

STATE OF MICHIGAN  
IN THE 54-A JUDICIAL DISTRICT COURT

---

STATE OF MICHIGAN,

Plaintiff,

v

TODD COURSER,

Defendant.

File No. 16-00873-FY

Hon. Hugh B. Clarke, Jr.

---

STATE OF MICHIGAN,

Plaintiff,

v

CINDY GAMRAT,

File No. 16-00874-FY

Hon. Hugh B. Clarke, Jr.

---

**DENISE M. HART (P45127)**  
**GREGORY TOWNSEND (P35857)**  
Michigan Attorney General's Office  
3030 West Grand Blvd.  
Detroit, MI 48202  
(313) 456-0285

**MATTHEW DEPERNO (P52622)**  
DePerno Law Office PLLC  
Attorney for Defendant Courser  
8175 Creekside Dr., Suite 240  
Portage, MI 49024  
(269) 321-5064

**MICHAEL J. NICHOLS (P59391)**  
The Nichols Law Firm, PLLC  
Attorney for Defendant Gamrat  
3452 E. Lake Lansing Rd.  
East Lansing, MI 48823  
(517) 432-9000

**GARY P. GORDON (P26290)**  
**DOUGLAS E. MAINS (P75351)**  
Special Assistant Attorneys General  
Attorneys for the Speaker  
Dykema Gossett, PLLC  
201 Townsend, Suite 900  
Lansing, MI 48933  
(517) 374-9133

---

**OPINION AND ORDER**

The Defendants have served a subpoena on the Speaker of the House of Representatives Kevin Cotter. Counsel for Mr. Cotter by Special Assistant Attorney

General Gary Gordon has filed a motion to quash the subpoena. The parties have briefed the issue and oral arguments were held on April 19, 2016.

The first argument advanced by counsel for Speaker Cotter is that he is immune from process pursuant to the Michigan Constitution of 1963, Article IV §11. This provision provides:

**§ 11 Legislators privileged from civil arrest and civil process; limitation; questioning for speech in either house prohibited.**

Sec. 11.

Except as provided by law, senators and representatives shall be privileged from **civil arrest and civil process** during sessions of the legislature and for five days next before the commencement and after the termination thereof. They shall not be questioned in any other place for any speech in either house. (Emphasis Supplied).

The language of this constitutional provision is clear and unequivocal. This provision applies to civil actions. The nature of the instant proceedings is clear and unequivocal--it is a criminal proceeding. The court in *In Re Wilkowski*, 270 Mich 687; 259 NW 658 (1935), which interpreted an earlier version of this provision under the Michigan Constitution of 1908, clearly stated that the immunity granted under the State Constitution did not apply to criminal proceedings. Similarly, this Court does not find that Article IV Section 11 grants immunity to Speaker Cotter in this matter.

Next, counsel for Speaker Cotter argues that MCL 4.553 exempts the Speaker from testifying in this matter. The statute provides:

**4.553 Subpoena as to statements made by legislator.**

Sec. 3.

A member of the legislature shall not be subject to a subpoena for any matter involving statements made by the legislator pursuant to his or her duty as a legislator.

The Court has been presented with various arguments by counsel as to why this statutory provision may or may not apply. Counsel for the Speaker avers the Speaker was making statements as they relate to the defendants' 'qualifications' to serve in the legislature, specifically the Michigan House of Representatives. At issue here is whether the conduct by the defendants, Gamrat and Courser, 'affect' their qualifications to serve as legislators. Specifically, whether a violation of Rule 41 as it relates to signing the 'blue back' copy of a house bill; asking a staffer of one of the representatives to send an email that was false in an attempt to cover up an extramarital affair; and alleged false statements to a House Business employee.

The Court noted during oral argument that there is at least one legislator that has a felony conviction and other members of the legislature who have pled guilty to a drinking and driving offense<sup>1</sup>. There have been no hearings or investigations to determine their "qualification" to serve in the legislature. Counsel suggests it is within the sole discretion of the legislative body to investigate a member's qualification.

