

**Testimony of Professor Josh Douglas on
Representative Goforth Impeachment, February 11, 2021**

Representatives, thank you for inviting me to speak today to this committee on a vital question of Kentucky law. My name is Josh Douglas, and I am the Ashland, Inc.-Spears Distinguished Research Professor of Law at the University of Kentucky J. David Rosenberg College of Law. My scholarship and teaching revolve around election law, voting rights, and constitutional law.

Let me begin by noting that I am not a member of the Kentucky bar and am not providing legal counsel. Instead, I have been asked to offer an expert opinion on the scope of Kentucky law with respect to whether a member of the House may be impeached. I am not an advocate for any person or side; I am providing my scholarly view of the relevant Kentucky legal authorities.

Let me also say that I offer no opinion on whether the allegations against Representative Goforth warrant his removal from the House. The allegations are, of course, disturbing, but they are also irrelevant to the legal question at issue: does impeachment apply to a member of the Kentucky House of Representatives?

The answer to that question is relatively easy: it does not. Impeachment under our Constitution is the mechanism to remove the Governor and other civil officers, but does not reach legislators.

Let's first begin with the text of the Kentucky Constitution. Section 68, which governs impeachment, says that "The Governor and *all civil officers* shall be liable to impeachment." Thus, there are two categories of individuals who are eligible for

impeachment: the Governor and “all civil officers.” Representative Goforth is not the Governor, so the question is whether he is a “civil officer” under this provision.

Although the Kentucky Constitution does not explicitly define this term, various provisions and authorities demonstrate that members of the legislature are not “civil officers.”

First, the Kentucky Constitution generally speaks of “members,” not “officers,” when it discusses legislators. Section 30, about the length of terms for those elected to the General Assembly, uses the term “members” of the House and Senate. Section 42 discusses the “compensation of members.” Section 43 says that the “members” of the General Assembly are privileged from arrest during their attendance at legislative sessions.

Contrast that language with the use of the term “officers” for executive branch officials. The heading just before Section 69 is titled “The Executive Department: Officers For The State At Large.” Section 78, about the Governor seeking information, speaks of “state officers” and “officers of the Executive Department.” Section 91, which creates the other statewide constitutional offices like Attorney General and Secretary of State, uses the term “constitutional state officers.”

In fact, the only time the Constitution uses the term “officers” to describe legislators relates to the legislative leaders. Section 34 uses the term “Officers of the Houses of General Assembly” and says that each house shall choose “its” officers. This language suggests that legislators themselves are not “officers” and that the legislative leaders are officers only with respect to the legislature itself—and not in the context of the impeachment clause.

The Constitution also separates “legislators” from other civil officers in designating who may serve in office. Section 44 provides, “No Senator or Representative shall, during the term for which he was elected, nor for one year thereafter, be appointed or elected to any civil office of profit in this Commonwealth.” If “civil officer” in the impeachment clause could include a legislator, then Section 44—which forbids a legislator from election to a civil office—would be nonsensical. They are separate categories.

The same goes for Section 234, which says that “civil officers” in statewide positions must reside within the state, and that “district, county, city, or town officers” shall reside in their respective areas. But legislators are not district or county officers. The header preceding Section 97 makes that clear in regulating “Officers For Districts And Counties,” which includes Commonwealth’s Attorney and Circuit Court Clerk. Similarly, the very next section, Section 235, says that “The salaries of public officers” cannot be changed while they are in office and then explicitly notes that the section also applies “to members of the General Assembly.” There would be no need to say explicitly that the section applies to legislators if they were already covered as “public officers.”

Moreover, the Constitution provides the mechanism to remove a legislator: expulsion through Section 39. That section provides that “Each House of the General Assembly may determine the rules of its proceedings, punish a member for disorderly behavior, and, with the concurrence of two-thirds, expel a member.” Expulsion, not impeachment, is the constitutional mechanism to oust a legislator from office during his or her term. There’s a major substantive difference between impeachment and expulsion: impeachment can include disqualification from future office, while

expulsion does not. As lawyer Shawn D. Chapman wrote in the *Kentucky Law Journal* in 2017, “Although this power requires a super-majority of the relevant house, as does conviction on an impeachment, it nonetheless differs from impeachment. The power to expel is given to each house over its own members, and does not require coordination with the other house.”¹

Finally, if the Kentucky authorities were not enough, the U.S. Constitution’s provisions on impeachment provide the same answer: members of Congress can only be “expelled” by 2/3 vote of that chamber, not impeachment²: The Federalist Papers noted that impeachment was to be a check on the executive and judiciary.³ And Congress actually attempted to impeach a federal legislator once but then dismissed the case: in 1797, the House impeached Senator William Blount, but the Senate dismissed the charges because he was not a “civil officer,” as the Constitution requires.⁴

Kentucky has seen four impeachments in its history, in 1803, 1888, 1916, and 1991.⁵ None were of a legislator. And that’s for good reason: the Kentucky Constitution does not permit impeachment of a member of the General Assembly. The sole constitutional mechanism to remove a legislator is through expulsion by that House.

I thank you again for asking me to provide my views and am happy to answer any questions you may have.

¹ Shawn D. Chapman, *Removing Recalcitrant County Clerks in Kentucky*, 105 Ky. L.J. 261, 297 (2017).

² U.S. Const. Art I, Section 5, cl. 2.

³ Federalist 66 and 79; *see also* https://constitution.congress.gov/browse/essay/artII_S4_1_2_1/#essay-3

⁴ U.S. Const. Article II, Section 4 (“The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.”); *see also* https://constitution.congress.gov/browse/essay/artII_S4_1_2_1/#essay-3.

⁵ 1803—Thomas Jones, Surveyor of Bourbon County; 1888—“Honest Dick” Tate, State Treasurer; 1916—Judge J.E. Williams; 1991—Commissioner of Agriculture Ward “Butch” Burnette. *See Impeachment in Kentucky*, Legislative Research Commission (1991), <http://www.e-archives.ky.gov/pubs/LRC/infobull/IB176.pdf>.