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Mr. Kevin J. Kennedy
Legal Counsel
Government Accountability Board
17 West Main Street, Suite 310
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Dear Mr. Kennedy:

You ask whether a person who has previously been elected as a judge but who has resigned before completing the term to which the person was elected may serve as a member of the Government Accountability Board ("Board"), even if the term for which the person was elected as a judge has not yet expired.

In my opinion, Wisconsin law does not allow a person who has resigned from the office of judge to serve as a member of the Board for the duration of the term to which the person was elected as a judge.

The Wisconsin Constitution provides that "[n]o justice of the supreme court or judge of any court of record shall hold any other office of public trust, except a judicial office, during the term for which elected." Wis. Const. art. VII, § 10. This prohibition is echoed by Wis. Stat. § 757.02(2),[1] which provides that "[t]he judge of any court of record in this state shall be ineligible to hold any office of public trust, except a judicial office, during the term for which he or she was elected or appointed."

In *Wagner v. Milwaukee County Election Com'n*, 2003 WI 103, ¶ 85, 263 Wis. 2d 709, 666 N.W.2d 816, the Wisconsin Supreme Court construed these provisions to mean that a person who was elected or appointed judge cannot hold any other office of public trust, except a judicial office, during the entire term the person would be legally entitled to serve as a judge by reason of the person's election or appointment, even if the person resigns from the bench before completing that term. Whether a former judge with an unexpired term would be eligible to serve on the Board thus depends on whether Board membership is an "office of public trust," and if so, whether it is a "judicial office," as those terms are used in Wis. Const. art. VII, § 10 and Wis. Stat. § 757.02(2).

[1]Except as otherwise specified, all statutory references are to the 2005-06 edition of the Wisconsin statutes.

1. Is Board Membership an Office of Public Trust?

Your opinion request takes the position that, for purposes of restricting the conduct of a judge under Wis. Const. art. VII, § 10, the phrase "office of public trust" refers only to an elective office.[2] According to your analysis, the constitutional history of the provision establishes that it was intended to bar a judge, during the judge's term of office, from using a judicial position as a stepping-stone to an *elective* political office. I conclude, to the contrary, that membership on the Board is an office of public trust, within the meaning of Wis. Const. art. VII, § 10.

When interpreting the Wisconsin Constitution, the courts seek to give effect to the intent of the framers and of the people who adopted the constitution by examining three sources: the plain meaning of the words in their context; the practices as they existed at the time the constitution was written; and the earliest interpretations of the constitutional provision under consideration. *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 85, 301 Wis. 2d 266, 732 N.W.2d 828.

The term "office of public trust" is not defined in either the constitution or statutes of this state. The history of the adoption of Wis. Const. art. VII, § 10, also provides little specific direction regarding the meaning of the term. It does not appear that any question was ever raised in the state constitutional conventions about what constitutes an office of public trust so as to trigger any reported discussion about the matter.

An important historical clue can nonetheless be gleaned from a phrase that existed in Wis. Const. art. VII, § 10, from the time of its adoption until its elimination in a 1977 amendment. After stating the rule that a judge could not hold another "office of public trust," the provision immediately went on to state that "all votes for [judges] . . . for any office, except a judicial office, given by the legislature or the people, shall be void." The fact that the provision voided "votes" for "any office" immediately after prohibiting judges from holding an "office of public trust"—without mentioning votes—implies that the authors of the constitution thought that an office of public trust included, but was not necessarily limited to, any office for which an incumbent would receive votes—*i.e.*, an elective office.

