IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Larry Krasner, in his official capacity as the District Attorney of Philadelphia, Petitioner	:	
v.	:	No. 563 M.D. 2022
Senator Kim Ward, in her official capacity as Interim President Pro Tempore of the Senate; Representative Timothy R. Bonner, in his official capacity as an impeachment manager; Representative Craig Williams, in his official capacity as an impeachment manager; Representative Jared Solomon, in his official capacity as an impeachment manager; and John Does, in their official capacities as members of the Senate Impeachment Committee, Respondents	:	Argued: December 29, 2022

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE ELLEN CEISLER, Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY JUDGE McCULLOUGH FILED: January 12, 2023

We cannot, at this juncture, rule on any of the claims presented in Petitioner Larry Krasner's (Krasner) Petition for Review (PFR). Although Krasner

has raised serious and far-reaching issues concerning his reputation and the breadth and scope of the Pennsylvania General Assembly's (General Assembly) impeachment powers (the import of which should not be minimized), he has failed to join in this action the Senate of Pennsylvania (Senate) and the Senate Impeachment Committee (Impeachment Committee), both of which clearly are indispensable parties. As such, I respectfully believe this Court is without subject matter jurisdiction to decide any of the claims asserted in the PFR.

Further, even assuming, *arguendo*, this Court had jurisdiction, the Majority's decision nevertheless has hurriedly and needlessly plunged this Court into a wash of nonjusticiable political questions over which we currently have no decision-making authority. In so doing, the Majority transgresses longstanding separation of powers principles.

For these reasons, I must respectfully, but avidly, dissent.

I. Subject Matter Jurisdiction

Although my esteemed colleagues in the Majority set out the correct standard for determining whether indispensable parties have not been joined, I believe the Majority errs in applying those standards to the interests of the Senate and Impeachment Committee. The Pennsylvania Constitution expressly provides that "[a]ll impeachments shall be tried *by the Senate*." Pa. Const. art. VI, § 5 (emphasis added). The entire Senate, not its individual members, officers, or caucus leaders, is the subject of this constitutional mandate. The Majority concludes that Respondent Senator Kim Ward, the Interim President Pro Tempore of the Senate (Senator Ward),[1] adequately represents the interests of the Senate and Impeachment

[1] Senator Ward was sworn in as the President Pro Tempore of the Senate on January 3, 2023.

Committee (the members of which have not yet been appointed). But, I believe the Majority misconstrues and largely ignores the actual interests of those parties.

In his Prayer for Relief, Krasner requests that we declare unconstitutional and unlawful both the impeachment proceedings that have occurred to date and *any action that Respondents, the Senate, or the House of Representatives (House) might take in the future* on the Amended Articles of Impeachment (Amended Articles). *See* PFR at 30, Prayer for Relief ¶ E (emphasis added). Thus, the Senate and the Impeachment Committee have interests far more substantial and specific than the general interests involved in the case relied upon by the Majority, *City of Philadelphia v. Commonwealth*, 838 A.2d 566 (Pa. 2003), a case which involved a challenge to legislation *after it had been voted on and implemented* by the General Assembly.[2] Krasner here, by contrast, asks us to declare *in advance* that the Senate (and, by association, the Impeachment Committee) may not lawfully act on the Amended Articles. The Senate's specific, institutional interest in this regard is a far cry from the General Assembly's general interest in upholding the "procedural regularity" of its already-enacted legislation. *See City of Philadelphia*, 838 A.2d at 584. I cannot conceive of how we could afford any relief, declaratory or otherwise, against the Senate and the Impeachment Committee without their joinder.

Further, although I concur with the Majority's reasoning in dismissing the hypothetical "John Does" of the Impeachment Committee, their dismissal does

[2] In *City of Philadelphia*, the mayor and city filed a declaratory judgment action against the presiding officers and minority leaders of the General Assembly in this Court, challenging on constitutional grounds the procedural regularity of newly-enacted legislation. The presiding officer and minority leader respondents asserted that this Court, and, on appeal, the Supreme Court, lacked jurisdiction because not all indispensable parties had been joined. The Supreme Court concluded that exercising jurisdiction was proper because the presiding officers and minority leaders of the General Assembly could adequately represent its "general interest in defending the procedural regularity of the bills that it approves." 838 A.2d at 572.

not make the *actual* Impeachment Committee members dispensable. Rather, it only further emphasizes the point that this action is premature. Krasner named the "John Doe" Impeachment Committee members as respondents because he rightly acknowledged that the Impeachment Committee as a body has a substantial interest in this case. *See* PFR at 6 (the "[Impeachment C]ommittee and its chairperson have the powers and duties conferred *on the Senate* and the President Pro Tempore") (emphasis added). The Senate's resolutions confer on the Impeachment Committee the responsibility for receiving evidence, taking testimony, and providing a summary of that evidence and testimony to the entire Senate. *See* Senate Resolution 386, § 10; Senate Resolution 388 at 3, lines 8-14. Although the Majority seems bewildered at the notion that the Impeachment Committee "does not exist and yet is indispensable to the litigation," *see Krasner v. Ward* (Pa. Cmwlth., No. 564 M.D. 2022, filed January 9, 2023), slip. op. at 9 n.5 (Majority Opinion), respectfully, that precisely is the point.

