



COMMONWEALTH OF KENTUCKY
EXECUTIVE BRANCH ETHICS COMMISSION

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Executive Branch Ethics Commission
ADVISORY OPINION 21-03
January 27, 2021

RE: Whether a Constitutional Officer may use state resources, including attorneys – whether employed by the Commonwealth or retained under a personal service contract with the Commonwealth – to defend the allegations filed in a petition for impeachment against that Constitutional Officer?

DECISION: Yes.

This opinion is issued in response to your January 25, 2021, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the January 27, 2021 meeting of the Commission and the following opinion is issued pursuant to KRS 11A.110(1).

You represent the Attorney General's Office ("AG") in submitting this request to the Commission. You ask whether the Attorney General may make use of agency counsel and resources to represent him in proceedings related to a Petition for Impeachment filed on January 22, 2021 with the House of Representatives.

The Commission is also aware through news media reports that the Governor has a similar situation involving a Petition for Impeachment that was filed on January 8, 2021, with the House of Representatives against the Governor. The Commission is cognizant that any opinion issued by the Commission in response to your request for an advisory opinion will have bearing on the Governor's legal staff currently representing him before the House of Representatives. As such, the Commission will review both scenarios in issuing this advisory opinion.

KRS 11A.005 provides the statement of public policy for the application of the Executive Branch Code of Ethics (the Ethics Code):

- (1) It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a

public trust and that the proper operation of democratic government requires that:

(c) A public servant not use public office to obtain private benefits; and

- (2) The principles of ethical behavior for public servants shall recognize that:
- (a) Those who hold positions of public trust, and members of their families, also have certain business and financial interests;
 - (b) Those in government service are often involved in policy decisions that pose a potential conflict with some personal financial interest; and
 - (c) Standards of ethical conduct for the executive branch of state government are needed to determine those conflicts of interest which are substantial and material or which, by the nature of the conflict of interest, tend to bring public servants into disrepute.

The Ethics Code further provides certain prohibited conduct of public servants in KRS 11A.020(1), which states as follows:

- (1) No public servant, by himself or through others, shall knowingly:
 - (a) Use or attempt to use his influence in any matter, which involves a substantial conflict between his personal or private interest and his duties in the public interest;
- ***
- (d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.
 - (2) If a public servant appears before a state agency, he shall avoid all conduct, which might in any way lead members of the general public to conclude that he is using his official position to further his professional or private interest.

The question before the Commission is whether the use of agency counsel to represent a Constitutional Officer in proceedings related to a Petition for Impeachment is an appropriate use of state resources and whether any provision of the Ethics Code would prohibit such use of agency personnel and resources.

Other provisions of Kentucky law provide guidance about the proper official use of agency counsel. KRS 12.211 provides that “the Attorney General may provide for the defense of any civil action brought against a state employee in his official or individual capacity, or both, on account of an act or omission made in the scope and course of his employment as an employee of the Commonwealth” Furthermore, KRS 12.212(1)(a) provides that “the Attorney General may decline to provide for the defense of a civil action brought against an employee or former employee if he determines that the act or omission was not within the scope and course of his employment as a state employee.” KRS 12.220(1) provides that a state

attorney has the authority to represent a state officer in legal proceedings in which the officer is a party in interest or the official rights, powers, or duties of the officer are directly or indirectly affected. Finally, KRS 15.753 allows that the Attorney General and his staff may be indemnified against any judgement against him “for any act or omission in the course of his duties.”

The Petition for Impeachment against Governor Andy Beshear included seven counts alleging that Governor Beshear engaged in official misconduct conduct in violation of KRS 522.030 and violating various provisions of the Kentucky and U.S. Constitutions when imposing lockdown orders related to the state of emergency caused by the COVID-19 pandemic.

The Petition for Impeachment against Attorney General Daniel Cameron includes two counts alleging violations of KRS 522.020. The first count concerns a press conference held by the Attorney General concerning the death of Breonna Taylor and the presentation of evidence to the Grand Jury in September of 2020. The second count involves his involvement on the Republican Attorneys General Association (RAGA), an organization he participates in because of his election as Attorney General.

An individual office holder being impeached may feel that the action against him or her is personal and punitive and the individuals bringing the petition may argue that the conduct that is being alleged is personal; however, what is actually at stake in an impeachment trial is the removal of a public officer. In the case of a Constitutional Officer, the public officer is a duly elected officer with the specter of removal from public office. That itself is a matter of public significance regardless of how the grounds for the impeachment originated. What is actually being defended is not the personal guilt, the personal treasury, or the personal honor of the individual office-holder, but is instead the dignity of the office and the collective right of the electorate to retain the elected person. As such, the Commission finds this to be a complete justification for the use of public resources to resist an involuntary removal from office in the case of Constitutional Officers. The Commonwealth has a stake in defending its selection of the officer to hold the position. The Commission is not contending that public resources *must* be used to resist every impeachment, and that is not the question before the Commission. The Commission is merely stating that public resources *may* be used without violating the Executive Branch Code of Ethics regardless of the nature of the grounds being asserted to justify the removal. In other words, the public’s interest in the defense of an impeachment action against a Constitutional Officer is too important to be left to the personal funding ability of the individual office holder.

Nevertheless, regardless of the validity of the allegations in the Petitions, all of the allegations are concerning alleged conduct of the Governor and the Attorney General while serving in their official capacities as Constitutional Officers. The Petitioners clearly challenge both the Governor and the Attorney General in their exercise of the duties assigned to their

Executive Branch Ethics Commission

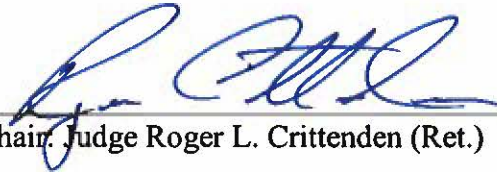
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roles as Constitutional Officers and whether they have appropriately carried out those duties. As such, nothing in the Ethics Code or any of the other provisions reviewed by the Commission would prohibit agency counsel from representing the Constitutional Officers in proceedings related to these positions.

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By Chair, Judge Roger L. Crittenden (Ret.)