The broader constitutional history of the period also supports the view that the framers of Wis. Const. art. VII, § 10, were concerned about the potential threats to judicial independence posed by the pursuit of appointive office, as well as elective office. Between 1846 and 1860, numerous states, in addition to Wisconsin, provided in their constitutions for popular election of judges. *See* Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 45 THE HISTORIAN 337 (1983). Proponents of popular election of judges saw that practice as enhancing, rather than subverting, the independence, prestige, and

[2]This opinion does not separately analyze Wis. Stat. § 757.02(2), as the statute tracks the relevant language of Wis. Const. art. VII, § 10. Accordingly, the statute is interpreted as a codification of the constitutional language and should be construed consistently with Wis. Const. art. VII, § 10.

power of the judicial branch of government. *Id.* at 343-45 and 349-50. In their view, the appointment of judges by governors or legislatures had led to the distribution of judgeships based on political service, rather than legal skill or judicial temperament. *Id.* at 347. Appointment of judges, they believed, was itself dangerous to judicial independence because it denied the judiciary its own claim to direct support from the sovereign people. *Id.* at 350. The elective system was thus meant to insulate the judiciary from the control of the other branches of government by providing for direct popular support of judges. Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AMERICAN JOURNAL OF LEGAL HISTORY 190, 205-06 (1993). This view of the purpose of judicial elections was articulated in the constitutional debates in Wisconsin. *See Wagner*, 263 Wis. 2d 709, ¶ 26 (quoting Milo Quaife, *The Convention of 1846* (1919) at 287-88).

At the same time, fears that elected judges might be too dependent on the popular will were calmed by including constitutional devices that staggered judicial elections, provided for district rather than state-wide judicial elections, gave judges fixed terms of office during good behavior, and made elected judges ineligible for other offices during the term for which they were elected. Hall, *The Judiciary on Trial*, 45 THE HISTORIAN at 352. The provision at issue here, Wis. Const. art. VII, § 10, is an example of the latter kind of constitutional safeguard, designed to insulate elected judges from the sway of popular politics. *See Wagner*, 263 Wis. 2d 709, ¶¶ 27-28. It is reasonable to conclude that the very same framers who required judges to be elected in order to protect them from the perceived evils of political patronage that were seen to be inherent in the appointment system would not have assumed that a sitting judge was immune to being influenced by the prospect of appointment to a non-judicial office, as well as by the prospect of election to such an office. In this historical context, it is apparent that the use of the broad phrase "office of public trust" in Wis. Const. art. VII, § 10—without any qualifier related to the elective or appointive nature of such office—was intended to shield sitting judges against possible political influences deriving either from election or appointment to a non-judicial office.

Moreover, it makes sense to construe "office of public trust" to be consistent with the term "public office," which clearly encompasses both elective and non-elective positions. Some sixty years after the adoption of the 1848 constitution, the Supreme Court suggested that the term "office of public trust" as used in Wis. Const. art. VII, § 10, was synonymous with "public office." *In re Appointment of Revisor*, 141 Wis. 592, 124 N.W. 670 (1910). In that case the Court considered the argument that being a trustee of the state law library "endows the justices with another public office not judicial . . . in violation of the constitution, which says that they shall hold no office of public trust during their term except a judicial office." *Id.*, 141 Wis. at 608. The Court went on to discuss whether the trustees held "an office" as "'public officers.'" *Id.*

One of my predecessors suggested essentially the same thing in a 1925 opinion, 14 Op. Att'y Gen. 332 (1925). There, it was stated that the "terms 'office' and 'public trust' in the constitution are nearly synonymous." *Id.* at 333. That opinion quoted a case which indicated that

an office of public trust is in effect a public office because the words "public trust" include every agency to which the public appoints persons to perform some duty or service. *Id.*

In *Law Enforce. Stds. Bd. v. Lyndon Station*, 98 Wis. 2d 229, 238, 295 N.W.2d 818 (Ct. App. 1980), *aff'd*, 101 Wis. 2d 472, 305 N.W.2d 89 (1981), the Court of Appeals indicated by analogy that an office of public trust is a public office. In discussing the parallel constitutional provision that a person convicted of an infamous crime was not eligible to any "'office of trust, profit or honor,'" the court stated that the "term 'office' as used in art. XIII, sec. 3 of the Wisconsin Constitution, means 'public office.'" *Id.*

Another of my predecessors provided an unequivocal definition of the term in a 1988 opinion, 77 Op. Att'y Gen. 256, 258 (1988), plainly stating that, in Wis. Const. art. VII, § 10, the "term 'office of public trust' is used synonymously with 'public office.'"

