Rec'd 2-4-26
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Joint Request of Members of the Tennessee General Assembly
(see undersigned signatories)

February 3, 2026

The Honorable Jonathan Skrmetti
Tennessee Office of the Attorney General and Reporter
P.O. Box 20207
Nashville, TN 37202-0207

Re: Request for Formal Written Opinion Pursuant to Tenn. Code Ann. § 8-6-109

Pursuant to Tennessee Code Annotated § 8-6-109, the undersigned signatories, being Members of the Tennessee General Assembly, hereby formally request that the Office of the Attorney General and Reporter issue a written legal opinion.

Pursuant to T.C.A. § 8-6-109(b)(6) it is a duty of the Office of Attorney General & Reporter to provide such written legal opinion.

QUESTION: Are judge and chancellor members of the Tennessee Board of Judicial Conduct (TBJC), and Tennessee Supreme Court justices in the Tennessee Code Commission (TCC) holding offices of trust or profit in violation of Article VI, Section 7 of the Constitution of the State of Tennessee? The undersigned Members of the General Assembly further respectfully request that the Office of the Attorney General and Reporter include in written legal opinion reconciliation of prior statements defining or classifying positions as "offices of trust or profit" contained in earlier Attorney General Opinions and Opinions of the Tennessee Supreme Court, and that such analysis be substantiated by citation to additional supporting legal authorities providing the historical meaning of "Public Office" and "Office of Trust" as understood by the framers of the Constitution of the State of Tennessee.

OFFICE OF THE ATTORNEY GENERAL & REPORTER OPINIONS REGARDING JUDGES HOLDING SECOND OFFICES

For reference, the Office of the Attorney General and Reporter has issued at least three opinions addressing the application of Article VI, Section 7, to judges holding a second office of trust or profit. In Opinion Nos. 01-116, 05-062, and 25-014, the Office expressed concern that a judge's simultaneous service in another position would constitute, or could potentially constitute, a violation of Article VI, Section 7.

Opinion No. 25-014

In Opinion No. 25-014, the question was asked; "*Is a recurring part-time general sessions and juvenile court judge in a class five county allowed to accept an appointed position to serve as a juvenile magistrate in a different and distinct class one county and hold both positions simultaneously?*"

The Office of Attorney General issued opinion; "*Likely not.*" The Office of Attorney General concluded that based on existing precedent, a court would conclude that "*the position of juvenile magistrate constitutes an office of trust or profit*" and is prohibited in Article VI, Section 7 of the Constitution of the State of Tennessee.

Opinion No. 25-014 cited Tenn. Sup. Ct. Opinion in *Frazier*, 173 S.W.2d at 564 – And in the end, the Frazier court commented that, "*if not technically holding another 'office,' within the letter of the prohibition, he is certainly within its spirit.*" at 566.

In Opinion No. 25-014 analysis, the Office of the Attorney General summarized as follows;

> In summary, therefore, we believe that a court would likely conclude that the position of juvenile magistrate constitutes an office of trust or profit within the context of Article VI, Section 7. And as a result, it is this Office's opinion that a part-time general sessions and juvenile court judge in one county is likely, under existing precedent, constitutionally prohibited from simultaneously serving as a juvenile magistrate in another county.

Opinion No. 05-062

In Opinion No. 05-062, the question was asked; "*May a person appointed to serve as a general sessions judge for the remainder of a term hold a seat on the State Election Commission?*"

The Office of Attorney General issued opinion plainly stating; "N*o, Article VI, Section 7, of the Tennessee Constitution prohibits the judge of an inferior court from holding any other office of trust or profit. Membership on the State Election Commission is an office of trust or profit within the meaning of this provision.*"

In Opinion No. 05-062, and similarly in Opinion No. 01-116, the Office of the Attorney General relied upon and quoted the Tennessee Supreme Court's decision in *Frazier v. Elmore*, 180 Tenn. 232, 238, 173 S.W.2d 563 (1943), as follows:

> [t]he term "office" in its context, must be given its broad meaning, so as to effectuate the **apparent intent** of the constitutional prohibition **against a diversion or division of the time and labor, energies and abilities of judges of our courts, which might destroy or diminish their capacity to discharge**

> **the exacting duties of their responsible positions; and also to limit them to one source of compensation.**

Further in Opinion No. 05-062 and 01-116, the Office of the Attorney General further states;

> **This Office has concluded that an "office of trust or profit" within the meaning of Article VI, Section 7, includes only those positions that require an individual to take an oath of office under** Article X, Section 1, of the Tennessee Constitution. Op. Tenn. Att'y Gen. 01-116 (July 20, 2001), citing Op. Tenn. Att'y Gen. 77-75 (March 18, 1977).