The Michigan Constitution of 1963, Article IV §7 provides:

**§ 7 Legislators; qualifications, removal from district.**

Sec. 7.

Each senator and representative must be a citizen of the United States, at least 21 years of age, and an elector of the district he represents. The removal of his domicile from the district shall be deemed a vacation of the office. No person who has been convicted of subversion or who has within the preceding 20 years been convicted of a felony involving a breach of public trust shall be eligible for either house of the legislature.

This Court opines that the investigation of a member's qualifications is limited to what the State Constitution lists as above. To rule otherwise would allow members of

---

<sup>1</sup> Rep Genetski (54B District Court 2012); Rep. Kivela (65<sup>th</sup> District Court 2015).

the legislature to be subject to the whim of the majority party to challenge a member of the minority party for any arbitrary reason they may choose, and leave others not subject to a similar inquiry for any arbitrary reason. This court does not believe the drafters of the Constitution had this in mind.

Finally, the Speaker is alleged to have made statements or have been interviewed by law enforcement during the course of the investigation. It would appear patently unfair to the defendants to allow the Speaker to invoke the Statute and not be subject to some reasonable limited inquiry by counsel for the defense in this matter. Fundamental fairness would seem to require this. While the Legislature may determine qualifications for its members, they certainly cannot do so in an arbitrary or discriminatory manner. No State Constitution would condone that type of application of its provisions.

The Defendants argue that the testimony of Speaker Cotter is necessary to guarantee their rights under the Michigan Constitution of 1963, Article 1 §11 and MCR 6.110. The problem with this argument is that with respect to the allegations of a violation of Rule 41, counsel for the Defendants cannot agree as to what the Speaker said during his interview with the Michigan State Police.

Secondly, the Court is not clear how or what the balance of the Speaker's testimony will be to assist the Court in determining whether or not probable cause to believe the offenses as charged exists and whether or not the Defendants committed the charged offenses. Also, there is the issue of whether or not the testimony sought is not available from other non-privileged witnesses. Without answers to these questions,

the Court cannot adequately balance the rights of the Defendants against the right of the Speaker to be free from being compelled to testify.

The testimony sought here relates to personnel decisions, and frankly what one could consider to be statements, that may exonerate the Defendants as to one or more of the misconduct in office charges. They may very well be more administrative in nature. It must be remembered, House Resolution 145 was adopted by the House of Representatives September 1, 2015 which directed an investigation by the Michigan Attorney General and the Michigan State Police into the behavior and conduct of the Defendants. Speaker Cotter is alleged to have made statements to the Attorney General and the Michigan State Police after this date.

To make this decision, the Court believes an in camera hearing with counsel for the Defendants, Speaker Cotter and his attorney is warranted. This procedure would allow the court to properly balance the interests of the Defendants against the privilege sought to be accorded Speaker Cotter. In U.S. v Nixon, 418 U.S. 683 (1974), the U.S. Supreme Court was faced with a Presidential privilege claim from the Petitioner. The court felt an in camera review was appropriate with the protections the district court could provide. There is no specialized claim here that an in camera review or questioning of Speaker Cotter would create a hardship or prevent him from otherwise carrying out his legislative duties.

Counsel for the Defendants shall discuss and prepare a list of fifteen (15) questions that they would like to ask Speaker Cotter and submit them in a sealed envelope to the Court within seven days from the date of this Opinion and Order. Counsel for Speaker Cotter shall contact the Court and propose three (3) dates and

times over the next three (3) weeks so the Court can schedule the in camera hearing. Following the hearing, the Court will issue a written opinion and order on whether or not the Court will quash the subpoena based upon these or other arguments advanced by Speaker Cotter.

**IT IS SO ORDERED.**

Date: 4/22/2016

  
HUGH B. CLARKE, JR. (P30156)  
District Court Judge