The Legislative Reference Bureau ("LRB") appears to hold the same view. In discussing changes to the constitution proposed in 1995, the LRB titled its discussion of a proposed change in Wis. Const. art. VII, § 10, "Removing Restriction on Judges Holding Nonjudicial Public Office after Resignation During the Judicial Term." Wisconsin Briefs, *Constitutional Amendments to be Considered by the Wisconsin Voters April 4, 1995*, LRB-95-WB-6 (March 1995).

The few cases from other jurisdictions that have attempted to define a term that, paradoxically, is widely used in legislation have agreed that an office of public trust is the same as a public office. *See, e.g., State ex rel. Gilson v. Monahan*, 84 P. 130, 133 (Kan. 1905); *Smith v. Moore*, 90 Ind. 294, *3 (1883), 1883 WL 5621.

A "public office" is one that is created by legislative act, possesses a delegation of a portion of the sovereign power of the state to be exercised independently without the control of a superior power, has some permanency, and is held by virtue of written authority. *Martin v. Smith*, 239 Wis. 314, 330-32, 1 N.W.2d 163 (1941).

Whether a position in government is a public office is not determined by the manner in which the incumbent is chosen. *Id.*, 239 Wis. at 333. A person may be "a public officer, however chosen, [if] there is devolved upon him by law the exercise of some portion of the sovereign power of the state in the exercise of which the public has a concern." *Id.* at 332. Public offices thus include those filled by either election or appointment. *See id.* at 330-33. Indeed, the Legislature has expressly defined "local public office" and "state public office" to include both elective and appointive offices, specifically including offices to which the incumbent is appointed by the Governor. Wis. Stat. §§ 19.42(7w) and 19.42(13).

Another of my predecessors has stated that the position of notary public, an appointive position, Wis. Stat. § 137.01(1)(a), is an "office of trust, profit or honor," as that term is used in Wis. Const. art. XIII, § 3. 63 Op. Att'y Gen. 74, 75 (1974). As noted above, the term "office of trust, profit or honor" in Wis. Const. art. XIII, § 3, has also been construed to be synonymous with

"public office." *Wis. Law Enforce. Stds. Bd.*, 98 Wis. 2d at 238. Thus, Attorneys General have recognized, in essence, that public offices include those filled by appointment.

This means, among other things, that a judge may not hold the appointive public office of notary public. The Legislature has apparently acknowledged this disqualification by providing that judges, although not notaries public, are authorized to perform notarial acts. Wis. Stat. § 706.07(3)(a)2. This authorization does not violate Wis. Const. art. VII, § 10, which only prohibits judges from holding another public office, not from performing functions that may also be performed by those who hold another public office.

Under the established definition of "public office" discussed above, Board membership is a public office. Wis. Stat. § 15.60(1) (2007). The Board independently exercises the power to enforce the elections, ethics, and lobbying laws of the state. Wis. Stat. § 5.05(1) (2007). And the members of the Board are appointed by the Governor for fixed six-year terms. Wis. Stat. § 15.60(1) and (2) (2007).

Because Board membership is a public office, members of the Board also hold an office of public trust within the contemplation of Wis. Const. art. VII, § 10. Indeed, they hold an office in which the public has placed considerable trust to oversee the conduct of elections, and of elected and appointed officers. Therefore, under the restriction of Wis. Const. art. VII, § 10, a former judge whose term of office as a judge has not expired can be a member of the Board only if Board membership is a "judicial office" within the meaning of that constitutional provision.

2. Is Board Membership a Judicial Office?

Your opinion request also takes the position that Board membership is a "judicial office" because statutory eligibility for such membership is entirely dependent on having held a judgeship, because the statutes require the active participation of the judiciary in the selection of Board members, and because much of the work of the Board is judicial in character. I conclude that Board membership cannot be considered a "judicial office," within the meaning of Wis. Const. art. VII, § 10.

