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HOUSE RESOLUTION NO. 530

Offered May 15, 2014

Directing the House Committee on Privileges and Elections to hold hearings beginning no later than seven calendar days following passage of this resolution to inquire as to the conduct of the Attorney General of the Commonwealth, examine the constitutional bases for impeachment, and recommend to the House of Delegates whether the House should or should not impeach Attorney General Mark Herring. Report.

Patrons—Marshall, R.G., Berg and Fariss

Committee Referral Pending

WHEREAS, House Resolution 502 (2014 Special Session I) states that no bill or resolution shall be introduced in the 2014 Special Session I without unanimous consent except (among other things) "joint resolutions or resolutions affecting the rules of procedure or schedule of business of the General Assembly or any of its committees"; and

WHEREAS, since this resolution affects the schedule of business of a standing House committee, it is properly before the House without unanimous consent; and

WHEREAS, Article IV, Section 17 of the Constitution of Virginia places the power to impeach and try officials for impeachment with the General Assembly of Virginia, as follows:

"The Governor, Lieutenant Governor, Attorney General, judges, members of the State Corporation Commission, and all officers appointed by the Governor or elected by the General Assembly, offending against the Commonwealth by malfeasance in office, corruption, neglect of duty, or other high crime or misdemeanor may be impeached by the House of Delegates and prosecuted before the Senate, which shall have the sole power to try impeachments."; and

WHEREAS, the grounds for impeachment in Article IV, Section 17 include actions that do not constitute crimes because (i) the scope of impeachable offenses is rooted in English law whereby Parliament defined a category of political offenses (e.g., neglect of duty) that were distinct from criminal offenses, (ii) Parliament's impeachment for "high crimes and misdemeanors" included offenses against orderly governance that were not statutory or common law crimes, and (iii) the House of Representatives of the United States has impeached officials for nonindictable offenses; and

WHEREAS, the Attorney General has no inherent or common law powers but only those prescribed by the General Assembly; and

WHEREAS, the Attorney General is required by law to render legal service in civil matters for the Commonwealth, the Governor, and every state department, institution, division, commission, board, bureau, agency, entity, official, court, or judge, including the conduct of all civil litigation in which any of them are interested; and if, in the opinion of the Attorney General, it is impracticable or uneconomical for such legal services to be rendered by him or one of his assistants, he may employ special counsel for this purpose; and

WHEREAS, there is no law permitting the Attorney General to refrain from either representing the Commonwealth or appointing special counsel to do so when the Commonwealth or its officials are defendants in a civil action; and

WHEREAS, the Attorney General's oath of office requires him to support and defend the Constitution of Virginia; the oath also requires the Attorney General to support and defend the Constitution of the United States, but that does not permit him to abandon the defense of the Constitution of Virginia where there is a nonfrivolous basis for asserting a defense; and

WHEREAS, in the case of *Bostic v. Rainey*, Attorney General Mark Herring claimed to have "plenary power" as a consequence of having been elected to that office and he unilaterally reversed the legal position of the Commonwealth and the government official whom the Attorney General was duty-bound to defend in the litigation without appointing any special counsel in his stead; and

WHEREAS, prior to Mark Herring becoming Attorney General, in the case *Bostic v. Rainey (Bostic)*, Attorney General Ken Cuccinelli fulfilled his responsibility to defend the constitutionality of Article I, Section 15-A of the Constitution of Virginia, and there were no allegations that his legal position (or that of the other attorneys general who have defended similar state laws in court) was frivolous; and

WHEREAS, in the *Bostic* case not only did Attorney General Mark Herring cease defending the validity of Article I, Section 15-A, but he joined the plaintiffs in convincing the judge to hold that Article I, Section 15-A was unconstitutional; and

WHEREAS, no provision in the Constitution of Virginia nor the Code of Virginia authorizes the Attorney General to unilaterally reject the sovereign will of the people as expressed through a

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59 duly-enacted provision of the Constitution or laws of Virginia and to seek to have such a provision
60 overturned in court; and

61 WHEREAS, Attorney General Mark Herring has admitted that the issue in *Bostic* will ultimately be
62 decided not by him but by the Supreme Court of the United States; and

63 WHEREAS, in filings in the appeal of *Bostic* to the federal court of appeals, Attorney General Mark
64 Herring also attacked the validity of Virginia's tax laws when he stated that because the plaintiffs "are
65 unmarried in the Commonwealth's eyes [they] . . . have faced discriminatory tax treatment"; and

66 WHEREAS, Attorney General Mark Herring, reversing the standing policy and interpretation of
67 Virginia's laws regarding in-state tuition for the children of illegal immigrants, advised the
68 Commonwealth's colleges and universities that the children were eligible to qualify for this substantial
69 reduction in the cost of tuition; and

70 WHEREAS, this assault on the Commonwealth's long-standing policy regarding in-state tuition is
71 based on faulty legal analysis and is contrary to the intent of the General Assembly, as evidenced by the
72 fact that as recently as the 2014 Regular Session, bills that would have legally changed the tuition
73 policy were defeated; and

74 WHEREAS, Attorney General Mark Herring's attack on Article I, Section 15-A of the Constitution
75 of Virginia, the tax laws of the Commonwealth, and the tuition policies of the Commonwealth, and his
76 disregard of the intent of the General Assembly, may constitute malfeasance and neglect of duty and be
77 grounds for the Committee on Privileges and Elections to recommend that the House impeach Attorney
78 General Mark Herring; now, therefore, be it

79 RESOLVED by the House of Delegates, That the House Committee on Privileges and Elections be
80 directed to hold hearings beginning no later than seven calendar days following passage of this
81 resolution to inquire as to the conduct of the Attorney General of the Commonwealth, examine the
82 constitutional bases for impeachment, and recommend to the House of Delegates whether the House
83 should or should not impeach Attorney General Mark Herring.

84 Administrative staff support shall be provided by the Office of the Clerk of the House of Delegates.
85 Legal, research, policy analysis, and other services as requested by the Committee on Privileges and
86 Elections shall be provided by the Division of Legislative Services. All agencies of the Commonwealth
87 shall provide assistance to the Committee, upon request.

88 The Committee shall conduct its hearings and meetings until such time as its work is completed even
89 if such hearings and meetings or preparation of its report extend beyond the 2014 Special Session I. The
90 Chairman shall submit to the House a report of its findings and recommendations for publication as a
91 House document. The report shall be submitted as provided in the procedures of the Division of
92 Legislative Automated Systems for the processing of legislative documents and reports and shall be
93 posted on the General Assembly's website.