REQUEST TO RECONCILE AND FURTHER SUBSTANTIATE PREVIOUS ATTORNEY GENERAL AND TENNESSEE SUPREME COURT OPINIONS

In Attorney General Opinion 05-062, the Office of Attorney General stated;

> This Office has concluded that an "office of trust or profit" within the meaning of Article VI, Section 7, includes only those positions that require an individual to take an oath of office under Article X, Section 1, of the Tennessee Constitution. Op. Tenn. Att'y Gen. 01-116 (July 20, 2001), citing Op. Tenn. Att'y Gen. 77-75 (March 18, 1977).

ARTICLE X, Section 1 of the Constitution of the State of Tennessee states as follows;

> Every person who shall be chosen or appointed to any office of trust or profit under this Constitution, **or any law made in pursuance thereof**, shall, before entering on the duties thereof, take an oath to support the Constitution of this state, and of the United States, and an oath of office.

The language of Article X, Section 1—particularly the phrase "*or any law made in pursuance thereof*"—unambiguously contemplates that future legislation will create additional offices of trust or profit. **This structure gives rise to a necessary logical sequence that must be observed. An "office of trust or profit" cannot be defined as a position that requires an oath when Article X, Section 1 itself imposes the oath requirement upon any person "appointed or chosen" to such an office. The constitutional duty to take an oath therefore presupposes the prior identification of the office, not the reverse.**

Accordingly, in determining whether an oath is required under Article X, Section 1, the General Assembly must first ascertain whether a position constitutes an office of trust

or profit based on objective characteristics of the office, independent of the oath requirement itself. To hold otherwise would invert the constitutional framework and render the operative language circular.

Further substantiating that an oath is not a proper criterion in determining an office of trust or profit is determined by oath is § 6 in Mechem's TREATIESE ON THE LAW OF PUBLIC OFFICES AND OFFICERS which states as follows.

> **§ 6 Oath a usual but not a necessary Criterion.** – Public officers are usually required by law to take the oath of office, and this fact goes far in determining the character of the duty. But the taking of the oath is not an indispensable criterion and the office may exist without it, for, as has been said, the oath is a mere incident and constitutes no part of the office.[1]

Please reconcile the Office of the Attorney General's prior conclusion that an "office of trust or profit," within the meaning of Article VI, Section 7 of the Tennessee Constitution, encompasses only those positions that require an individual to take an oath of office pursuant to Article X, Section 1. The requested reconciliation should include a reasoned analysis, supported by citation to additional legal authorities, explaining why this interpretation is not circular and does not presuppose the prior identification of an office of trust or profit.

Also in Opinion No. 05-062, the Office of Attorney General cites the Tennessee Supreme Court in *Frazier v. Elmore*, 180 Tenn. 232, 238, 173 S.W.2d 563 (1943) as stating;

> [t]he term "office" in its context, must be given its broad meaning, so as to effectuate the **apparent intent** of the constitutional prohibition **against a diversion or division of the time and labor, energies and abilities of judges of our courts, which might destroy or diminish their capacity to discharge the exacting duties of their responsible positions; and also to limit them to one source of compensation.**

In this statement the Tenn. Sup. Ct. suggests the "apparent intent" Article VI, Section 7 prohibition of judges holding any other office is to prevent "diversion or division of time and labor of judges and dual compensation.