It also is telling that, in permitting Senator Jay Costa's (Senator Costa) intervention, the Majority concludes under Pennsylvania Rule of Civil Procedure (Pa. R.Civ.P.) 2327(4) that our declarations in this case "will directly affect [Senator Costa's] interests as a member of the Senate." (Majority Opinion at 44.) I heartily agree. But Senator Costa and Senator Ward cannot by themselves answer Krasner's claims. The Senate and Impeachment Committee, as institutions, must be parties because they are among the entities against which Krasner seeks specific relief. In *Larsen v. Senate of Pennsylvania*, 646 A.2d 694 (Pa. Cmwlth. 1994), former Justice Rolf Larsen apparently recognized what the Majority here misses. Former Justice Larsen sought declaratory and injunctive relief very similar to that sought by Krasner here. But former Justice Larsen, unlike Krasner, asserted his claims against the Senate and the membership of the Senate's Impeachment Trial Committee, *i.e.*, the actual parties against whom he sought relief. *Id.* at 695.

Clearly, then, the *actual* Impeachment Committee (and not its hypothetical membership) is an indispensable party to this action. Its current nonexistence (and, therefore, absence) divests this Court of jurisdiction. For that reason, I would grant, in part, Senator Ward's Cross-Application for Summary Relief and dismiss this action in its entirety on the ground that we currently are without subject matter jurisdiction to decide it.

II. Justiciability

Even assuming that we had subject matter jurisdiction over this case, which I contend we do not, I also would conclude that the Majority invalidly appropriates to itself decision-making authority over questions reserved in the first instance for a coordinate branch of our Commonwealth government. Again, assuming that we had jurisdiction, and although I believe that we could at this juncture decide the first two claims presented in the PFR, the same does not hold true for the question presented in the third claim, namely, whether the Amended Articles state viable grounds for impeachment. In disposing of that claim, the Majority decides, in advance, an unripe political question that at this point is constitutionally reserved for the Senate's determination.[3]

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[3] The 206th General Assembly has adjourned and the 207th has begun. The House, the body with the constitutional authority to draft and deliver impeachment articles to the Senate for trial, determined that Krasner is a "civil officer" subject to impeachment pursuant to article VI, section 6 of the Pennsylvania Constitution. Pa. Const. art. IV, § 6. Because both of these events have occurred and concluded, we could review Krasner's first two claims without usurping the authority of the General Assembly or transgressing separation of powers principles. Thus, and again assuming our jurisdiction, I would not disagree with the Majority's disposition of those claims.

However, although I agree with the Majority that what constitutes "misbehavior in office" presents a potential constitutional question upon which we may rule, nevertheless, whether, to what extent, and in what format this Court may review the constitutionality of completed impeachment proceedings is not clear. In whatever form that review would take, it should happen

(Footnote continued on next page…)

Questions of justiciability are threshold matters to be resolved before addressing the merits of a dispute. *Robinson Township, Washington County, Pennsylvania v. Commonwealth*, 83 A.3d 901, 917 (Pa. 2013). In Pennsylvania, and unlike the federal approach, questions of justiciability "have no constitutional predicate, do not involve a court's jurisdiction, and are regarded instead as prudential concerns implicating courts' self-imposed limitations." *Id.* Further,

> [t]he applicable standards to determine whether a claim warrants the exercise of judicial abstention or restraint under the political question doctrine are well settled. Courts will refrain from resolving a dispute and reviewing the actions of another branch only where the determination whether the action taken is within the power granted by the Constitution has been entrusted exclusively and finally to the political branches of government for self-monitoring. To illustrate our approach to the political question doctrine, we customarily reference the several formulations by which the [United States (U.S.)] Supreme Court has described a "political question" in *Baker v. Carr*, 369 U.S. 186, 217 . . . (1962). ***Cases implicating the political question doctrine include those in which: there is a textually demonstrable constitutional commitment of the disputed issue to a coordinate political department***; there is a lack of judicially discoverable and manageable standards for resolving the disputed issue; ***the issue cannot be decided without an initial policy determination of a kind clearly for non[-]judicial discretion; a court cannot undertake independent resolution without expressing lack of the respect due coordinate branches of government***; there is an unusual need for unquestioning adherence to a political decision already made; and there is potential for embarrassment from multifarious pronouncements by various departments on one question.

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on a developed record after the Senate, as constitutionally mandated, has had the opportunity to adjudicate the Amended Articles by trial, summary dismissal, or otherwise.

> We have made clear, however, that we will not refrain from resolving a dispute which involves only an interpretation of the laws of the Commonwealth, for the resolution of such disputes is our constitutional duty.

