompetence or misconduct in accordance with § 3-307 of the State Government Article.

MD Code, Public Utility Companies, § 2-103 Chairman

(a) With the advice and consent of the Senate, the Governor shall appoint a Chairman.

(b)
(1) The term of the Chairman is 5 years and begins on July 1.
(2) At the end of a term, the Chairman continues to serve until a successor qualifies.
(3) A Chairman who is appointed after a term has begun serves for the rest of the term and until a successor qualifies.

MD Code, Public Utility Companies, § 2-112 Jurisdiction; general powers

(a) To the full extent that the Constitution and laws of the United States allow, the Commission has jurisdiction over each public service company that engages in or operates a utility business in the State and over motor carrier companies as provided in Title 9 of this article.

(b)(1) The Commission has the powers specifically conferred by law. (2) The Commission has the implied and incidental powers needed or proper to carry out its functions under this article.

(c) The powers of the Commission shall be construed liberally.

MD Code, State Government, § 3-307 Complaints against civil or military officers

Governor's authority--investigation of complaint
(a) On the filing of a complaint against a civil or military officer who may be suspended or removed from office by the Governor, the Governor:
(1) shall provide to the respondent:
(i) a copy of the complaint; and
(ii) notice of the time when the Governor shall hear the complaint;
(2) may summon any witness to testify concerning the complaint, pay the witness a fee of $1 a day for attending, and reimburse the witness for travel expenses incurred in testifying;
(3) may designate one or more individuals to attend on the Governor's behalf any part of any hearing that relates to the establishment of the facts of the complaint; and
(4) may order either party or the State to pay any costs of the proceeding.

Governor's authority--enforcement of orders
(b) The Governor, in the same manner as a court of the State, may enforce:
(1) the attendance of a witness summoned under subsection (a)(2) of this section; or
(2) an order under subsection (a)(4) of this section for payment of costs by a party or the State.

Payment of costs by State
(c) If the State is ordered to pay costs under subsection (a)(4) of this section, the Comptroller shall issue a warrant to the Treasurer to pay the costs.

Maryland Rule 15-504 Temporary Restraining Order

(a) Standard for Granting. A temporary restraining order may be granted only if it clearly appears from specific facts shown by affidavit or other statement under oath that immediate, substantial, and irreparable harm will result to the person seeking the order before a full adversary hearing can be held on the propriety of a preliminary or final injunction.

(b) Without Notice. A temporary restraining order may be granted without written or oral notice only if the applicant or the applicant's attorney certifies to the court in writing, and the court finds, that specified efforts

commensurate with the circumstances have been made to give notice. Before ruling, the judge may communicate informally with other parties and any other person against whom the order is sought or their attorneys.

(c) Contents and Duration. In addition to complying with Rule 15-502(e), the order shall (1) contain the date and hour of issuance; (2) define the harm that the court finds will result if the temporary restraining order does not issue; (3) state the basis for the court's finding that the harm will be irreparable; (4) state that a party or any person affected by the order may apply for a modification or dissolution of the order on two days' notice, or such shorter notice as the court may prescribe, to the party who obtained the order; and (5) set forth an expiration date, which shall be not later than ten days after issuance for a resident and not later than 35 days after issuance for a nonresident. The order shall be promptly filed with the clerk. On motion filed pursuant to Rule 1-204, the court by order may extend the expiration date for no more than one additional like period, unless the person against whom the order is directed consents to an extension for a longer period. The order shall state the reasons for the extension.

(d) Service; Binding Effect. A temporary restraining order shall be served promptly on the person to whom it is directed, but it shall be binding on that person upon receipt of actual notice of it by any means.

(e) Denial. If the court denies a temporary restraining order, the clerk shall note the denial by docket entry in accordance with Rule 2-601(b).

(f) Modification or Dissolution. A party or person affected by the order may apply for modification or dissolution of the order on two days' notice to the party who obtained the temporary restraining order, or on such shorter notice as the court may prescribe. The court shall proceed to hear and determine the application at the earliest possible time. The party who obtained the temporary restraining order has the burden of showing that it should be continued.

Maryland Rule 15-505. PRELIMINARY INJUNCTION

(a) Notice. A court may not issue a preliminary injunction without notice to all parties and an opportunity for a full adversary hearing on the propriety of its issuance.

(b) Consolidation With Trial on Merits. Before or after commencement of the hearing on the preliminary injunction, the court may order that a trial on the merits be advanced and consolidated with the preliminary injunction hearing, so long as any right to trial by jury is preserved.

Maryland Rule 5-201. Judicial Notice Of Adjudicative Facts

(a) Scope of Rule. This Rule governs only judicial notice of adjudicative facts. Sections (d), (e), and (g) of this Rule do not apply in the Court of Special Appeals or the Court of Appeals.

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When Discretionary. A court may take judicial notice, whether requested or not.

(d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to Be Heard. Upon timely request, a party is entitled to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing Jury. The court shall instruct the jury to accept as conclusive any fact judicially noticed, except that in a criminal action, the court shall instruct the jury that it may, but is not required to, accept as conclusive any judicially noticed fact adverse to the accused.