

EXECUTIVE BRANCH ETHICS COMMISSION
ADVISORY OPINION 06-31
December 15, 2006

RE: Reconsider Advisory Opinion 06-16

DECISION: Uphold Original Opinion

This opinion is issued in response to your December 1, 2006 request for a reconsideration of Advisory Opinion 06-16 by the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the December 15, 2006 meeting of the Commission and the following opinion is issued.

You provide the relevant facts as follows. You represent the Attorney General regarding Advisory Opinion 06-16 in which the Commission opined that a conflict would exist if the Attorney General ran as a candidate for the office of Governor while prosecuting the sitting Governor who is also a candidate for the office of Governor. That opinion went further to state that "a potential conflict of interest will present itself should the Attorney General at any time file as a candidate in the 2007 gubernatorial election, regardless of whether the investigation and prosecution have been completed, or whether the current Governor remains a candidate in that election." You disagree with that opinion, especially considering the facts as they developed subsequent to the issuance of Advisory Opinion 06-16.

You believe that the events that have transpired clearly demonstrate that no conflict of interest will exist if the Attorney General were to file as a candidate. You state that both the sitting Governor and the Franklin District Court recognized in the agreed order dismissing the prosecution of the sitting Governor that "the Attorney General's investigation and prosecution of this matter were necessary and proper exercises of his constitutional duty." Given this acknowledgement, you believe that a conflict would not exist if the Attorney General were to become a candidate for the office of Governor.

You deem that the Commission's advisory opinion affects the ability of the Attorney General to properly discharge his duties. You state that the Attorney General has the constitutional right to run as a candidate for elective office. As he was fulfilling his constitutional duty as Attorney General and acting in the interest of the Commonwealth in prosecuting the action against the Governor, an opinion that he cannot be a candidate for Governor would not only compromise the prosecutorial function of the Office of the Attorney

General, it would deprive him of his constitutional rights as a citizen to run for office.

Thus, in light of the facts that have developed since the issuance of Advisory Opinion 06-16, the Attorney General requests the Commission to reconsider Advisory Opinion 06-16 on the question as to whether it would constitute a conflict of interest should he file as a candidate for Governor in 2007.

KRS 11A.005(1) provides:

(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:

- (a) A public servant be independent and impartial;
- (b) Government policy and decisions be made through the established processes of government;
- (c) A public servant not use public office to obtain private benefits; and
- (d) The public has confidence in the integrity of its government and public servants.

Further, KRS 11A.020(1) provides:

- (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;
 - (b) Use or attempt to use any means to influence a public agency in derogation of the state at large;
 - (c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or
 - (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.

The Commission recognizes that the Attorney General has a constitutional and statutory duty to conduct his prosecutorial function. This was plainly acknowledged in Advisory Opinion 06-16 when the Commission stated that the Attorney General's duty in the public interest was his "mandate to enforce the law in Kentucky." The cause for concern of a public official's conduct of his official duty arises if or when the line between one's private interest and one's duties in the public interest become blurred. It is for this reason that the Commission opined that if the Attorney General has a potential conflict of interest or foresees that some action could result in a future conflict of interest, he should recuse himself from such a matter and refer the matter to an independent agency for investigation and/or prosecution. To not do so would allow for a

potential conflict of interest to exist in the exercise of his constitutional duties, which certainly does not uphold the public trust in the operation of state government as required by KRS 11A.005.

In the event that it is impossible for the Attorney General to refer a matter to another prosecutorial entity, then the Commission believes that he must fulfill the constitutional duties of his elected office. In the interest of strict neutrality, however, the Commission recommends that he refrain from taking action that would appear to compromise his independence in the conduct of those official duties, such as in this case, his filing as a candidate for the office of Governor.

The Commission agrees that a conflict of interest would not exist if the Attorney General conducted an investigation and/or prosecution of a sitting Governor who was running for Governor, if the Attorney General had no intention of filing as a candidate for Governor. The Commission also notes that the order agreed to by the Attorney General, the Governor, and the Franklin District Court since the issuance of Advisory Opinion 06-16 states that “the Attorney General’s investigation and prosecution of this matter were necessary and proper...” Advisory Opinion 06-16 said nothing to the contrary, addressing instead whether, because of the investigation, a conflict would exist if the Attorney General became a candidate for Governor. This is a question that was not addressed in the agreed order. Given that the Attorney General publicly indicated to the press during the course of the investigation that he was “considering” a possible run for the office of Governor in 2007, if he were to now file as a candidate, it would increase the potential that a conflict existed during the previous investigation and prosecution. Consequently, the Commission upholds Advisory Opinion 06-16.

Advisory Opinion 06-16 does not prohibit the Attorney General from filing as a candidate for the office of Governor, as the Commission agrees that he does have a constitutional right to run as a candidate for elective office. However, due to the fact that through his office he has had involvement in the investigation and prosecution of the sitting Governor who is running for reelection, a question may arise as to the Attorney General’s actual impartiality during the conduct of the investigation and prosecution of the Governor, if he were to run at this time for that office. It is for this reason that the Commission in Advisory Opinion 06-16 cautioned the Attorney General regarding a potential run for governor.

The same concern would arise if the Attorney General filed as a candidate for the office of Governor, and subsequently an investigation of the Governor was necessary. The potential for conflict would prohibit the Attorney General from involvement in that investigation and or any related prosecution, thus stymieing his duty as Attorney General in such a matter. The concern lies not with the Attorney General’s fulfillment of his official duties, as he has a constitutional

EXECUTIVE BRANCH ETHICS COMMISSION
ADVISORY OPINION 06-31
December 15, 2006
Page Four

and statutory obligation to carry those out. The concern arises if the Attorney General allows his personal political ambitions to interfere with his handling of those duties, or if he uses those duties to further his personal political ambitions.

Sincerely,
EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: John A. Webb