Id. at 928 (most internal citations and quotations omitted) (emphasis added).

In accord with the above, there is a "textually demonstrable constitutional commitment" to the Senate of the question of whether the Amended Articles set forth sufficient allegations of "misbehavior in office." We at least implicitly recognized that principle in *Larsen*, a case largely sidestepped by the Majority. There, former Justice Larsen brought an action in this Court seeking declaratory and injunctive relief barring the Senate from proceeding on articles of impeachment adopted by the House and scheduled for trial. *Larsen*, 646 A.2d at 695-96. The respondents, the Senate, and members of the Senate Trial Impeachment Committee, argued in part that Larsen impermissibly sought advance review of non-justiciable political questions. *Id.* at 699. We acknowledged in *Larsen* that appellate courts may review and rule upon the constitutionality of the actions of other coordinate branches of government. Proceeding more prudently than the Majority does here, however, we also observed that "where the courts have undertaken to examine legislative actions as justiciable questions, the Pennsylvania Supreme Court and this [C]ourt were *reviewing actions already theretofore taken* by the processes of the legislative body." *Larsen*, 646 A.2d at 700 (emphasis in original). Although we discussed to some degree the questions former Justice Larsen presented for review, we ultimately declined to afford any relief in advance of trial in the Senate:

> Of most significance is our conviction, from study of the ***impeachment*** provisions of the Pennsylvania Constitution, that such process ***is committed by the Constitution to the Senate of Pennsylvania to an extent which clearly bars the courts from intervening with prior restraint.*** Impeachment involves an adjudicative process,

> but one which has been clearly set apart by the Constitution as distinguished from adjudications by the judicial branch of government, regardless of whatever powers the courts may have to interpret actions of the legislative body, by way of review, after they have been taken. As in the case of scrutinizing the constitutionality of statutes themselves, the courts clearly have no power to intervene by injunction in advance of legislative action, any more than a court would have any power to enjoin, in advance, the enactment of a law appearing (to the courts) to be constitutionally invalid.

Larsen, 646 A.2d at 705 (emphasis added).

Although *Larsen* involved a direct request for pre-trial injunctive relief (a request that Krasner strategically avoids here), the applicable principle from *Larsen* remains the same: judicial restraint and respect for constitutional separation of powers. Krasner requests that this Court act in advance and tell the Senate, the House, and (at least hypothetically) the Impeachment Committee, all non-parties, that they may not lawfully take any further action in these impeachment proceedings. Krasner also candidly has admitted, as he must, that any failure of any of these parties to comply with the Majority's pronouncements would precipitate a request for injunctive relief. As discussed *supra*, however, Krasner has not named as a respondent any party with independent authority to proceed with the impeachment proceedings. It therefore is not clear against whom he would seek such injunctive relief. This, once again, highlights in boldface the jurisdictional problems with permitting this action to proceed in its current form.

Moreover, Krasner in this third claim does not ask us to review the constitutionality of legislation already enacted by the General Assembly. Nor does he request that we review and issue declarations (and, if necessary, injunctions) regarding a law's constitutionality before it is enforced by the executive branch. The courts' ability to conduct those kinds of review is firmly established. Instead,

Krasner requests that we evaluate the substance of legislative action that has not yet occurred. The Majority's willingness to do so is ill-advised, particularly given that the legislative function at issue is judicial in character and has been constitutionally assigned to another branch of Commonwealth government. Whatever review we may conduct of the Senate's determination on the Amended Articles, we ought not conduct it now. In this respect, the question presented in Krasner's third claim is nonjusticiable both because it is a political question and because it is unripe. In concluding to the contrary, the Majority shirks the more prudential course of exercising judicial restraint.

Thus, and only if this Court had jurisdiction, I alternatively would concur with the Majority's disposition of Krasner's first and second claims regarding, respectively, whether the impeachment proceedings carry over from the 206th General Assembly and whether Krasner is a "civil officer" subject to impeachment under article VI, section 6 of the Pennsylvania Constitution. Unlike the Majority, however, I would sustain, in part, the Preliminary Objections of Respondent Representatives Timothy R. Bonner and Craig Williams and dismiss as nonjusticiable and unripe Krasner's third claim regarding whether the Amended Articles sufficiently allege impeachable "misbehavior in office." This, I believe, is the only disposition that properly would heed our Supreme Court's sage admonition that "[i]t is on the preservation of the lines which separate the cardinal branches of government [] that the liberties of the citizen depend." *Wilson v. School District of Philadelphia*, 195 A. 90, 93-96 (Pa. 1937).

III. Conclusion

Whatever may be this Court's preliminary reaction to the impeachment proceedings now underway in the General Assembly, I am convinced that we are duty-bound to decide only those legal questions that presently are within our

jurisdictional purview. In its current form, this action presents us with none. It accordingly should be dismissed.

s/ Patricia A. McCullough
PATRICIA A. McCULLOUGH, Judge