Article VI, Section 7 of the Constitution of the State of Tennessee closely parallels the Incompatibility Clause of the United States Constitution, which prohibits individuals holding office under the United States from simultaneously serving as Members of Congress. It is well established that the purpose of the federal constitution

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[1] Floyd R. Mechem, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS, Ch I, § 6 (1890)

Incompatibility Clause is to prevent the concentration of governmental power, to avoid conflicts of interest, and to safeguard the independence of the legislative branch from undue influence.

In a Cornell Law Review Article; One Person, One Office: "The Incompatibility Clause was motivated by worries about British-style corruption. The Framers did not perceive it as having much to do with the separation of powers ..." Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 Cornell L. Rev. 1045, 1048 (1994).

Please reconcile the Tenn. Sup. Ct. opinion that the "apparent intent" of Art. VI, Sect. 7 is to prevent the "diversion or division of time and labor of judges" when other strong supporting authorities evidence such provision was intended to prevent British-style corruption.

DEFINITIONS

The following definitions and characteristics of the term "Office", "Public Office" and "Office of Trust" are found in Black's Law Dictionary and Floyd R. Mechem's 1890: A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS and evidence the historical definition and characteristics of a "public office" and "office of trust" at the time our constitutions were written.

Floyd R. Mechem (1858–1928) was a prominent American legal scholar and professor, best known for his foundational work on public office and administrative law. Mechem was part of the late-19th/early-20th-century generation of U.S. legal academics who systematized common-law doctrines into treatises that courts could readily cite. He served on the faculty of the University of Chicago Law School, where he taught public law subjects and developed a reputation for careful doctrinal analysis grounded in case law.

Mechem carefully synthesized state and federal case law, extracting general principles that courts could apply across jurisdictions. Because of that approach, his treatise has been frequently cited by courts, especially in disputes over whether a position is a "public office," or whether an officer lawfully holds office.

Mechem's A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS (1890) has been cited by the U.S. Supreme Court on multiple occasions. Also, in March 2005, the U.S. Deputy Assistant Attorney General issued a Memorandum Opinion citing Mechem's treatise on whether members of the President's Council on Bioethics hold an Office of Profit or Trust under Article I, § 9, cl.8 of the federal constitution.

Black's Law Dictionary is the most authoritative and widely used legal dictionary in the United States. It defines legal terms, phrases, maxims, and doctrines as they are actually used by courts, statutes, and lawyers. It defines terms as courts use them, not just in everyday language, includes citations to cases, statutes, and treatises, and generally preserves historical meanings of legal terms when those meanings matter.

BLACK'S LAW DICTIONARY

> **Office:** A position of duty, trust, or authority, esp. one conferred by a governmental authority for a public purpose.[2]
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> **Office:** A right, and correspondent duty, to exercise a public trust. A public charge or employment. An employment on behalf of the government in any station or public trust, not merely transient, occasional, or incidental. **The most frequent occasions to use the word arise with reference to a duty and power conferred on an individual by the government;** and when this is the connection, "public office" is the usual and more discriminating expression.[3]
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> **Public Office:** The right, authority, and duty created and conferred by law, by which for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of government for the benefit of the public.[4]

Mechem's TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS

> **§ 16 Office of Trust:** An office whose duties and functions require the exercise of discretion, judgment, experience and skill is an office of trust, and it is not necessary that the officer should have the handling of public money or property, or the care and oversight of some pecuniary interest of the government.[5]
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> **§ 4 Office involves Delegation of Sovereign Functions:** The most important characteristic which distinguishes an office from an employment or contract is that the creation and conferring of an office involves a delegation to the individual of some of the sovereign functions of government, to be exercised by him for the benefit of the public; that some portion of the sovereignty of the country, either legislative, executive or judicial, attaches, for the time

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[2] Black's Law Dictionary, Tenth Edition, p 1254
[3] Black's Law Dictionary, Fifth Edition, p 976
[4] Black's Law Dictionary, Fifth Edition, p 977
[5] Floyd R. Mechem, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS, Ch I, § 16 (1890)

being, to be exercised for the public benefit. Unless the powers conferred are of this nature, the individual is not a public officer.[6]