Under the established methodology for construing the meaning of a constitutional provision, courts give priority to the plain meaning of the words of the provision in the context in which those words were used at the time the provision was adopted, taking into account other provisions of the constitution. *See Dairyland Greyhound Park v. Doyle*, 2006 WI 107, ¶ 117, 295 Wis. 2d 1, 719 N.W.2d 408 (Prosser, J., concurring in part and dissenting in part) (citing *Buse v. Smith*, 74 Wis. 2d 550, 568, 247 N.W.2d 141 (1976) and *State ex rel. Bare v. Schinz*, 194 Wis. 397, 403-04, 216 N.W. 509 (1927)). Therefore, in attempting to determine whether Board membership can be considered a "judicial office" within the meaning of Wis. Const. art. VII, § 10, primary attention should be given to the meaning that the phrase "judicial office" would have had to the framers of the constitution in 1848, rather than any meanings derived from contemporary

English usage. And in determining that historical meaning, it is helpful, in particular, to examine how that term or closely related terms were used in other contemporaneous provisions of the Wisconsin Constitution.

The specific phrase "judicial office" appears not to be used anywhere in the 1848 Wisconsin Constitution other than in Wis. Const. art. VII, § 10. The component word "judicial," however, is used in several other sections of the Judiciary article. *See* Wis. Const. art. VII, § 1 ("No judicial officer shall exercise his office after he shall have been impeached . . ."); § 2 ("The judicial power of this state . . . shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace."); §§ 4-5 (organization of "judicial circuits"); § 12 (court clerks for "each county organized for judicial purposes"); § 21 (publication of certain "judicial decisions made within the state"); and § 23 (Legislature may vest in certain persons "such judicial powers as shall be prescribed by law") (1848). It is desirable, if possible, to harmonize the meaning of these various uses of the word "judicial" within Wis. Const. art. VII, including its use in the phrase "judicial office" in Wis. Const. art. VII, § 10.

In order to harmonize these meanings, it is necessary to look to the overall purpose of the Judiciary article of the Constitution in light of general principles of the separation of powers. The Wisconsin Constitution implicitly provides for the separation of powers by separately vesting the state's legislative power in a bicameral legislature, Wis. Const. art. IV, § 1, its executive power in a governor, Wis. Const. art. V, § 1, and its judicial power in a unified court system, Wis. Const. art. VII, § 2. This constitutional structure creates three separate coordinate branches of government that may share certain powers but that are unable either to control the other branches or to exercise the core powers committed to the other branches by the constitution. *See State v. Holmes*, 106 Wis. 2d 31, 42-43, 315 N.W.2d 703 (1982); *see also* Wis. Stat. § 15.001(1) ("It is a traditional concept of American government that the 3 branches are to function separately, without intermingling of authority, except as specifically provided by law.").

In light of this structure, the overall purpose of Wis. Const. art. VII is plainly to establish an independent judicial branch of state government. This is accomplished not only, as has been shown, by vesting the judicial power of the state in a unified court system, but also by expressly providing that the supreme court shall have superintending and administrative authority over all courts. Wis. Const. art. VII, § 3. Furthermore, the Wisconsin Constitution declares that the chief justice of the supreme court shall be the administrative head of the judicial system and shall exercise that administrative authority pursuant to procedures adopted by the supreme court. Wis. Const. art. VII, § 4. In addition, as previously noted, the specific purpose of Wis. Const. art. VII, § 10 was to protect the independence of the judiciary from political influence. *See Wagner*, 263 Wis. 2d 709, ¶¶ 25-29. The framers nonetheless chose to allow a judge to hold another "judicial office"—but not "any other office of public trust"—prior to the end of the term to which the judge had been previously elected. The most reasonable inference is that the framers believed it was acceptable to allow a judge to assume another "judicial office" because, like the judge's previous office, the new "judicial office" would be similarly insulated from political influence.

