TO: House Select Committee on Impeachment

Rep. Jason Nemes (Chair)

Rep. George Brown, Jr.

Rep. Angie Hatton

Rep. Kim King

Rep. C. Ed Massey

Rep. Suzanne Miles

Rep. Patti Minter

FROM: Advisory Committee on the Standard for Impeachment

Hon. Joseph Lambert

Hon. William Graves

Hon. Daniel Venters

Professor Samuel Marcosson

Professor Luke Milligan

We offer the following observations in response to Representative Nemes' request for our views on the appropriate standard for impeachment under Section 68 of the Kentucky Constitution. Neither the historical sources indicating the original understanding of the impeachment provisions of the federal and Kentucky Constitutions, nor historical precedents in their use, provide a definitive rule. The common understandings that can be gleaned, however, suggest that impeachment is available to deal with corrupt misconduct and malfeasance that is harmful to the public, and was not intended and has not been used to resolve political disputes.

The text of Section 68 provides that "The Governor and all civil officers shall be liable to impeachment for any misdemeanors in office …." While the reference to "misdemeanors in office" might suggest that an actual criminal offense is required, it is apparent that in historical context, this phrase (and its counterpart in the U.S. Constitution, "high Crimes and Misdemeanors") was not meant to make only criminal conduct impeachable. As the Congressional Research Service noted in a 2019

report, “This standard applied to behavior found damaging to the state, including significant abuses of a government office or power, misapplication of funds, neglect of duty, corruption, abridgement of parliamentary rights, and betrayals of the public trust.”[1]

Historical analysis reveals impeachment encompasses more than criminal conduct. Beyond that, it is much harder to define precisely what conduct constitutes a “misdemeanor in office” as provided in Section 68. One key point that requires emphasis, however, is that because removing any official elected by the people is a deeply serious step, one that never has been, and should not be, taken based on mere policy or political disagreements, “misdemeanor in office” does not include a perceived or actual error in judgment on the part of an official. This is because the framers of the Kentucky Constitution did not intend to empower the General Assembly to remove an elected official based on policy disagreements. Even disputes over core principles like the scope of an official’s authority and whether he or she exceeded it have never been regarded as “misdemeanors in office” justifying impeachment. Our system provides remedies other than the extreme step of impeachment to resolve such questions. Courts routinely resolve claims that a Governor has overstepped his or her authority. Indeed, virtually every executive official has, at one time or another, acted in a way that a court has later found was beyond their power. But such rulings have never been a basis for impeachment, as long as the official does not persist in defiance of the rule of law.

Apart from litigation, the normal operation of the political process offers remedies for most disputes that arise in our system. Two examples illustrate this point. First, if a Governor or other elected official exceeds powers delegated to him or her by the General Assembly, the legislature is free to alter the statutory delegation. Second, if the people conclude that an elected official is carrying out

[1] Congressional Research Service, *Impeachment and the Constitution*, November 20, 2019, at 9-10 (*available at* https://crsreports.congress.gov/product/pdf/R/R46013).

policies that are unwise or harmful, they can choose not to reelect him or her, and put in office someone who is pledged to reverse those decisions.

We are fortunate that impeachment has rarely been utilized in Kentucky (where a Governor has never been impeached), or at the federal level (where impeachment has been utilized only a handful of times, and an executive branch official has never been removed from office via impeachment). Once the door is opened and the meaning of "misdemeanor in office" is expanded to allow removal from office because the legislature disagrees with an official's policy judgment, it is difficult to envision that door ever closing again.

For these reasons, we conclude that the conduct that constitutes a "misdemeanor in office" giving rise to impeachment is that which involves illegal conduct, defiance of the rule of law, corruption, or neglect of duty. In Federalist No. 65, Alexander Hamilton explained that impeachable offenses "relate chiefly to injuries done immediately to the society itself." Such injuries occur when an official engages in lawless or corrupt behavior. Put another way, "'Misdemeanor in office' is synonymous with misconduct in office and is broad enough to embrace any wilful malfeasance, misfeasance, or nonfeasance in office." *In re Investigation of Circuit Judge of Eleventh Judicial Circuit of Florida*, 93 So.2d 601, 606 (Fl. 1957) (*en banc*). For example, judges have been removed for accepting bribes in the conduct of their office. These instances contrast with cases, such as that of U.S. Supreme Court Justice Samuel Chase in 1804, in which judges have *not* been removed because the legislature disagreed with their rulings.

We hope that these points prove useful in the work of the Select Committee.