§ 5 Office is created by Law and not by Contract: In distinguishing between an office and an employment, the fact that the powers in question are created and conferred by law, is an important criterion. For though an employment may be created by law, it is not necessarily so, but is often, if not usually, the creature of contract. A public office, on the other hand, is never conferred by contract, but finds its source and limitations in some act or expression of the governmental power. Where, therefore, the authority in question was conferred by a contract, it must be regarded as an employment and not as a public office.[7]

§ 6 Oath a usual but not a necessary Criterion. – Public officers are usually required by law to take the oath of office, and this fact goes far in determining the character of the duty. But the taking of the oath is not an indispensable criterion and the office may exist without it, for, as has been said, the oath is a mere incident and constitutes no part of the office.[8]

§ 7 Salary or Fees not a necessary Criterion – Like the requirement of an oath, the fact of the payment of a salary or fees may aid in determining the nature of the position, but it is not conclusive, for while a salary or fees are usually annexed to the office, it is not necessarily so. As in the case of the oath, the salary or fees are mere incidents and form no part of the office. Where a salary or fees are annexed, the office is often said to be "coupled with an interest"; where neither is provided for, it is a naked or honorary office, and is supposed to be accepted merely for the public good.[9]

§ 8 Duration of Continuance as Criterion – The term office, it is said, embraces the idea of tenure and duration, and certainly a position which is merely temporary and local cannot ordinarily be considered an office. "But," says Chief Justice Marshall, "*if a duty be a continuing one, which is defined by rules prescribed by the government and not by contract, which an individual is appointed by government to perform, who enters on the*

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[6] Floyd R. Mechem, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS, Ch I, § 4 (1890)

[7] Floyd R. Mechem, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS, Ch I, § 5 (1890)

[8] Floyd R. Mechem, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS, Ch I, § 6 (1890)

[9] Floyd R. Mechem, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS, Ch I, § 7 (1890)

duties pertaining to his station without any contract defining them, if those duties continue though the person be changed, – it seems very difficult to distinguish such a charge or employment from an office or the person who performs the duties from an officer."[10]

§ 9 Scope of Duties as a Criterion – "Any man is a public officer who hath any duty concerning the public, and he is not the less a public officer where his authority is confined to narrow limits; for it is the duty of this office and the nature of that duty which make him an officer, and not the extent of this authority."[11]

§ 10 Designation of Place as "office" as a Criterion – The fact that the place is designated, in the law providing for the creation, as an office, affords some reason for determining it to be such.[12]

§ 11 Authority to appoint to Office constitutes a public Officer – The authority and duty of appointing others to office, of themselves constitute the person vested with that authority and duty a public officer, and it is immaterial that such person is not designated as an officer and takes no oath and receives no fees.[13]

§ 12 Authentication by chief Executive not necessary – Where an individual has been appointed or elected, in a manner prescribed by law, has a designation or title given him by law, and exercises functions concerning the public assigned to him by law, he must be regarded as a public officer, and it can make no difference whether he be commissioned by the chief executive officer with the authentication of the seal of the state or not. Where that is given, it is but evidence of his title to the office, and this evidence may in some cases be of greater and in others of less solemnity.[14]

§ 13 Lucrative Office, or Office of Profit – An office to which salary, compensation or fees are attached is a lucrative office, or, as it is frequently called, an office of profit. The amount of the salary or compensation

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[10] Floyd R. Mechem, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS, Ch I, § 8 (1890)

[11] Floyd R. Mechem, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS, Ch I, § 9 (1890)

[12] Floyd R. Mechem, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS, Ch I, § 10 (1890)

[13] Floyd R. Mechem, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS, Ch I, § 11 (1890)

[14] Floyd R. Mechem, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS, Ch I, § 12 (1890)

attached is not material. The amount attached is supposed to be an adequate compensation and fixes the character of the office as a lucrative one, or an office of profit.[15]

In Mechem's treatise, each of the above definitions and characteristics of "Office" are supported by citations (in footnote) to various State and U.S. Supreme Court Opinions as established "case law" of the period, and at the time state and federal constitutions were written.