It follows that the phrase "judicial office," as used in the Judiciary article of the Constitution, should be construed as referring to an office that is located within the judicial branch of government created by that article. The Legislature has, in another context, provided a good definition of those agencies that are in the judicial branch. *See* Wis. Stat. § 16.70(5): "'Judicial branch agency' means an agency created under ch. 757 or 758 or an agency created by order of the supreme court." *Compare* Wis. Stat. § 16.70(4) ("'Executive branch agency' means an agency in the executive branch but does not include the building commission."). The Board, however, is not a judicial branch agency in this sense, for it is not created under Wis. Stat. ch. 757 or 758, nor is it an agency created by order of the supreme court. On the contrary, the Board has been created by the Legislature under Wis. Stat. ch. 15, the title of which refers to the "Executive Branch." The Board thus is an executive branch agency that is not under the supervisory authority or superintending control of the Wisconsin Supreme Court or the judiciary. Accordingly, membership on the Board cannot be deemed a "judicial office" in the constitutional sense.

Your opinion request noted that it has been the longstanding, continual practice of the Legislature to statutorily require judges to serve as members of certain agencies, such as the Judicial Commission, the Sentencing Commission, the Council on Uniformity of Traffic Citations and Complaints, and the Crime Victims Council. In my opinion, however, those examples do not establish a practice of allowing "judicial offices" to exist outside the judicial branch of government.

The example of the Judicial Commission does not support your position for the simple reason that the Judicial Commission is not an executive branch agency. It is created under Wis. Stat. § 757.83 and, as already shown, an agency created under Wis. Stat. ch. 757 is a judicial branch agency. Furthermore, Wis. Stat. § 757.83 has been enacted pursuant to Wis. Const. art. VII, § 11, which authorizes the Legislature to establish procedures for implementing the supreme court's inherent superintending and administrative authority over judges. Accordingly, the Judicial Commission, unlike an executive branch agency, is subject to the supervisory authority and superintending control of the supreme court. *See State ex rel. Lynch v. Dancey*, 71 Wis. 2d 287, 293-95, 238 N.W.2d 81 (1976).

The other three examples cited in your letter do involve executive branch agencies or entities: the Sentencing Commission (Wis. Stat. § 15.105(27) (now repealed)); the Crime Victims Council (Wis. Stat. § 15.257); and the Council on Uniformity of Traffic Citations and Complaints (Wis. Stat. § 15.467(4)). It is not at all clear, however, that membership on any of those entities amounts to an "office" in the constitutional sense. The Wisconsin Supreme Court has said that "the principal consideration determining whether a position is an office and one holding it is an officer is the type of power that is wielded." *Burton v. State Appeal Board*, 38 Wis. 2d 294, 300, 156 N.W.2d 386 (1968). Moreover, as noted earlier in this opinion, the characteristics of a public office include the possession of some delegated portion of the sovereign power of government to

be exercised for the benefit of the public without the control of a superior power. *Martin v. Smith*, 239 Wis. at 332.

Each of the three executive branch entities referenced above is an advisory body. There is authority for the proposition that advisory bodies do not exercise a delegated portion of the sovereign power of government. In *Harmer v. Superior Court In and For Sacramento County*, 79 Cal. Rptr. 855, 857 (Cal. App. 1969) and in *Parker v. Riley*, 113 P.2d 873, 875-76 (Cal. 1941), the California courts indicated that a California constitutional provision prohibiting legislators from holding any office, trust, or employment other than an elective office did not preclude California legislators from serving on advisory committees. *See Parker*, 113 P.2d at 876 ("Such tasks do not require the exercise of a part of the sovereign power of the state."); *see also* 83 Cal. Op. Att'y Gen. 50, *2 (2000), 2000 WL 223305. *Cf. Harvey v. Ridgeway*, 450 S.W.2d 281, 284 (Ark. 1970) (examining the interpretation of a since-repealed Illinois constitutional provision that was similar to Wis. Const. art. VII, § 10(1)). If advisory bodies do not exercise a delegated portion of the sovereign power of government, then membership on them does not constitute service in a public "office" and, *ipso facto*, also does not constitute service in a "judicial office" within the meaning of Wis. Const. art. VII, § 10.

Nor do I agree with the suggestion that Board membership is a "judicial office" because only former judges are statutorily eligible for such membership. In my opinion, it is logically circular to reason that an office is judicial, in the constitutional sense, merely because the Legislature has decreed that it must be occupied by a judge—whether current or former. If that were true, then Wis. Const. art. VII, § 10 would place no limits at all on the ability of the Legislature, at its own pleasure, to create additional public offices for judges to occupy by the simple expedient of not allowing anyone other than a judge to hold those offices. Such an outcome would be inconsistent with the evident intent of the framers of Wis. Const. art. VII, § 10 to insulate judges from the influence of the political branches of government.

Likewise, the fact that the statutes give designated members of the judiciary a role in the nomination of candidates for Board membership is also insufficient to make such membership a "judicial office." At most, such nomination procedures allow the designated members of the judiciary to decide which judges might be subjected to the potential influence of the political branches. The purpose of Wis. Const. art. VII, § 10, however, is to ensure that no judges are subject to such influence.

Finally, I also disagree with the contention that Board membership can be considered a "judicial office" because some of the work of the Board—such as issuing legal opinions and adjudicating certain controversies—is judicial in character. The Wisconsin Supreme Court has recognized that the delegation of some adjudicative authority to executive branch agencies does not violate separation-of-powers principles as long as that authority is sufficiently limited to what is reasonably necessary for carrying out the agency's administrative responsibilities. *See Layton School of Art & Design v. WERC*, 82 Wis. 2d 324, 348-50 and n.26, 262 N.W.2d 218 (1978). It

does not follow, however, that the adjudicative authority delegated to executive branch agencies can properly be characterized as judicial in character. On the contrary, the Supreme Court said in *Layton*: "This court has recognized that *not all adjudication is judicial* and that courts are not the exclusive instrumentalities for adjudication." *Id*. at 348 (emphasis added). The Court then approvingly cited an earlier decision that upheld worker's compensation statutes which authorized the Industrial Commission to decide certain controversies on the ground that the statutes did not "'vest[] in the Commission judicial powers within the meaning of the constitution.'" *Id.* at 348 n.26 (quoting *Borgnis v. Falk Co.*, 147 Wis. 327, 358, 359, 133 N.W. 209 (1911)). Although the Commission may act quasi-judicially by ascertaining some questions of fact and applying the law thereto, the Court noted, "'*it is not thereby vested with judicial power in the constitutional sense*." *Id.* (emphasis added by the Court in *Layton*).

In other words, the *Layton* decision reasoned that separation-of-powers principles are not violated by delegations of limited adjudicative power to executive branch agencies because that adjudicative power is not "judicial" power within the meaning of Wis. Const. art. VII, § 2, which vests the judicial power of the state in the courts. *See id.* at 347 and n.24. Your opinion request has suggested, however, that precisely such a delegation of limited adjudicative power to the Board makes membership on that body a "judicial office" under Wis. Const. art. VII, § 10. But if that were true, it would follow that the word "judicial" would have a different meaning in Wis. Const. art. VII, § 2, than it has in Wis. Const. art. VII, § 10. In my opinion, a court would be reluctant to construe the Judiciary article of the constitution in such a fashion. Accordingly, I conclude that an office vested with adjudicative authority that is not "judicial power" in the constitutional sense cannot thereby be deemed a "judicial office" within the meaning of Wis. Const. art. VII, § 10.

A review of the language of successive draft versions of Wis. Const. art. VII, § 10 supports the same conclusion. The version of that provision in the proposed 1846 constitution included, among other things, a clause that would have voided all votes given by the Legislature or the people for the purpose of electing a sitting judge to "any office except that of judge of the supreme or circuit court." *Wagner*, 263 Wis. 2d 709, ¶¶ 23-24 (quoting Milo Quaife, *The Convention of 1846* (1919) at 293; Tenney, *Journal of the Convention to Form a Constitution*

(1848) at 637). Similarly, the version of Wis. Const. art. VII, § 10 reported out of committee at the second constitutional convention in 1847 provided, in pertinent part, as follows:

> They shall hold no other office of public trust, and all votes for either of them for any office, except that of judge of the supreme or circuit court, given by the legislature or the people shall be void.