FURTHER CONCERNS TO RECONCILE AND FURTHER SUBSTANTIATE

In discussing eligibility for public office, Mechem notes that the holding of public office is not a vested right. He further explains that constitutional provisions governing qualifications or prohibitions, when stated in exclusive terms, are controlling and may not be superseded, evaded, or altered by legislative action. Mechem also observes that, while the legislature possesses authority to create new offices and to prescribe qualifications for those offices pursuant to the phrase "*or any law made in pursuance thereof*" in the Tennessee Constitution, that authority is limited. Specifically, legislative power may not be exercised in a manner that circumvents express constitutional restrictions, including Article VI, Section 7 of the Tennessee Constitution, which prohibits judges from holding any other office.

> **§ 65 May be controlled by the Constitution** – It is entirely competent for the people, in framing their governments, to declare what shall be the qualifications which shall entitle one to hold and exercise a public office, and in many of the constitutions this has been done with more or less certainty and precision. **Constitutional provisions, which are exclusive in their nature, are, of course, supreme, and it is not within the power of the legislature to supersede, evade or alter them.**[16]
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> **§ 66 In other Cases Legislature may prescribe** – Where, however, the constitution does not prescribe the qualifications, it is the province and the right of the legislature to declare upon what terms and subject to what conditions the right shall be conferred. And where the constitution has

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[15] Floyd R. Mechem, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS, Ch I, § 13 (1890)

[16] Floyd R. Mechem, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS, Ch III, § 65 (1890)

made some provision, **but not exclusive ones**, the legislature may add such others as are reasonable and proper.[17]

Again, Floyd R. Mechem was a prominent American legal scholar and professor, who systematized common-law doctrines into treatises that courts could readily cite, and did cite, including the Supreme Court of the United States. Mechem's treaties on public offices and officers was written in the year 1890, a mere 20 years after the 1870 Tennessee Constitution was ratified.

Based upon Mechem's treaties on public offices and officers and Black's Law Dictionary, a public office is one conferred by law, and exercises some sovereign authority of the state to be exercised from the benefit of the public, and an office of trust is an office whose duties and functions require the exercise of discretion, judgment, experience and skill is an office of trust, regardless of whether the officers has the handling of public money, or some pecuniary interest of the state.

The TBJC and the TCC were created by law – Tenn. Code Ann. 17-5-201 and 1-1-101. Both the TBJC and TCC exercise sovereign functions of the state for the benefit of the public and both require the exercise of discretion, judgment, experience and skill.

In the case of the Chief Justice of the Tenn. Sup. Ct. as a member of the TCC, the Chief Justice is statutorily invested with the power to appoint other persons to the TCC (T.C.A. 1-1-101(a), and according to Mechem **§ 11 Authority to appoint** – his position in the TCC is a "Public Office."

It appears clear that the TBJC and TCC are offices of trust, and both agencies statutorily include members who are judges, chancellors, or justices. Please address and reconcile how positions held by judges, chancellors, and justices in the TBJC and TCC are not holding offices expressly prohibited in Article VI, Section 7 of the Constitution of the State of Tennessee.

Please also address and reconcile the basis upon which prior opinions of the Office of the Attorney General and Reporter have not relied upon Mechem's *Treatise on the Law of Public Offices and Officers* or *Black's Law Dictionary* in defining the terms "office," "public office," or "office of trust or profit," and instead have relied upon judicial opinions—particularly decisions of the Tennessee Supreme Court—that reference definitions drawn from Webster's Dictionary rather than from recognized legal treatises or law dictionaries, including Mechem's 1890 treatise, as well as pertinent decisions of

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[17] Floyd R. Mechem, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS, Ch III, § 66 (1890)

other state supreme courts or the United States Supreme Court cited by Mechem in his treatise.

We appreciate your consideration of this request and respectfully ask for a formal written opinion addressing the concerns presented. Please do not hesitate to contact the undersigned should additional information or clarification be required in the course of your review.

Respectfully submitted,

Members, Tennessee General Assembly:

Senator Janice Bowling
Member Tennessee Senate
District 16

Janice Bowling

_____

Title/Name Rep Bud Hulsey

Member Tennessee (House) / Senate

District 2

Sign _____

Title/Name Rep Michele Reneau

Member Tennessee House / Senate

District 27

Sign Michele Reneau