Wagner, 263 Wis. 2d 709, ¶ 29 (quoting Tenney, *Journal of the Convention to Form a Constitution* at 67). The convention subsequently voted to amend the above provision as follows:

> [B]y striking out . . . the word 'other' before the word 'office' and inserting after the word 'trust' the words 'except a judicial office during the term for which they are respectively elected'; also by striking out . . . the words 'judge of the supreme and circuit court' and inserting 'a judicial office.'

Milo Quaife, *The Attainment of Statehood* (1928) at 691.

The phrase "judicial office," as ultimately used in the 1848 version of Wis. Const. art. VII, § 10, thus originated as a substitute for earlier phrases that had specifically identified the offices of supreme court judge and circuit court judge. This strongly suggests that, in the framers' understanding, the phrase "judicial office" did not signify every office that might involve some adjudicative functions, including offices within the political branches of government, but rather was closely associated with a traditional view of the kinds of courts that compose the judicial branch of government.

Recent scholarship has likewise shown that, in the 19th century, specifically judicial power was understood as the power to conclusively dispose of an individual's legal claim to the core private rights to life, liberty, and property that government was instituted to safeguard. Caleb Nelson, *Adjudication in the Political Branches*, 107 Columbia L. Rev. 559, 562 (2007). Under traditional separation-of-powers doctrine, such judicial power is vested exclusively in the courts of the judicial branch of government. *Id.* at 564-65. In contrast, the political branches of government were understood as being capable, in proper circumstances, of authoritatively adjudicating other legal interests—including interests held by the public as a whole—without thereby exercising specifically *judicial* power. *Id.* at 565; *cf. Layton*, 82 Wis. 2d at 348 (adjudicative authority exercised by executive branch agency is not judicial power).

With regard to the present inquiry, the Board is statutorily authorized to investigate complaints alleging certain violations of election laws, to conduct administrative hearings on such complaints in appropriate cases, and to order appropriate injunctive relief. Wis. Stat. §§ 5.06 and 5.061 (2007). In adjudicating such complaints, it appears that the Board would not be determining any private individual's rights to life, liberty, or property, but rather would be vindicating the legal interests of the public as a whole in the integrity of the electoral and governmental processes.

According to the understanding described above, the adjudication of such public rights does not involve the exercise of specifically judicial power, in the 19th century sense of the term. This historical analysis, too, thus supports the conclusion that, when the Wisconsin Constitution was created in 1848, the term "judicial office" was not understood in a way that would include an office like Board membership.

In conclusion, for all of the above reasons, it is my opinion that membership on the Board is an office of public trust but is not a judicial office within the meaning of Wis. Const. art. VII, § 10, and therefore, in conformity with that constitutional provision, an individual who has resigned from the office of judge may not serve as a member of the Board for the duration of the term to which the individual was elected to serve as a judge.

Finally, it is my understanding that one or more current Board members were elected to terms for judicial office that have not yet expired. However, please be advised that Wisconsin law follows the "de facto officer" doctrine. A "de facto officer" is a person who is in possession of an office, performs the duty of the office, and claims the office under color of an election or appointment. *Walberg v. Deisler*, 73 Wis. 2d 448, 463-64, 243 N.W.2d 190 (1976). As stated by the Wisconsin Supreme Court: "It is generally recognized that the acts of a de facto officer are valid as to the public and third parties and cannot be attacked collaterally." *Id*. at 463. Therefore, unless and until information to the contrary is presented, the Board should assume that the Board members who are not entitled to hold the office of a Board member are de facto officers and that their prior actions, and the prior actions of the Board, are valid, legal, and binding.

Sincerely,

J.B. Van Hollen
Attorney General

JBVH:RPT:SPM:TCB:rk:lkw